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Provisional text

JUDGMENT OF THE COURT (Second Chamber)

11 May 2017 (\*)

(Reference for a preliminary ruling — Taxation — Common system of value added tax — Directive 2006/112/EC — Article 2(1)(a) — Article 14(1) — Taxable transactions — Meaning of ‘supply of goods for consideration’ — Transfer to the State or to a local authority of immovable property in order to settle a tax debt — Not included)

In Case C-36/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland), made by decision of 21 September 2015, received at the Court on 22 January 2016, in the proceedings

**Minister Finansów**

v

**Posnania Investment SA,**

THE COURT (Second Chamber),

composed of M. Ilešič, President of the Chamber, A. Prechal, A. Rosas, C. Toader (Rapporteur) and E. Jarašič, Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- the Polish Government, by B. Majczyna, acting as Agent,
- the European Commission, by L. Lozano Palacios and M. Owsiany-Hornung, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 16 February 2017,

gives the following

**Judgment**

1 The present request for a preliminary ruling relates to the interpretation of Articles 2(1)(a) and 14(1) 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 the Minister Finansów (Minister for

Finance, Poland; ‘the Minister’) and Posnania Investment SA (‘Posnania’), concerning the liability to value added tax (VAT) of a transaction in which that company transferred ownership of immovable property to a local authority in settlement of a tax debt.

## **Legal framework**

### **EU law**

3 Article 2(1) of the VAT Directive provides:

‘The following transactions shall be subject to VAT:

(a) the supply of goods for consideration within the territory of a Member State by a taxable person acting as such;

...’

4 Article 9(1) of that 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.’

5 According to Article 14(1) of that directive, ‘supply of goods’ is to mean the transfer of the right to dispose of tangible property as owner.

6 Article 16 of the VAT Directive provides:

‘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.

However, the application of goods for business use as samples or as gifts of small value shall not be treated as a supply of goods for consideration.’

### **Polish law**

7 Article 2(6) of the ustawa o podatku od towarów i usług (Law on the tax on goods and services), of 11 March 2004, as amended (Dz. U. of 2011, no 177, item 1054; ‘the Law on VAT’), provides:

‘Wherever in the following provisions there is mention of “goods”, this shall be understood as objects or parts thereof and also any forms of energy.’

8 Article 5(1)(1) of that law is worded as follows:

‘The following are subject to the tax on goods and services: the supply of goods and services for consideration within the territory of the country.’

9 Article 7(1) of that law states:

‘The supply of goods referred to in Article 5(1)(1) shall mean the transfer of the right to dispose of the goods as owner. ...’

10 Article 15(1) of that law provides:

‘Taxable persons are legal persons, organisational units without legal personality and natural persons pursuing an independent economic activity referred to in paragraph 2, regardless of the purpose or result of such activity.’

11 Article 15(2) of the Law on VAT provides:

‘Economic activities shall comprise all activities of producers, traders and service providers, including mining and agricultural activities and activities of the professions, or similar activities, even if the given activity was carried out only once but in circumstances indicating an intention to perform such activities on a continuing basis. Economic activity shall also include activities consisting in the exploitation of goods or intangible or legal assets on a continuing basis for the purpose of obtaining income therefrom.’

12 Article 66 of the *ordynacja podatkowa* of 29 August 1997 (Tax Code, Dz. U. of 2015, item 613) is worded as follows:

‘1. A particular instance of the discharge of a tax liability is the transfer of ownership of tangible property or property rights to:

(1) the State Treasury — in settlement of tax arrears in respect of taxes constituting State budget revenues;

(2) a municipality, district or regional authority — in settlement of tax arrears in respect of taxes constituting revenues accruing to their budget.

2. The transfer shall take place at the request of the taxable person:

(1) in the case referred to in paragraph 1(1), on the basis of a contract concluded, with the consent of the relevant director of the tax or customs authority, between the district officer carrying out the tasks of the central administration and the taxable person;

(2) in the case referred to in paragraph 1(2), on the basis of a contract concluded between the mayor, the town president, the district officer or the president of the region and the taxable person.

...

4. In the cases mentioned in paragraph 1, the time at which the tax debt is discharged is the date on which the transfer of ownership of the tangible property or property rights occurs. ...’

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

13 Posnania is a company governed by Polish law and is economically active in the field of property transactions. As such, it is subject to VAT. In order to discharge arrears for non-payment of a tax for which it was liable, the company applied to the municipality of Czerwonak (Poland; ‘the municipality’) with a view to concluding, pursuant to Article 66 of the Tax Code, a contract for the transfer of the ownership of unbuilt-on land held by it to the municipality.

14 That contract, concluded on 5 February 2013, resulted in the partial discharge of Posnania's tax debt concurrently with the transfer of ownership of that immovable property to the municipality.

15 Posnania lodged an application for an individual tax ruling in order to determine whether, in such a situation, the transaction concluded with the municipality was subject to VAT and whether, as a result, it had to issue a corresponding invoice.

16 In its application, Posnania submitted that the transaction at issue ought not to be subject to VAT on the basis of the case-law of the referring court, the Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland), according to which the transfer of ownership of an asset to the State Treasury in settlement of tax arrears in respect of taxes constituting State budget revenues is a transaction that is not subject to VAT.

17 By his individual tax ruling of 10 May 2013, the Minister expressed the view that, upon the transfer of ownership of the immovable property from Posnania to the municipality, the latter acquired all the rights of an owner and, therefore, that transfer of ownership in settlement of tax arrears constituted a supply of goods for consideration, within the meaning of the Polish legislation, and was, in principle, subject to VAT.

18 Posnania brought an action before the Wojewódzki Sąd Administracyjny w Warszawie (Regional Administrative Court, Warsaw, Poland) seeking annulment of that individual tax ruling.

19 By judgment of 13 February 2014, that court upheld the action and annulled the tax ruling. It ruled that VAT may be due in the event of the transfer of ownership of tangible property by order of the public authorities or by force of law, on condition that such a transfer is effected in return for consideration. Given that, under Polish law, that was not the position in the present case, that court decided that the transfer of ownership of tangible property to the State Treasury in settlement of arrears of taxes constituting State budget revenues was a transaction that was not subject to VAT.

20 The Minister brought an appeal on a point of law against that judgment before the referring court.

21 In its request for a preliminary ruling, the referring court states that, while Posnania's status as a taxable person is not in dispute, the question nonetheless arises as to whether it is possible to consider the transfer of the right to dispose of tangible property as owner, made in settlement of a tax debt, to be a 'supply of goods for consideration' within the meaning of the VAT Directive.

22 In this regard, the referring court cites its own case-law, according to which the transfer of ownership of tangible property to the State Treasury in settlement of arrears of taxes constituting State budget revenues is a transaction that is not subject to VAT inasmuch as a tax is not a pecuniary performance which may be obtained in exchange for another performance, its principal feature being that it is unilateral.

23 In those circumstances, the Naczelny Sąd Administracyjny (Supreme Administrative Court) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Does the transfer of ownership of land (tangible property) by a person taxable for VAT purposes to:

(a) the State Treasury — in settlement of tax arrears in respect of taxes constituting State budget revenues, or

(b) a municipality, district or regional authority — in settlement of tax arrears in respect of taxes constituting their budget revenues, resulting in the discharge of tax liabilities,

constitute a transaction that is subject to tax (supply of goods for consideration) within the meaning of Article 2(1)(a) and Article 14(1) of the [VAT] Directive?’

### **Consideration of the question referred for a preliminary ruling**

24 By its question, the referring court asks, essentially, whether Articles 2(1)(a) and 14(1) of the VAT Directive must be interpreted as meaning that the transfer of ownership of immovable property by a person subject to VAT, for the benefit of the State Treasury or a local authority of a Member State, occurring, as in the main proceedings, in payment of tax arrears, constitutes a supply of goods for consideration that is subject to VAT.

25 It must be remembered, first of all, that the VAT Directive establishes a common system of VAT based on, *inter alia*, a uniform definition of taxable transactions (judgment of 20 June 2013, *Newey*, C-653/11, EU:C:2013:409, paragraph 39).

26 According to Article 2(1)(a) of the VAT Directive, the supply of goods for consideration within the territory of a Member State by a taxable person acting as such is subject to VAT.

27 Pursuant to Article 9(1) of the VAT Directive, ‘taxable person’ means any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity. The exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis is in particular to be regarded as an ‘economic activity’.

28 Article 14(1) of the VAT Directive defines ‘supply of goods’ as the transfer of the right to dispose of tangible property as owner.

29 As regards the transaction at issue in the main proceedings, it is common ground, firstly, that the contract concluded between Posnania and the municipality resulted in the transfer of ownership of immovable property and, secondly, that Posnania has the status of a taxable person.

30 Thirdly, the condition of the place of supply of the goods is undoubtedly met, the transaction having taken place within the territory of a Member State, namely in Poland.

31 Concerning, fourthly, the question whether the transaction transferring ownership of immovable property to a public entity — in this instance, the transfer of land to a municipality — in payment of tax arrears can be considered to have been made for consideration, it should be noted that a supply of goods is made ‘for consideration’, within the meaning of Article 2(1)(a) of the VAT Directive, only if there is a legal relationship between the supplier and the purchaser entailing reciprocal performance, the price received by the supplier constituting the value actually given in return for the goods supplied (judgments of 27 April 1999, *Kuwait Petroleum*, C-48/97, EU:C:1999:203, paragraph 26, and of 21 November 2013, *Dixons Retail*, C-494/12, EU:C:2013:758, paragraph 32).

32 In the present case, there does, admittedly, exist, between the supplier of the immovable property and the beneficiary of that property, a legal relationship, such as that which links a creditor and its debtor.

33 However, the obligation of the taxpayer, as a debtor owing a tax debt, to make payment to the tax authorities, as creditor of that debt, is unilateral in nature inasmuch as the payment of the tax by that taxpayer results only in the statutory discharge of its tax debt, even if this is done, as in the present case, by means of the provision of immovable property.

34 A tax is a compulsory charge imposed by the sovereign power of the public authorities on the resources of persons coming under their fiscal jurisdiction. That charge is intended to be used, through public budgets, for services in the public interest. Such a charge, whether it relates to a sum of money or, as in the present case, to tangible property, does not result in any performance on the part of the public authority or, therefore, in any corresponding performance on the part of the taxable person.

35 Consequently, there is no legal relationship entailing reciprocal performance, within the meaning of the Court's case-law cited in paragraph 31 of this judgment.

36 As such, a transaction providing property in lieu of payment, the purpose of which is to discharge a tax debt, cannot be considered to be a transaction effected for consideration within the meaning of Article 2(1)(a) of the VAT Directive, and cannot be subject to VAT.

37 It should, nonetheless, be added that, although the national court has sole jurisdiction to determine the facts in the case before it and to interpret the national legislation, in preliminary ruling proceedings the Court, which is called on to provide answers of use to the national court, may provide guidance based on the documents in the file in the main proceedings and on the observations submitted to it, in order to enable the national court to give judgment (judgment of 24 February 2015, *Grünwald*, C-559/13, EU:C:2015:109, paragraph 32).

38 With regard to a transaction such as that at issue in the main proceedings, it cannot be ruled out that a taxable person such as Posnania has already made a deduction of input tax in relation to the immovable property at issue in the main proceedings, by virtue of its status as a person subject to VAT.

39 In this regard, as the Advocate General has observed in point 44 of her Opinion, if there is a risk of an untaxed final consumption, that risk is, nevertheless, covered by the provisions of Article 16 of the VAT Directive.

40 It follows from the Court's case-law that the purpose of that provision is to ensure equal treatment as between a taxable person who applies goods for his own private use or for that of his staff, on the one hand, and a final consumer who acquires goods of the same type, on the other (see, to that effect, judgment of 17 July 2014, *BCR Leasing IFN*, C-438/13, EU:C:2014:2093, paragraph 23 and the case-law cited).

41 In order to attain that objective, Article 16 of the VAT Directive treats as a supply of goods for consideration 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, where the VAT on those goods or the component parts thereof was wholly or partly deductible (judgment of 17 July 2014, *BCR Leasing IFN*, C-438/13, EU:C:2014:2093, paragraph 24).

42 Having regard to the foregoing considerations, the answer to the question referred is that Articles 2(1)(a) and 14(1) of the VAT Directive must be interpreted as meaning that the transfer of ownership of immovable property by a person subject to VAT, for the benefit of the State Treasury or a local authority of a Member State, occurring, as in the main proceedings, in payment of tax

arrears, does not constitute a supply of goods for consideration that is subject to VAT.

### **Costs**

43 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)(a) and 14(1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning that the transfer of ownership of immovable property by a person subject to value added tax, for the benefit of the State Treasury or a local authority of a Member State, occurring, as in the main proceedings, in payment of tax arrears, does not constitute a supply of goods for consideration that is subject to value added tax.**

[Signatures]

\* Language of the case: Polish.