

Provisional text

JUDGMENT OF THE COURT (Ninth Chamber)

6 July 2017 (*)

(Reference for a preliminary ruling — Value added tax (VAT) — Directive 2006/112/EC — Article 199(1)(c) — No VAT registration — Reverse charge — Hypothetical nature of the question referred — Inadmissibility of the question referred)

In Case C-392/16

REQUEST for a preliminary ruling under Article 267 TFEU from the Curtea de Apel Bucureşti (Court of Appeal, Bucharest, Romania), made by decision of 25 April 2016, received at the Court on 13 July 2016, in the proceedings

Dumitru Marcu

v

Agenţia Naţională de Administrare Fiscală (ANAF) —

Direcţia Generală Regională a Finanţelor Publice Bucureşti,

THE COURT (Ninth Chamber),

composed of E. Juhász, President of the Chamber, C. Vajda and C. Lycourgos (Rapporteur),
Judges,

Advocate General: M. Bobek,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- the Romanian Government, by R.-H. Radu, L. Lişu and C.M. Florescu, acting as Agents,
- the European Commission, by L. Lozano Palacios and L. Radu Bouyon, 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 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), and Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1), in particular the interpretation of their provisions concerning

the conditions for application of the reverse charge mechanism.

2 The request has been made in a dispute between Mr Dumitru Marcu and the Agen?ia Na?ional? de Administrare Fiscal? (ANAF) — Direc?ia General? Regional? a Finan?elor Publice Bucure?ti (National Agency of Tax Administration (ANAF) — Regional Directorate General of Public Finance, Bucharest; ‘the tax agency’) concerning an application for annulment of the latter’s decision requiring the applicant to make a retroactive payment of VAT and refusing him the application of the reverse charge mechanism.

Legal context

3 Article 2 of the Act of 21 June 2005 concerning the conditions of accession of the Republic of Bulgaria and Romania and the adjustments to the treaties on which the European Union is founded (OJ 2005 L 157, p. 203) provides:

‘From the date of accession, the provisions of the original Treaties and the acts adopted by the institutions and the European Central Bank before accession shall be binding on Bulgaria and Romania and shall apply in those States under the conditions laid down in those Treaties and in this Act.’

Directive 2006/112

4 Article 9(1) of Directive 2006/112 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 Article 12 of that directive provides:

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”.

...

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

6 Article 135(1) of the directive 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);

(k) the supply of land which has not been built on other than the supply of building land referred to in point (b) of Article 12(1);

...’

7 Under Article 137(1) of the directive:

‘Member States may allow taxable persons a right of option for taxation in respect of the following transactions:

...

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

(c) the supply of land which has not been built on other than the supply of building land referred to in point (b) of Article 12(1);

...’

8 Article 193 of Directive 2006/112 provides:

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

9 Article 199(1) of that directive provides:

‘Member States may provide that the person liable for payment of VAT is the taxable person to whom any of the following supplies are made:

...

(c) the supply of immovable property, as referred to in Article 135(1)(j) and (k), where the supplier has opted for taxation of the supply pursuant to Article 137;

...’

10 Article 395(1) of that directive provides:

‘The Council, acting unanimously on a proposal from the Commission, may authorise any Member State to introduce special measures for derogation from the provisions of this directive, in order to

simplify the procedure for collecting VAT or to prevent certain forms of tax evasion or avoidance.

...'

11 Article 411 of the directive is worded as follows:

'1. Directive 67/227/EEC and Directive 77/388/EEC are repealed, without prejudice to the obligations of the Member States concerning the time limits, listed in Annex XI, Part B, for the transposition into national law and the implementation of those directives.

2. References to the repealed directives shall be construed as references to this directive and shall be read in accordance with the correlation table in Annex XII.'

12 Article 413 of Directive 2006/112 provides:

This directive shall enter into force on 1 January 2007.'

Romanian law

Law No 571/2003 establishing the tax code

13 Article 127 of Law No 571/2003 establishing the tax code ('the Tax Code') provides:

'Taxable persons and economic activity

(1) "Taxable person" shall mean any person who, independently, carries out in any place an economic activity as referred to in paragraph 2, whatever the purpose or results of that activity.

(2) Pursuant to this Title, 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 purpose of obtaining income therefrom on a continuing basis shall in particular be regarded as an economic activity.'

14 Article 160 of the Tax Code, in the version in force during 2007, provided:

'Simplification measures

(1) The suppliers and recipients of the goods or services referred to in paragraph 2 shall apply the simplification measures provided for in this article. In accordance with Article 153, the registration of both the supplier and the recipient as taxable persons for VAT purposes is a mandatory requirement for application of the simplification measures.

(2) The goods and services to which the simplification measures shall apply are the following:

...

(b) buildings and parts of buildings and land of all kinds the supply of which is subject to taxation;

...

(3) Suppliers shall include in invoices issued for the supply of goods mentioned in paragraph 2 the words "reverse charge mechanism", without indicating the tax relating thereto. The recipients shall state the tax relating thereto on the invoices issued by the supplier, on which they shall state both the amount of tax received and the amount of tax deductible in the VAT declaration. No VAT

payment shall take place between the seller and the recipient in respect of the transactions subject to the simplification measures.

...

(5) Both the supplier and the recipient shall apply the provisions of this article. If the supplier has not indicated “reverse charge procedure” in invoices issued for goods or services falling within paragraph 2, the recipient shall apply the reverse charge procedure, shall not pay the tax to the supplier, shall include on his own initiative in the invoice the words “reverse charge procedure” and perform the obligations laid down in paragraph 3.’

Government Decision No 44/2004 on the procedure for the application of the Tax Code

15 In the version modified during 2007, Paragraph 62(2) of Government Decision No 44/2004 on the procedure for the application of the Tax Code (‘the decision’) provided:

‘When the taxable person has reached or exceeded the exemption ceiling and has not requested registration in accordance with Article 153 of the Tax Code, the competent tax authorities shall proceed as follows:

(a) when the competent tax authorities have noted a failure to comply with the legal provisions before the taxable person has been registered as a taxable person for VAT purposes in accordance with Article 153 of the Tax Code, they shall require that person to pay the amount of tax he would have had to pay had he been registered as a taxable person for VAT purposes under the normal system, in accordance with Article 153 of the Tax Code, for the period from the date on which the person concerned should have been registered as a taxable person for VAT purposes if he had requested such registration within the time limit prescribed by the law and that on which the failure to comply with the legal provisions was noted. Furthermore, the supervisory authorities shall, of their own motion, register that person as a taxable person for VAT purposes in accordance with Article 153(7) of the Tax Code.

...’

16 Paragraph 82 of the decision, in the version in force during 2007, was drafted as follows:

‘The mandatory condition laid down in Article 160(1) of the Tax Code for the application of simplification measures, that is, the reverse charge procedure, is that both the supplier and the recipient are persons registered for VAT purposes, in accordance with Article 153 of the Tax Code, and that the relevant transaction is taxable. ...

...

(9) The tax authorities shall penalise the suppliers and recipients in respect of the failure to apply the simplification measures laid down by law by requiring them to rectify the transactions and apply the reverse charge procedure in accordance with the provisions of these rules.

...’

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

17 Between August 2005 and December 2009, Mr Marcu entered into, as a seller, 35 property transactions relating to his personal assets in the form of land and apartments with both natural persons, not VAT registered, and VAT registered Romanian legal persons. In respect of those transactions he has neither received VAT nor paid VAT to the State.

18 According to the referring court, only 7 of those 35 property transactions are relevant to the matter of which it is seised. These are seven contracts of sale, entered into between September 2006 and November 2007 with VAT registered Romanian legal persons.

19 Following a review carried out during 2010, the tax authorities found that those property transactions satisfied the legal conditions to be met to be subject to VAT and that Mr Marcu was a taxable person, given that he had exceeded the exemption ceiling and carried out an economic activity consisting of the exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis.

20 In that regard, on 29 September 2010, the tax authorities noted that Mr Marcu had not registered for VAT as required within 10 days of his exceeding the VAT exemption ceiling. Furthermore, those authorities took the view that Mr Marcu became liable to pay VAT from 1 February 2006 and issued a tax assessment in respect of the VAT due retroactively on all the property transactions which he had concluded as a vendor since that date.

21 Mr Marcu challenged the validity of that tax assessment before the Agen²ia Na³ional⁴ de Administrare Fiscal⁵ — Direc⁶ia General⁷ de Solu⁸ionare a Contesta⁹iilor National Tax Authority — Directorate-General for the settlement of complaints, Romania; ‘the tax agency — complaints settlement department’) and, in respect of the transactions concluded during 2006 and 2007 with persons registered for VAT, applied for the application of the reverse charge mechanism which, at that time, was obligatory for land transactions between taxable persons under the national legislation.

22 According to Mr Marcu, since the tax agency retroactively disputed his status as a taxable person from 1 February 2006, it should also have applied the reverse charge mechanism in respect of those transactions. He has argued that VAT registration is a formal requirement intended to ensure supervision of the implementation of that mechanism and must not have any impact on the recognition of the right to be subject thereto.

23 The tax agency — complaints settlement department rejected Mr Marcu’s arguments as to the retroactive application of the reverse charge mechanism on the ground that, under the national tax legislation, in the version in force in 2006 and 2007, the application of that mechanism was subject to the mandatory condition that both the supplier and the recipient have been registered for VAT. As regards Mr Marcu, that condition was not satisfied.

24 In the context of the court proceedings following that decision of the tax agency — complaints settlement department, the tax agency maintained its position, based on the same arguments. Before the referring court, Mr Marcu argued that it would be appropriate to ask for a ruling from the Court of Justice as to whether that position is compatible with EU law on VAT.

25 In that regard, the referring court notes that the Court has held that VAT registrations constitutes a formal requirement which cannot call into question the right to deduct VAT, provided that the substantive conditions giving rise to that right are satisfied. According to that court, in circumstances such as those of the main proceedings, that raises the question of whether the fact of having a valid VAT registration number at the time of supply of immoveable property also constitutes a formal requirement for the purposes of the application of the reverse charge

mechanism, or whether it becomes a substantive requirement, in such a way that, of necessity, it means that that mechanism is inapplicable, even though, under Romanian law, the application of that mechanism is mandatory for land transactions.

26 In those circumstances, the Curtea de Apel Bucureşti (Court of Appeal, Bucharest) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

‘In circumstances such as those in the main proceedings, do Directives [77/388/EEC] and [2006/112/EC] preclude national legislation or a tax practice according to which the reverse charge mechanism (simplification measures) — which was at the time mandatory for transactions, relating to land, between taxable persons for VAT purposes — is not applicable to a person who has been subject to an investigation and registered, automatically, for VAT purposes following that investigation, on the grounds that that person had not applied for or been granted registration before the transactions were carried out or the ceiling [for exemption] was exceeded?’

Admissibility of the request for a preliminary ruling

27 By its question, the referring court asks, in essence, whether Directives 77/388 and 2006/112 preclude a rule of national law or a national tax practice according to which the reverse charge mechanism is applicable only provided that the supplier and the recipient of the asset involved are both registered for VAT at the time when the transaction takes place, failure to satisfy that condition having the consequence that, under the normal rules of the VAT system, the supplier is liable to pay that tax.

28 With regard to the admissibility of the request for a preliminary ruling, it must be noted, firstly, that one of the seven immovable property transactions at issue in the main proceedings consists of a sale contract concluded on 13 September 2006, that is to say, before the accession of Romania to the European Union, which took place on 1 January 2007.

29 The Court has jurisdiction to interpret directives only as regards their application in a new Member State with effect from the date of that State’s accession to the European Union (see, to that effect, judgment of 10 January 2006, *Ynos*, C-302/04, EU:C:2006:9, paragraph 36 and the case-law cited).

30 Consequently, the Court does not have jurisdiction to answer the question referred in so far as it concerns the sale contract of 13 September 2006.

31 Secondly, it must be noted that the question referred concerns both the provisions of the Sixth Directive 77/388 and those of Directive 2006/112.

32 In that regard, it is appropriate to note that the facts material to the dispute in the main proceedings are more recent than 1 January 2007, the date on which Directive 2006/112, pursuant to Articles 411 and 413 thereof, entered into force and repealed the Sixth Directive 77/388. Furthermore, it is clear from Article 411(2) of Directive 2006/112 that the references to Directive 77/388 are to be understood, as from that date, as references to Directive 2006/112.

33 Accordingly, only an examination of the provisions of Directive 2006/112 is relevant to the consideration of the question referred.

34 Thirdly, it is appropriate to point out that the European Commission entertains doubts as to the usefulness of the answer to the question referred to the resolution of the dispute in the main proceedings and, accordingly, as to the admissibility of the request for a preliminary ruling. It is not certain that Mr Marcu may be classified as a ‘taxable person’, within the meaning of Article 9 of

Directive 2006/112, as a seller of parcels of land and of apartments forming part of his personal assets. If it were found that that classification does not apply to Mr Marcu, in the Commission's view it would be necessary to annul the tax assessment at issue in the main proceedings, without it being necessary to refer the question to the Court.

35 In that regard, it is to be remembered that it is not for the Court to rule on the interpretation and applicability of provisions of national law or to establish the facts relevant to a decision in the main proceedings. The Court must, under the division of jurisdiction between the Courts of the European Union and the national courts, take account of the factual and legislative context, as described in the order for reference, in which the question put to it is set (see, to that effect, *inter alia*, judgment of 13 June 2013, *Kostov*, C-62/12, EU:C:2013:391, paragraph 25).

36 In those circumstances, despite the fact that Mr Marcu does not appear to have disputed the fact that he has been classified as a taxable person under the national procedure, regard must be had to the fact that the referring court, in its request for a preliminary ruling, held that Mr Marcu was a taxable person, on the basis of the provisions of Romanian law which transposed Article 9 of Directive 2006/112.

37 It follows therefrom that, from that point of view, the request for a preliminary ruling is admissible.

38 In accordance with the settled case-law of the Court, fourthly and finally, the Court may reject as inadmissible a request made by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, to that effect, judgment of 2 March 2017, *Pérez Retamero*, C-97/16, EU:C:2017:158, paragraph 22 and the case-law cited).

39 In that regard, it must be pointed out that the question referred is based on the premiss that the reverse charge mechanism, as provided for in Directive 2006/112, can be applied to the transactions dealt with in the main proceedings.

40 It is not apparent, however, from the file submitted to the Court that Romania obtained, on the basis of Article 395 of Directive 2006/112, authorisation to apply the reverse charge mechanism in situations not expressly provided for in that directive.

41 Consequently, it is necessary to examine whether the immoveable property transactions at issue in the main proceedings can be subject to the reverse charge mechanism on the basis of Article 199(1)(c) of Directive 2006/112.

42 Article 199 of Directive 2006/112 constitutes an exception to the principle set out in Article 193 of that directive according to which VAT is payable by any taxable person carrying out a taxable supply of goods or services. That Article 199 allows Member States to introduce a reverse charge mechanism, in the situations referred to in paragraphs 1(a) to (g) of that article, whereby the person liable for the payment of VAT is the taxable person who is the recipient of the transaction subject to VAT (see, to that effect, judgment of 13 June 2013, *Promociones y Construcciones BJ 200*, C-125/12, EU:C:2013:392, paragraph 23).

43 Thus by virtue of Article 199(1)(c) of Directive 2006/112, Member States may provide that the person liable for payment of VAT is the taxable person to whom the supply of immovable property, as referred to in Article 135(1)(j) and (k) of that directive, where the supplier has opted for taxation of the supply pursuant to Article 137 of that directive.

44 It must be noted that Article 135(1)(j) and (k) of Directive 2006/112 requires Member States to exempt 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) of that directive and the supply of land which has not been built on other than the supply of building land as referred to in point (b) of Article 12(1) of that directive. Points (a) and (b) of Article 12(1) of Directive 2006/112, to which Article 135(1)(j) and (k) thereof refers, covers the supply, before first occupation, of a building or parts of a building and of the land on which the building stands and the supply of building land.

45 It is therefore clear from a combined reading of those two provisions that, on the one hand, the supply of a building or parts thereof and of the land on which it stands other than that carried out before first occupation and, on the other, the supply of land which has not been built on other than the supply of building land must, in principle, be exempt from VAT.

46 Nonetheless, Article 137 of Directive 2006/112 permits Member States to allow taxable persons a right of option for taxation in respect of certain transactions, including the transactions referred to in Article 135(1)(j) and (k) of that directive, namely the transactions referred to in the preceding paragraph.

47 It is only when the Member State concerned has opted to allow its taxable persons the option provided for in Article 137 of Directive 2006/112 and one of those taxable persons has exercised that option in respect of transactions covered by Article 135(1)(j) and (k) thereof that the reverse charge mechanism may be applied to those transactions on the basis of Article 199(1)(c) of that directive.

48 In that regard, it must be noted that the request for a preliminary ruling does not state the exact nature of the immovable property at issue in the main proceedings.

49 However, even if, firstly, the transactions at issue in the main proceedings did involve immovable property within the meaning of Article 135(1)(j) and (k) of Directive 2006/112, it would still be necessary for Romania to have provided, in its legislation, for the possibility, set out in Article 137 of that directive, of allowing taxable persons the right of option for taxation of the supply of such immovable property. Subject to verification by the referring court, it does not appear to be clear from the order for reference that Romania has applied that possibility in its legislation.

50 In that regard, even if that possibility does exist in Romanian legislation, it is clear from the request for a preliminary ruling that Mr Marcu did not opt for taxation of the transactions at issue in the main proceedings since, first of all, he was not registered for VAT and then, when he was automatically regarded by the tax administration as being a taxable person and a tax assessment was sent to him in respect of those transactions, he disputed the lawfulness of that assessment.

51 In consequence, although the transactions at issue in the main proceedings, or some of them, concern immovable property within the meaning of Article 135(1)(j) and (k) of Directive 2006/112, since Romania has not applied, in its legislation, the facility provided for in Article 137(1)(b) and (c) of that directive to allow its taxable persons the right of option for taxation of those transactions or, in the absence of an express request by Mr Marcu, in accordance with Article 137 of that directive, to have VAT applied to those transactions, the conditions for application of Article 199(1)(c) of that directive are not met and, in consequence, the reverse

charge mechanism, as provided for in that directive, cannot apply.

52 Even if, secondly, the transactions at issue in the main proceedings relate to immovable property within the meaning of Article 12(1)(a) and (b) of Directive 2006/112, the reverse charge mechanism still cannot apply to those transactions, since they are not among the operations exhaustively referred to in Article 199(1)(a) to (g) of Directive 2006/112.

53 Having regard to the foregoing, it must be held that it is clear from the analysis of the provisions of Directive 2006/112 that the reverse charge mechanism for which it provides is not capable of application to the transactions at issue in the main proceedings. It follows therefrom that the question referred, which concerns the conditions for application of that mechanism, is hypothetical and the answer to it is not necessary for the resolution of the dispute in the main proceedings. That question is, accordingly, inadmissible.

54 Having regard to all the foregoing considerations, it must be held that this request for a preliminary ruling is inadmissible.

Costs

55 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 (Ninth Chamber) hereby rules:

The request for a preliminary ruling made by the Curtea de Apel Bucureşti (Court of Appeal, Bucharest, Romania) is inadmissible.

[Signatures]

* Language of the case: Romanian