Provisional text

JUDGMENT OF THE COURT (Sixth Chamber)

24 March 2022 (*)

(Reference for a preliminary ruling – Taxation – Value added tax (VAT) – Directive 2006/112/EC – Article 9 – Taxable person – Articles 295 and 296 – Flat-rate scheme for farmers – Spouses engaged in an agricultural activity using property forming part of the marital community of property – Possibility for those spouses to be regarded as separate taxable persons for VAT purposes – Choice on the part of one of the spouses to give up flat-rate farmer status and to bring her activity under the normal VAT arrangements – Loss of flat-rate farmer status for the other spouse)

In Case C?697/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Naczelny S?d Administracyjny (Supreme Administrative Court, Poland), made by decision of 22 July 2020, received at the Court on 21 December 2020, in the proceedings

W.G.

v

Dyrektor Izby Skarbowej w L.,

THE COURT (Sixth Chamber),

composed of I. Ziemele, President de chambre, T. von Danwitz and A. Kumin (Rapporteur), Judges,

Advocate General: N. Emiliou,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– W.G., by T. Mi?ek, doradca podatkowy,

– the Dyrektor Izby Skarbowej w L., by M. Ko?aci?ski,

– the Polish Government, by B. Majczyna, acting as Agent,

– the European Commission, by L. Lozano Palacios and M. Siekierzy?ska, 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 9, 295 and 296 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 W.G. and the Dyrektor Izby Skarbowej w L. (Director of the Tax Chamber, L., Poland), concerning the payment of value added tax (VAT) relating to certain months in 2011.

Legal context

European Union law

3 Article 9(1) of the VAT 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.’

4 Title XII of that directive, concerning ‘special schemes’, includes inter alia Chapter 2, entitled ‘Common flat-rate scheme for farmers’, which contains Articles 295 to 305 of that directive.

5 Article 295(1) of the VAT Directive provides:

‘For the purposes of this Chapter, the following definitions shall apply:

(1) “farmer” means any taxable person whose activity is carried out in an agricultural, forestry or fisheries undertaking;

(2) “agricultural, forestry or fisheries undertaking” means an undertaking regarded as such by each Member State within the framework of the production activities listed in Annex VII;

(3) “flat-rate farmer” means any farmer covered by the flat-rate scheme provided for in this Chapter;

…’

6 Article 296(1) and (2) of that directive states:

‘1. 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.

2. Each Member State may exclude from the flat-rate scheme certain categories of farmers, as well as farmers for whom application of the normal VAT arrangements, or of the simplified procedures provided for in Article 281, is not likely to give rise to administrative difficulties.’

Polish law

7 Under Article 15 of the ustawa o podatku od towarów i us?ug (Law on the tax on goods and

services) of 11 March 2004 (Dz. U. of 2004, No 54, item 535), in the version in force at the material time in the main proceedings ('the Law on VAT'):

'1. Taxable persons are legal persons, organisational units without legal personality and natural persons who carry out, independently, one of the economic activities referred to in paragraph 2, whatever the purpose or results of that activity.

…

4. In the case of natural persons carrying out exclusively an activity in an agricultural, forestry or fisheries undertaking, taxable persons means any persons who have filled out a registration declaration 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.

…'

8 Article 43(1) of that law provides:

'The following are exempt:

…

3. the supply by a flat-rate farmer of agricultural products resulting from his or her agricultural activity and the supply of agricultural services by a flat-rate farmer;

…'

9 Article 96 of that law provides as follows:

'1. The entities referred to in Article 15 are required to file a registration declaration with the director of the Tax Office before the date of performing the first activity referred to in Article 5, subject to paragraph 3.

2. In the case of natural persons referred to in Article 15(4) and (5), the registration declaration may only be made by one of the persons in whose name invoices for the purchase of goods and services will be issued and who will issue invoices for the sale of agricultural products.

…'

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

10 On 31 December 2010, W.G., who reared broiler chickens, in two of six poultry houses on an agricultural holding jointly owned with her spouse, submitted a registration declaration for VAT referred to in Article 96 of the Law on VAT, thus giving up her previous flat-rate farmer status. By contrast, W.G.'s spouse, who also reared broiler chickens in the four other poultry houses on that holding, with flat-rate farmer status, did not take that step.

11 On 29 August 2016, W.G. filed applications for VAT corrections, claiming overpayment of VAT paid for February, April, June, August, October and November 2011.

12 By decision of 26 October 2016, the relevant director of the Tax Office refused to grant that application. That refusal was upheld by decision of the relevant director of the Tax Chamber, L., of 28 February 2017. That authority considered that, since W.G. had filed the registration declaration

and was subject to VAT under the normal VAT arrangements, she had the status of a taxable person for VAT purposes in respect of the performance of her agricultural activity in the context of the agricultural holding belonging jointly to the spouses. Thus, the filing, by W.G., of the registration declaration also produced effects with regard to her spouse, the latter having accordingly lost flat-rate farmer status.

13 The action brought by W.G. against that decision before the Wojewódzki S?d Administracyjny w L. (Regional Administrative Court, L., Poland) was dismissed by judgment of 17 August 2017. That court held that where, in the context of a joint agricultural holding, spouses who have adopted the statutory community of property regime carry out an agricultural activity of the same kind, only one of the spouses may be subject to VAT. The fact that, in the present case, W.G. and her husband reared poultry in different poultry houses on the same agricultural holding is irrelevant in that regard.

14 W.G. brought an appeal on a point of law before the Naczelny S?d Administracyjny (Supreme Administrative Court, Poland), the referring court.

15 That court states that the question raised is whether, in the context the joint agricultural holding of a married couple, one of the spouses may be taxed under the normal VAT arrangements while the other may benefit from the flat-rate scheme for farmers, or whether the giving up of the flat-rate scheme by one necessarily produces effects for the other.

16 According to that court, it is apparent from Article 15(1) and (2) of the Law on VAT and Article 9 of the VAT Directive that classification of an entity as a ‘taxable person’ presupposes that that person carries out an economic activity independently. Thus, those provisions, taken in isolation, do not preclude the activity of two separate taxable persons on the same agricultural holding, provided that they carry out their activity independently.

17 However, the referring court states that, in the case of the natural persons referred to in Article 15(4) and (5) of the Law on VAT, Article 96 of that law provides that the registration declaration may be completed only by one of the persons in whose name invoices for the purchase of goods and services will be issued and who will issue invoices for the sale of agricultural products or services. As the national case-law has confirmed, it follows from those provisions that only the person who filed the registration declaration may have the status of a taxable person and that, consequently, the combination of two taxable persons on the same agricultural holding is not permitted.

18 That court considers that no provision of the VAT Directive expressly allows the introduction of such a scheme, which results in the special treatment of farmers. That said, that scheme makes it possible to prevent abuse consisting of dividing an agricultural holding into several entities and to implement the objectives pursued by the flat-rate scheme for farmers, such as simplification of administrative procedures for farmers.

19 The referring court also raises the question of the relevance of the fact that W.G. and his spouse had separate bank accounts for the purposes of rearing poultry and that they managed the resources for the rearing of poultry separately. Thus, the holdings are distinct from an economic, financial and organisational point of view, with each farm operating as an independent undertaking.

20 Since the Naczelny S?d Administracyjny (Supreme Administrative Court) therefore had doubts as to whether the rules laid down in Article 15(4) and (5) of the Law on VAT are compatible with the VAT Directive, it decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘1. Must the provisions of [the VAT Directive], in particular Articles 9, 295 and 296, be interpreted as precluding a national practice laid down in Article 15(4) and (5) of the [Law on VAT], which excludes the option of treating as separate VAT taxable persons spouses who engage in agricultural activity within an agricultural holding using property forming part of the marital community of property?

2. Is it relevant to the answer to the first question that, according to national practice, if one spouse opts to tax his or her business on the basis of general VAT rules, the other spouse ceases to be a flat-rate farmer?

3. Is it relevant to the answer to the first question that it is possible to clearly distinguish between the assets used independently and autonomously by each spouse for the purposes of the business activity concerned?’

Consideration of the questions referred

21 By its questions, which it is appropriate to examine together, the referring court asks, in essence, whether Articles 9, 295 and 296 of the VAT Directive must be interpreted as precluding the practice of a Member State that prohibits spouses engaging in an agricultural activity in the context of a single holding, using property forming part of the marital community of property, from being regarded as separate taxable persons for VAT purposes, including where it is possible to separate the property used by each of the spouses for his or her own activity, with the consequence that, by virtue of that practice, in circumstances where the spouses carry out an agricultural activity under the flat-rate scheme for farmers, the choice of one of the spouses to place his or her activity under the normal VAT arrangements entails the loss of flat-rate farmer status for the other spouse.

22 In order to answer that question, it must be recalled that, in accordance with the first subparagraph 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.

23 In that regard, it is settled case-law that Article 9 of the VAT Directive assigns a very wide scope to VAT (judgments of 21 April 2005, *HE*, C?25/03, EU:C:2005:241, paragraph 40, and of 13 June 2018, *Polfarmex*, C?421/17, EU:C:2018:432, paragraph 39 and the case-law cited). Thus, an activity is, as a general rule, categorised as ‘economic’. within the meaning of Article 9, where it is permanent and is carried out in return for remuneration which is received by the person carrying out the activity (judgment of 13 June 2018, *Polfarmex*, C?421/17, EU:C:2018:432, paragraph 38 and the case-law cited). Furthermore, in order to establish that an economic activity is being carried out in an independent manner, it is necessary to examine whether the persons concerned perform their activities in their own name, on their own behalf and under their own responsibility, and whether they bear the economic risk associated with carrying out those activities (judgment of 12 October 2016, *Nigl and Others*, C?340/15, EU:C:2016:764, paragraph 28 and the case-law cited). Finally, the status of taxable person must be assessed exclusively on the basis of the criteria set out in Article 9 of that directive (see, to that effect, judgment of 21 April 2005, *HE*, C?25/03, EU:C:2005:241, paragraph 41).

24 It follows from the case-law referred to in the previous paragraph that a person carrying on an agricultural activity on a holding which he or she owns with his or her spouse as part of the marital community of property, has the status of a taxable person, within the meaning of Article 9(1) of the VAT Directive, where that activity is carried out independently because he or she acts in his or her own name, on his or her own behalf and under his or her own responsibility, bearing

only the economic risk associated with carrying out his or her activity.

25 The fact that the spouses manage the resources for the rearing of poultry separately, those resources being distinct from an economic, financial and organisational point of view, may constitute relevant evidence. By contrast, the mere fact that those spouses carry out their activities in the context of a single agricultural holding which they own under the marital community of property regime is irrelevant.

26 The conclusion reached in paragraph 24 of the present judgment is not called into question by Articles 295 and 296 of the VAT Directive, which form part of the provisions of that directive relating to the common flat-rate scheme for farmers.

27 In that regard, it should be recalled that, while Article 295(1) of that directive defines concepts relevant for the application of that scheme, Article 296 of that directive provides, in paragraph 1 thereof, that where the application to farmers of the normal VAT arrangements is likely to give rise to difficulties, Member States may apply to farmers a flat-rate scheme designed to offset the VAT charged on purchases of goods and services made by the flat-rate farmers, and adds, in paragraph 2, that each Member State may exclude from the flat-rate scheme certain categories of farmers, as well as farmers for whom application inter alia of the normal VAT arrangements is not likely to give rise to administrative difficulties.

28 It cannot be inferred from those provisions that a Member State may restrict, in the case of an activity carried out in the context of an agricultural holding, the possibility for a person to register as a taxable person for VAT purposes solely on the ground that his or her spouse uses that same holding for his or her own activities subject to VAT.

29 Therefore, a practice of a Member State which prevents spouses carrying out an agricultural activity within the same holding using property forming part of the marital community of property from being regarded as separate taxable persons for VAT purposes is not, in principle, compatible with the VAT Directive.

30 However, the particular feature of the case in the main proceedings lies in the fact that one spouse carries out her activity under the normal VAT arrangements whereas the other spouse wishes to remain under the flat-rate scheme for farmers. It is therefore necessary to consider whether a Member State may, in order to avoid the simultaneous existence of two different statuses for spouses, provide that the effect of one of the spouses' waiver of the flat-rate scheme for farmers is to cause the other spouse to lose his or her flat-rate farmer status.

31 The referring court states that the practice at issue in the main proceedings is intended to prevent abuses which may be associated with the division of an agricultural holding into several entities so that one of the spouses can benefit from the flat-rate scheme for farmers while, under the normal VAT arrangements, the other is entitled to deduct input tax.

32 In that regard, it should be noted that the prevention of tax evasion, avoidance and abuse is an objective recognised and encouraged by the VAT Directive (judgment of 4 June 2020, *C.F. (Tax audit)*, C?430/19, EU:C:2020:429, paragraph 42 and the case-law cited). However, the practice at issue in the main proceedings, in so far as it has, in the case of the registration of one of the spouses under the normal VAT arrangements, in any event the consequence that the other spouse loses the status of flat-rate farmer, is ultimately tantamount to a general presumption of tax evasion which must be regarded as disproportionate for attaining the objective of preventing tax evasion (see, by analogy, judgments of 11 June 2020, *SCT*, C?146/19, EU:C:2020:464, paragraph 39 and the case-law cited, and of 15 April 2021, *Finanzamt für Körperschaften Berlin*, C?868/19, not published, EU:C:2021:285, paragraph 63).

33 Consequently, in circumstances such as those in the main proceedings, it is for the competent tax authority to examine whether, in the light of the specific situation, the loss of flat-rate farmer status on the part of the other spouse is necessary in order to counter risks of abuse and tax evasion which cannot be addressed by the spouses' producing appropriate evidence showing, inter alia, that each spouse carries out his or her activity independently.

34 It should be added, as has been pointed out in paragraph 27 of this judgment, that Article 296(1) of the VAT Directive provides that where the application to farmers of the normal VAT arrangements is likely to give rise to difficulties, Member States 'may apply' a flat-rate scheme, and states, in paragraph 2, that each Member State 'may exclude' from the flat-rate scheme, inter alia, farmers for whom application of the normal VAT arrangements is not likely to give rise to administrative difficulties.

35 Furthermore, the Court has held that the common flat-rate scheme for farmers is a scheme which derogates from and is an exception to the normal VAT arrangements and which must therefore be applied only to the extent necessary to achieve its objective. Among the two objectives of that scheme is that relating to the need for simplification, which must be reconciled with the objective of offsetting the input VAT borne by farmers (judgment of 12 October 2016, *Nigl and Others*, C?340/15, EU:C:2016:764, paragraphs 37 and 38 and the case-law cited).

36 Therefore, if the assessment of a specific situation such as that at issue in the main proceedings indicates that the carrying out by spouses of an agricultural activity in the context of the same holding and using property forming part of the marital community of property independently, each under the normal VAT arrangements, does not present any administrative difficulties compared with a situation where one comes under the normal arrangements and the other under the flat-rate scheme, the Member State concerned may legitimately decide that the waiver, by one of the spouses, of the other scheme has the effect of the other's losing flat-rate farmer status.

37 In the light of all of the foregoing considerations, the answer to the questions referred is that Articles 9, 295 and 296 of the VAT Directive must be interpreted as:

– precluding a practice of a Member State which prohibits spouses carrying out an agricultural activity in the same holding, using property forming part of the marital community of property, from being regarded as separate taxable persons for VAT purposes where each of those spouses carries out an economic activity independently;

– not precluding, in circumstances in which spouses carry out that agricultural activity under the flat-rate scheme for farmers, the choice of one spouse to place her activity under the normal VAT arrangements from resulting in the other spouse losing the status of flat-rate farmer, where, after examination of the specific situation, such an effect is necessary in order to counter the risk

of abuse and tax evasion which cannot be addressed by the spouses' production of appropriate evidence, or where the carrying out of that activity by those spouses, independently and each under the normal VAT arrangements, is not likely to give rise to administrative difficulties, compared with a situation entailing the simultaneous existence of two different statuses for those spouses.

Costs

38 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 (Sixth Chamber) hereby rules:

Articles 9, 295 and 296 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as:

– **precluding a practice of a Member State which prohibits spouses carrying out an agricultural activity in the same holding, using property forming part of the marital community of property, from being regarded as separate taxable persons for value added tax (VAT) purposes where each of those spouses carries out an economic activity independently;**

– **not precluding, in circumstances in which spouses carry out that agricultural activity under the flat-rate scheme for farmers, the choice of one spouse to place her activity under the normal VAT arrangements from resulting in the other spouse losing the status of flat-rate farmer, where, after examination of the specific situation, such an effect is necessary in order to counter the risk of abuse and tax evasion which cannot be addressed by the spouses' production of appropriate evidence, or where the carrying out of that activity by those spouses, independently and each under the normal VAT arrangements, is not likely to give rise to administrative difficulties, compared with a situation entailing the simultaneous existence of two different statuses for those spouses.**

[Signatures]

* Language of the case: Polish.