62016CJ0308
JUDGMENT OF THE COURT (Second Chamber)

16 November 2017 (*1)

(Reference for a preliminary ruling — Taxation — Common system of value added tax (VAT) — Directive 2006/112/EC — Article 12(1) and (2) — Article 135(1)(j) — Taxable transactions — Exemption for the supply of buildings — Concept of ‘first occupation’ — Concept of ‘conversion’)

In Case C?308/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Naczelny S?d Administracyjny (Supreme Administrative Court, Poland), made by decision of 23 February 2016, received at the Court on 30 May 2016, in the proceedings

Kozuba Premium Selection sp. z o.o.,

v

Dyrektor Izby Skarbowej w Warszawie

THE COURT (Second Chamber),

composed of M. Ileši?, President of the Chamber, A. Rosas, C. Toader (Rapporteur), A. Prechal and E. Jaraši?nas, Judges,

Advocate General: M. Campos Sánchez-Bordona,

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 R. Lyal and M. Owsiany-Hornung, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 4 July 2017,

gives the following

Judgment

1

The present request for a preliminary ruling relates to the interpretation of Article 12(1)(a) and Article 135(1)(j) 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 reference was made in the course of proceedings between Kozuba Premium Selection sp. z o.o. (‘Kozuba’) and the Dyrektor Izby Skarbowej w Warszawie (Director of the Tax Inspection Authority, Warsaw, Poland, ‘the Director’) concerning value added tax (VAT) on the sale of a building that had been used by its owner for its own requirements and had been modernised before that sale.

Legal context

European Union law

3

Recitals 7 and 35 of the VAT Directive read as follows:

‘(7)

The common system of VAT should, even if rates and exemptions are not fully harmonised, result in neutrality in competition, such that within the territory of each Member State similar goods and services bear the same tax burden, whatever the length of the production and distribution chain.

(35)

A common list of exemptions should be drawn up so that the Communities’ own resources may be collected in a uniform manner in all the Member States.’

4

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;

…’

5

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.’

6

Under Article 12(1) and (2) of that directive:

‘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:

(a)

the supply, before first occupation, of a building or parts of a building and of the land on which the building stands;

(b)

the supply of building land.

2. For the purposes of paragraph 1(a), “building” shall mean any structure fixed to or in the ground.

Member States may lay down the detailed rules for applying the criterion referred to in paragraph 1(a) to conversions of buildings and may determine what is meant by “the land on which a building stands”.

Member States may apply criteria other than that of first occupation, such as the period elapsing between the date of completion of the building and the date of first supply, or the period elapsing between the date of first occupation and the date of subsequent supply, provided that those periods do not exceed five years and two years respectively.’

7

Under Article 14(1) of the VAT Directive, “supply of goods” means the transfer of the right to dispose of tangible property as owner.

8

Article 135(1) of the directive, within Chapter 3 thereof, entitled ‘Exemptions for other activities’, provides:

‘Member States shall exempt the following transactions:

…

(j)

the supply of a building or parts thereof, and of the land on which it stands, other than the supply referred to in point (a) of Article 12(1);

…’

Polish law

9

Article 2(14) of the ustawa o podatku od towarów i us?ug (Law on the tax on goods and services) of 11 March 2004 (Dz. U. No 54, position 535) as amended (‘the Law on VAT’), provides:

‘For the purposes of the following provisions:

…

“first occupation”, shall mean release for use of buildings, civil engineering works or their parts, in performance of taxable activities, to the first customer or user, following their:

(a)

erection, or

(b)

upgrade, if the expenditure incurred for the upgrade, as defined in the regulations on income tax, constituted at least 30% of the initial value;

…’

10

Article 43(1), points 10 and 10a, and Article 43(7a), of that law provide:

‘1. … the following are exempt:

…

10.

the supply of buildings, civil engineering works or parts thereof, except where:

(a)

the supply is made within the framework of the first occupation or prior to the first occupation,

(b)

the period between the first occupation and the supply of the building, civil engineering works or parts thereof was less than two years;

10a

the supply of buildings, civil engineering works or parts thereof which is not subject to the exemption referred to in subparagraph 10, on condition that:

(a)

the supplier did not have the right to deduct input tax in respect of the supply of the property concerned,

(b)

the supplier did not incur expenses on the upgrade of the property supplied for which he was

entitled to deduct input tax, and, if he incurred such expenses, they were lower than 30% of an initial value of those goods;

…

7a. The condition laid down in paragraph (1)10a(b) does not apply if the buildings, civil engineering works or parts thereof were used, after being updated, by a taxable person for taxable activities over a period of at least 5 years.'

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

11

On 17 September 2005, Poltrex Sp. z o. o., established in Poland, whose name was later changed to become Kozuba, decided to increase its share capital. On the same day, one of the associates contributed to the company a residential building situated in Jab?onka (Poland) ('the building in question') built in 1992.

12

In 2006, the building in question was adapted for the purposes of the economic activity carried out by Kozuba, the latter having agreed for that purpose to investments of up to, approximately, 55% of the initial value of the building. After the works were completed, the building in question was registered on 31 July 2007 as a separate fixed asset in the fixed assets register, under the heading 'show home', where it remained until the date of its sale to a third party on 15 January 2009.

13

Since it concerned an old building, Kozuba considered that the sale was exempt from VAT and did not declare the profit on that sale in its self-assessment for VAT for the first quarter of 2009.

14

By decision of 12 April 2013, the Dyrektor Urz?du Kontroli Skarbowej (Director of the Tax Inspection Authority, Poland), taking the view that Kozuba's failure, in its VAT declaration for the first quarter of 2009, to include the profit from the sale of the building in question was not well founded, determined the taxable amount of Kozuba for VAT for that period by adding the amount of the sale of that building.

15

On 17 May 2013, Kozuba lodged an appeal against that decision before the Director.

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By decision of 30 July 2013, the latter upheld the decision of the Director of the Tax Inspection Authority. Agreeing with the latter, the Director considered that while, following the improvements made, the building in question had indeed been allocated, from an accounting perspective, for the company's own requirements with effect from 31 July 2007, that allocation had not however generated, since that date, any taxable activities. Consequently, first, the 'first occupation' of the building in question, after the improvements made to it, had to be fixed not at 31 July 2007 but at 15 January 2009, that date corresponding to the date of the first taxable transaction to which the building in question had given rise since the improvements, namely its sale and, second, Kozuba

could not claim the exemption provided for in Article 43(1)(10) of the Law on VAT, since that sale had been made in the context of the first occupation of the building in question.

17

Kozuba lodged an appeal against that decision by the Director with the Wojewódzki S?d Administracyjny w Warszawie (Regional Administrative Court, Warsaw, Poland), which, by judgment of 22 May 2014, annulled that decision on procedural grounds. Nevertheless, that court confirmed that the tax administration's point of view as to the merits was well founded.

18

Kozuba appealed against that judgment before the referring court.

19

In its order for reference, that court states that the transposition of Article 135(1)(j) of the VAT Directive into Polish law gives rise to doubts as to whether the concept of 'first occupation' as defined in Article 2(14) of the Law of VAT, and used in Article 43(1)(10) of that law, is consistent with the VAT Directive.

20

In that regard, that court notes that it is necessary to establish whether the concept of 'first occupation' of a building, within the meaning of Article 12(1) of the VAT Directive, must be understood to mean that the first occupation must take place in the context of a taxable transaction.

21

That court also has doubts regarding the condition in Article 2(14) of the Law on VAT, according to which, in the event of the upgrade of a building, the exemption from VAT is only possible if the costs incurred by those improvement works amount to less than 30% of the initial value of the building in question. Thus, the Polish law assimilates any improvement of the building generating added value equal to or greater than the threshold for a conversion within the meaning of Article 12(2) of the VAT Directive to be capable of giving rise to a 'new first occupation', which would justify a new liability for VAT.

22

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

'Must Article 135(1)(j) of Directive [2006/112] be interpreted as precluding a national law (Article 43(1), point 10, of the [Law on VAT] … under which the supply of buildings, civil engineering works or parts thereof is exempt from VAT, save where:

(a)

the supply is made within the framework of the first occupation or prior to the first occupation,

(b)

the period between the first occupation and the supply of the building, civil engineering works or parts thereof was shorter than 2 years,

in so far as point 14 of Article 2 of the Law on VAT defines first occupation as release for use of buildings, civil engineering works or parts thereof, in performance of taxable activities, to the first customer or user, following their:

(a)

erection, or

(b)

upgrade, if the expenditure incurred for the upgrade, as defined in the regulations on income tax, constituted at least 30% of the initial value?'

Consideration of the question referred

23

By its question, the referring court asks, in essence, whether Article 12(1) and (2) and Article 135(1)(j), of the VAT Directive must be interpreted as precluding a national law, such as that at issue in the main proceedings, under which the exemption of supplies of buildings from VAT is subject to two conditions, namely that the supply is not made in the context of a first occupation arising in the course of a taxable transaction and that, in the case of the upgrade of an existing building, the costs incurred for that purpose are less than 30% of the initial value of that building.

24

It must be recalled, 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 11 May 2017, Posnania Investment, C?36/16, EU:C:2017:361, paragraph 25 and the case-law cited).

25

According to Article 2(1)(a) of that 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.

26

Pursuant to Article 9(1) of the 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'.

27

As the Advocate General observed in point 43 of his Opinion, the VAT Directive thus takes into account the professional and regular nature of the exercise of economic activities as general criteria for attributing persons the status of taxable person for VAT purposes. However those criteria are adapted in relation to immovable property transactions, since, in accordance with Article 12(1)(a), the VAT Directive allows Member States also to regard as a taxable person anyone who supplies, on an occasional basis, a building or part of a building and the land on which it stands, before its first occupation.

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

Article 135(1)(j) of the VAT Directive provides that the supply of buildings, other than those referred to in Article 12(1)(a) thereof, is exempt from VAT.

30

Article 12(1)(a) of the VAT Directive refers to the supply of a building or a part of a building and the land on which its stand, made before its first occupation. Thus, those provisions, read together, make a distinction between old and new buildings, the sale of an old building not being, as a rule, subject to VAT (see, to that effect, judgment of 12 July 2012, J.J. Komen en Zonen Beheer Heerhugowaard, C?326/11, EU:C:2012:461, paragraph 21).

31

The ratio legis of those provisions is the relative lack of added value generated by the sale of an old building. Even though it raises the concept of ‘economic activity’, within the meaning of Article 9 of the VAT Directive, the sale of a building following its first supply to a final consumer, which marks the end of the production process, does not generate any significant added value and must therefore, as a rule, be exempt (see, to that effect, judgment of 4 October 2001, Goed Wonen, C?326/99, EU:C:2001:506, paragraph 52).

32

Article 12(2) of the VAT Directive also confirms that it is the added value which determines whether the supply of a building is taxable for VAT purposes since it allows Member States to lay down the detailed rules for applying the criterion referred to in Article 12(1)(a), namely that of ‘first occupation’, to the conversion of buildings. In that way, the VAT Directive makes it possible to tax supplies of buildings that have been converted, since a conversion adds value to the building concerned, in the same way as the initial construction does.

33

In the present case, the building in question was erected in 1992 and the sale thereof in 2009, which is the object of the main proceedings, could, in principle, be exempt from VAT. On the other hand, that building was the object of an upgrade after being included amongst Kozuba’s assets, which thus raises the possibility of it being taxable for VAT since those upgrade works generated added value.

34

The law at issue in the main proceedings, namely Article 2(14) of the Law on VAT, defines ‘first occupation’ as the release for use, in the context of taxable transactions, of buildings, civil engineering works or parts thereof, to the first customer or user after their erection or upgrade, if the costs incurred for that purpose constitute at least 30% of the initial value.

35

Thus, the Polish legislature, first, excluded from that exemption — by linking the concept of ‘first occupation’ to the exercise of a taxable transaction — occupations which were not the source of or did not generate taxable transactions, with the consequence that the exemption provided for in Article 135(1)(j) of the VAT Directive is not applicable to a transfer of an existing building which has been the object, as in the case in the main proceedings, of use by its owner for its own commercial purposes, on the ground that that use cannot be classified as ‘first occupation’ in the absence of a taxable transaction. Second, to the extent that it extended the criterion of ‘first occupation’ to conversions of buildings, it fixed a quantitative criteria according to which the costs of such a conversion must reach a certain percentage of the initial value of the building concerned, namely, in the present case, at least 30% thereof, to lead to its sale being taxable for the purposes of VAT.

36

In those circumstances, it must be examined whether Article 12(1) and (2) and Article 135(1)(j) of the VAT Directive preclude such a national law.

37

As regards, first, the concept of ‘first occupation’, it must be noted that it appears in Article 12 of the VAT Directive without, however, being defined there.

38

The Court of Justice has consistently held that the need for a uniform application of EU law and the principle of equality require that the terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation, which must take into account the context of that provision and the purpose of the legislation in question (see, to that effect, judgment of 13 October 2016, Miko?ajczyk, C?294/15, EU:C:2016:772, paragraph 44, and the case-law cited).

39

It should also be observed at the outset that, according to settled case-law of the Court, the terms used to describe the exemptions envisaged by Article 135(1) of the VAT Directive are to be interpreted strictly since these constitute exceptions to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person (see judgment of 19 November 2009, Don Bosco Onroerend Goed, C?461/08, EU:C:2009:722, paragraph 25, and the case-law cited).

40

Nevertheless, the interpretation of those terms must be consistent with the objectives pursued by

those exemptions and comply with the requirements of the principle of fiscal neutrality inherent in the common system of VAT. Accordingly, that requirement of strict interpretation does not mean that the terms used to specify the exemptions referred to in that article must be construed in such a way as to deprive the exemptions of their intended effects (judgment of 19 November 2009, Don Bosco Onroerend Goed, C?461/08, EU:C:2009:722, paragraph 25 and the case-law cited).

41

As is clear from, first of all, the preparatory documents for the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization 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), which remain relevant for the interpretation of the VAT Directive in the context of the exemptions laid down in Article 135(1)(j) thereof, the criterion of the ‘first occupation’ of a building must be understood as corresponding to the first use of the property by its owner or tenant. The preparatory documents state that that criterion was included as determining the point in time when the product was likely to leave the production process and enter into the consumption sector. It does not follow from that historical analysis that the use of the building by its owner must take place in the context of a taxable transaction.

42

Next, as regards the context of that provision, it should be noted that recital 7 of the VAT Directive states that the common system of VAT should, even if rates and exemptions are not fully harmonised, result in neutrality in competition, such that within the territory of each Member State, similar goods and services bear the same tax burden, whatever the length of the production and distribution chain. Furthermore, it is clear from recital 35 of that directive that a common list of exemptions is to be drawn up so that the European Union’s own resources may be collected in a uniform manner in all the Member States.

43

It follows that the principle of fiscal neutrality, which is the reflection by the European Union legislature, in matters relating to value added tax, of the principle of equal treatment (judgments of 10 April 2008, Marks & Spencer, C?309/06, EU:C:2008:211, paragraph 49, and of 14 June 2017, Compass Contract Services, C?38/16, EU:C:2017:454, paragraph 21), precludes the system of tax exemptions, as transposed into national laws, from being applied differently in one Member State than in another.

44

Finally, the VAT exemptions are intended to enable a comparable collection of the European Union’s own resources in all the Member States. It follows that, even if Article 135(1)(j) of the VAT Directive, read in conjunction with Article 12 thereof (to which it refers), refers to the conditions for exemption fixed by the Member States, the exemptions laid down by that provision correspond to autonomous concepts of EU law so that the basis for assessing VAT may be determined in a uniform manner and according to common rules (see, to that effect, judgment of 4 October 2001, Goed Wonen, C?326/99, EU:C:2001:506, paragraph 47, and the case-law cited).

45

It follows from that, in particular, that while Article 12(2) of the VAT Directive allows Member States to lay down the detailed rules for the application to conversions of buildings of the criteria referred to in Article 12(1)(a), as regards, inter alia, the supply of a building made before its first occupation,

that provision cannot however be interpreted as meaning that Member States have a discretion that allows them to alter the concept of ‘first occupation’ itself in their national laws, without harming the effectiveness of that exemption.

46

From a textual analysis of Article 12 and Article 135(1)(j) of the VAT Directive, combined with an examination of the context and the aims of that directive, it is clear that it does not confer on Member States the power to place conditions on or restrict the exemptions laid down in those articles.

47

It follows that Member States are not permitted, inter alia, to subject the VAT exemption on supplies of buildings made after their first occupation to the condition, which is not laid down in the VAT Directive, that the first occupation occurs in the context of a taxable transaction.

48

As regards, secondly, the possibility for Member States of defining, according to Article 12(2) of the VAT Directive, the detailed rules for the application of the criterion of ‘first occupation’ referred to in Article 12(1)(a), to conversions of buildings, it must be observed that the imposition of a quantitative criterion, according to which the costs of such a conversion must amount to a certain percentage of the initial value of the building concerned, namely, in the present case, at least 30% thereof, to lead to liability for VAT, constitutes the implementation of that possibility.

49

In the present case, the order for reference states that the building in question was a building that had been upgraded, the costs of which exceeded 30% of its initial value.

50

As the Advocate General observed in point 69 of his Opinion, it is necessary, therefore, to define the content of the concept of ‘conversion’ in Article 12(2) of the VAT Directive, from a qualitative perspective.

51

In that regard, it must be observed that the VAT Directive does not define the concept of ‘conversion’.

52

While such a term is not unambiguous, as the various language versions — including that of ‘conversions’ in English, ‘Umbauten’ in German, ‘transform?ri’ in Romanian and ‘przebudowa’ in Polish — demonstrate, it suggests at the very least that the building concerned must have been subject to substantial modifications intended to modify the use or alter considerably the conditions of its occupation.

53

That interpretation of the concept of ‘conversion’ is supported by the case-law of the Court according to which the supply of immovable property comprising land and an old building being

transformed into a new building is exempt from VAT since, at the time of that supply, the old building had only undergone partial demolition work and was, at least in part, still used as such (judgment of 12 July 2012, J.J. Komen en Zonen Beheer Heerhugowaard, C?326/11, EU:C:2012:461, paragraph 39).

54

Thus, the concept of ‘conversion’ covers, inter alia, a situation where completed or sufficiently advanced works have been carried out and on completion of those works, the building concerned is intended to be used for other purposes.

55

The interpretation of the concept of ‘conversion’ given in Article 52 of this judgment is, moreover, in line with the objective of the VAT Directive, in particular that of taxation of a transaction that seeks to increase the value of the property at issue. For new buildings, as the Advocate General observed in points 71 and 72 of his Opinion, that added value is the result of construction work that leads to a substantial modification of what physically exists as a result of the transition from immovable property without a building, or even undeveloped land, to a habitable building. For old buildings, that added value arises when a substantial transformation has taken place, such that the old building in question may be regarded as a new building.

56

In the present case, it must be noted that the concept of ‘conversion’ in Article 12(2) of the VAT Directive has been transposed into Polish law in Article 2(14) of the Law on VAT, which has recourse to that of ‘upgrade’.

57

However, provided that the latter term is interpreted by the national courts as being synonymous with the concept of ‘conversion’, within the meaning set out in paragraph 52 above, the terminological difference observed is not such, in itself, to make the Law on VAT incompatible with the VAT Directive.

58

In the present case, the costs incurred by the ‘upgrade’ of the building in question amounted to 55% of its initial value. Even though such a percentage suggests a priori that the modifications made could have, as a result of their quantity, contributed to altering considerably the conditions of occupation of the building, it is for the national court, however, to assess on the basis of the evidence available to it, the extent to which the ‘upgrade’ at issue in the main proceedings led to a substantial modification of that building, in the sense set out in paragraph 52 of this judgment.

59

In the light of the foregoing considerations, the answer to the question referred is that Article 12(1) and (2) and Article 135(1)(j) of the VAT Directive must be interpreted as precluding a national law, such as that at issue in the main proceedings, which makes the VAT exemption on the supply of buildings subject to the condition that the first occupation thereof arises in the context of a taxable transaction. The same provisions must be interpreted as not precluding such a national law from making that exemption subject to the condition, in the case of the ‘upgrade’ of an existing building, that the costs incurred have not exceeded 30% of the initial value thereof, provided that that concept of‘upgrade’ is interpreted in the same way as that of ‘conversion’ in Article 12(2) of the

VAT Directive, namely as meaning that the building concerned must have been subject to substantial modifications intended to modify the use or alter considerably the conditions of occupation.

Costs

60

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 12(1)(a) and 135(1)(j) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as precluding a national law, such as that at issue in the main proceedings, which makes the VAT exemption on the supply of buildings subject to the condition that the first occupation thereof arises in the context of a taxable transaction. The same provisions must be interpreted as not precluding such a national law from making that exemption subject to the condition, in the case of the ‘upgrade’ of an existing building, that the costs incurred have not exceeded 30% of the initial value thereof, provided that that concept of ‘upgrade’ is interpreted in the same way as that of ‘conversion’ in Article 12(2) of Directive 2006/112, namely as meaning that the building concerned must have been subject to substantial modifications intended to modify the use or alter considerably the conditions of occupation.

[Signatures]

(*1) Language of the case: Polish.