JUDGMENT OF THE COURT (Second Chamber)

9 July 2015 (*)

(Reference for a preliminary ruling — Taxation — Value-added tax — Sixth Directive 77/388/EEC — Articles 2(1) and 4(1) — Tax liability — Immovable property transactions — Sale of lands assigned to the private assets of a natural person exercising the profession of sole trader — Taxable person acting as such)

In Case C?331/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Vrhovno sodiš?e (Slovenia), made by decision of 12 June 2014, received at the Court on 8 July 2014, in the proceedings

Petar Kezi? s.p. Trgovina Prizma

v

Republika Slovenija,

THE COURT (Second Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, J.-C. Bonichot (Rapporteur), A. Arabadjiev, J.L. da Cruz Vilaça and C. Lycourgos, Judges,

Advocate General: E. Sharpston,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Petar Kezi? s.p. Trgovina Prizma, by B. Ozimek, odvetnica,

– the Slovenian Government, by A. Grum, acting as Agent,

– the European Commission, by L. Lozano Palacios and B. Rous Demiri, 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 2(1) and 4(1) 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; ‘the Sixth Directive’).

2 The request has been made in proceedings between Petar Kezi? s.p. Trgovina Prizma (Petar Kezi?, a natural person exercising the profession of sole trader under the name ‘Trgovina

Prizma') and the Republika Slovenija (Republic of Slovenia), represented by the Ministrstvo za finance (Ministry of Finance), concerning the levying of value added tax ('VAT') on the sale of lands.

Legal context

EU law

3 Article 2 of the Sixth Directive provides:

'The following shall be subject to [VAT]:

1. the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such;

...'

4 Under Article 4(1) and (2) of the Sixth Directive:

'1. "Taxable person" shall mean any person who independently carries out in any place any economic activity specified in paragraph 2, whatever the purpose or results of that activity.

2. The economic activities referred to in paragraph 1 shall comprise all activities of producers, traders and persons supplying services including mining and agricultural activities and activities of the professions. The exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis shall also be considered an economic activity.'

Slovenian law

5 The Sixth Directive was transposed into Slovenian law by the Law on value added tax (Zakon o davku na dodano vrednost, Uradni list RS, št. 89/98, p. 8433) which provides at Article 3(1) thereof that VAT is to be calculated and paid on the supply of goods and the supply of services for consideration by a taxable person in the course of his economic activity within the territory of the Republic of Slovenia.

6 According to Article 27 of that law, the transfer of immovable property is exempt from VAT, except for the first assignment of a property right or of a right of disposal in or over newly constructed buildings.

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

7 Mr Kezi? has, since 1995, been registered as a sole trader exercising his profession as a natural person under the trade name 'Trgovina Prizma'.

8 According to the order for reference, between 1998 and 2002, Mr Kezi? purchased, not as a sole trader but in his private capacity, seven plots of land. Two plots of land were accordingly acquired from a natural person in 1998 and 2000, while the remaining five were acquired from a commercial company in 2001 and 2002. Mr Kezi? was not required to pay VAT on those various acquisitions.

9 Between 2001 and 2003, Mr. Kezi? obtained the administrative permits required for the construction of a shopping centre on the abovementioned seven plots. Then, in his capacity as a sole trader, he began the construction work in May 2003.

10 In June 2003, Mr Kezi? assigned the five plots of land acquired last to the assets of his

business, thereby taking into account their value estimated by a court-appointed land surveyor. However, he maintained the two other plots as part of his private assets (‘the land at issue’).

11 In 2004, Mr Kezi? sold the shopping centre and the seven plots on which it was built to two commercial companies. Accordingly, on the one hand, when he sold, acting as a sole trader, the five plots of land on which part of the shopping centre was built and that part of the shopping centre, he charged the purchasers output VAT, and, on the other hand, when he sold, acting as a private individual, the land at issue and the other part of the shopping centre built on that land, he did not charge output VAT.

12 By decision of 26 October 2004, the competent tax authority, having concluded that the sale of the land at issue fell within the economic activity carried out by Mr Kezi? acting as a sole trader, demanded from him payment of VAT relating to that sale.

13 On 18 July 2007, the Ministry of Finance rejected the action brought by Mr Kezi? against that decision as unfounded.

14 The Upravno sodiš?e (Administrative Court) upheld that decision and, by judgment of 25 May 2011, the Vrhovno sodiš?e (Supreme Court) dismissed the appeal on a point of law brought by Mr Kezi?. That decision was, however, set aside by the Ustavno sodiš?e (Constitutional Court) which, by decision of 21 November 2013, referred the case to the Vrhovno sodiš?e for a fresh decision.

15 The referring court considers that the dispute before it involves determining the conditions under which the Sixth Directive allows a taxable person to exclude from the VAT system property which he uses in the exercise of his economic activity.

16 In those circumstances, the Vrhovno sodiš?e decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

‘Are Articles 2(1) and 4(1) of the Sixth Directive to be interpreted to the effect that, in circumstances such as those of this case — in which a person buys plots of land acting as a natural person, without being charged any input VAT, then, acting as a sole trader, builds on those plots a shopping centre, enters as assets of his business on the basis of national accounting rules only some of the plots on which he built the shopping centre and then sells the centre together with all the plots of land to the developer — such a person, merely because he has not entered certain plots of land as assets of his business, has excluded those plots from the VAT system, and is therefore not to be considered a taxable person obliged to calculate and pay output VAT when selling those plots of land?’

The question referred for a preliminary ruling

17 By its question, the referring court asks, in essence, whether Articles 2(1) and 4(1) of the Sixth Directive must be interpreted as meaning that, in circumstances such as those of the case in the main proceedings — where a taxable person has acquired plots of land, some of which have been assigned to his private assets and others to his business and, where he has built, in his capacity as a taxable person, upon all of those plots of land, a shopping centre which was then sold together with the plots of land on which the building was erected — the sale of the plots of land which were assigned to that taxable person’s private assets must be subject to VAT.

18 It is clear from the wording of Article 2(1) of the Sixth Directive that a taxable person must act ‘as such’ for a transaction to be subject to VAT. However, a taxable person carrying out a transaction in a private capacity does not act as a taxable person and such a transaction is not

subject to VAT (see, to that effect, judgments in *Armbrecht*, C-291/92, EU:C:1995:304, paragraphs 16 to 18, and *Bakcsi*, C-415/98, EU:C:2001:136, paragraph 24).

19 It should also be recalled that, according to the Court's settled case-law, a 'taxable person' is defined by reference to the term 'economic activity' which, under Article 4(2) of the Sixth Directive, encompasses 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 (see, to that effect, judgment in *S?aby and Others*, C-180/10 and C-181/10, EU:C:2011:589, paragraphs 43 and 44).

20 Moreover, where capital goods are used both for business and for private purposes the taxpayer has the choice, for the purposes of VAT, of (i) allocating those goods wholly to the assets of his business, (ii) retaining them wholly within his private assets, thereby excluding them entirely from the system of VAT, or (iii) integrating them into his business only to the extent to which they are actually used for business purposes (judgment in *Charles and Charles-Tijmens*, C-434/03, EU:C:2005:463, paragraph 23). Thus, such property may be excluded from the VAT system even if it is used partially for the needs of the economic activity of the taxable person, who is then, however, deprived of any right of deduction (judgment in *Bakcsi*, C-415/98, EU:C:2001:136, paragraph 27).

21 In addition, a taxable person who sells property, part of which he had chosen to reserve for his private use, does not act as a taxable person with respect to the sale of that part (see, to that effect, judgment in *Armbrecht*, C-291/92, EU:C:1995:304, paragraph 24). The taxable person must, however, throughout his period of ownership of the property in question, demonstrate an intention to retain part of it amongst his private assets (see judgment in *Armbrecht*, C-291/92, EU:C:1995:304, paragraph 21).

22 It cannot however be inferred from the abovementioned case-law that the sale by a taxable person of land which he had assigned to his private assets is not subject to VAT for that reason alone. Since transactions effected for consideration by a taxable person are in principle subject to VAT where that person acted as such, it is also necessary, in addition to there being an assignment to those private assets, that such a sale be made by the taxable person concerned not in the course of his economic activity, but in the course of the management and the administration of his private assets.

23 In this respect it is true that the mere exercise of the right of ownership by its holder cannot, in itself, be regarded as constituting an economic activity (see, to that effect, judgment in *S?aby and Others*, C-180/10 and C-181/10, EU:C:2011:589, paragraph 36). Furthermore, from that point of view, the fact that the subject-matter of the sale was acquired by the taxable person using his personal resources cannot have a decisive effect.

24 However, as regards the sale of building land, the Court has already stated that a relevant assessment criterion is the fact that the party has taken active steps to market property by mobilising resources similar to those deployed by producers, traders or persons supplying services within the meaning of Article 4(2) of the Sixth Directive, such as, in particular, the carrying out on that land of preparatory work to make development possible, and the deployment of proven marketing measures (see, to that effect, judgment in *S?aby and Others*, C?180/10 and C?181/10, EU:C:2011:589, paragraphs 39 and 40). Such initiatives do not normally fall within the scope of the management of private assets so that the sale of land designated for development in such a situation cannot be regarded as the mere exercise of the right of ownership by its holder (see, to that effect, judgment in *S?aby and Others*, C?180/10 and C?181/10, EU:C:2011:589, paragraph 41).

25 As regards the facts referred to by the referring court, in particular the fact that (i) the seven plots of land were acquired by Mr Kezi? over a relatively short time, between 1998 and 2002, (ii) those plots were, together, a necessary requirement for the construction, from May 2003, of a shopping centre, and (iii) Mr Kezi? carried out restoration work on the land at issue which cost more than EUR 48 000, it should be noted that those facts are liable to show that the sale of the land at issue falls outside the mere exercise by Mr Kezi? of his right to property, but in fact forms part of his commercial economic activity.

26 It should be added that none of the documents submitted to the Court attempts to explain why the sale of the land at issue should be regarded as an act of administration of private assets and should, on that basis, be distinguished from the sale of the other plots of land on which Mr Kezi? erected a shopping centre in the course of his commercial economic activity.

27 In those circumstances, and subject to the checks which are for the referring court to carry out, Mr Kezi? must be regarded as having acted as a taxable person for VAT purposes when selling the land at issue, such that that transaction should have been subject to that tax.

28 In the light of the foregoing, the answer to the question referred is that Articles 2(1) and 4(1) of the Sixth Directive must be interpreted as meaning that, in circumstances such as those of the case in the main proceedings — where a taxable person has acquired plots of land, some of which have been assigned to his private assets and others to his business and, where he has built, in his capacity as a taxable person, upon all of those plots of land, a shopping centre which was then sold together with the plots of land on which the building was erected — the sale of the plots of land which were assigned to that taxable person’s private assets must be subject to VAT since that person, at the time of that transaction, acted as such.

Costs

29 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 (Second Chamber) hereby rules:

Articles 2(1) and 4(1) of the 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 must be interpreted as meaning that, in circumstances such as those of the case in the main proceedings — where a taxable person has acquired plots of land, some of which have been assigned to his private assets and others to his business and, where he has built, in his capacity as a taxable person, upon all of those plots of land, a shopping centre which was then sold together with the plots of land on which the building was erected — the sale of the plots of land which were assigned to that taxable person’s private assets must be subject to value added tax since that person, at the time of that transaction, acted as such.

[Signatures]

* Language of the case: Slovenian.