OPINION OF ADVOCATE GENERAL

MAZÁK

delivered on 12 April 2011 (1)

Joined Cases C?180/10 and C?181/10

Jaros?aw S?aby

v

Minister Finansów (C?180/10),

and

Emilian Ku?

and

Halina Jeziorska-Ku?

v

Dyrektor Izby Skarbowej w Warszawie (C?181/10)

(References for a preliminary ruling from the Naczelny S?d Administracyjny (Poland))

(Value added tax – Taxable person – Economic activity – Sale of land purchased as agricultural land and subsequently transformed into building land)

1. Must a person who successively sells plots originally making up land purchased as agricultural land for the purposes of carrying out a farming activity, use of which was subsequently changed in the local management plan by virtue of its reclassification as land designated for a holiday home development or for residential and service development, be regarded as subject to value added tax ('VAT')?

2. The answer to that question is significant for Jaros?aw S?aby (applicant in the main proceedings in Case C?180/10) and Emilian Ku? and Halina Jeziorska-Ku? (applicants in the main proceedings in Case C?181/10) who respectively requested that the competent tax authorities give an individual interpretation concerning liability to pay VAT on the sale of land.

3. In the case of Mr S?aby, plots making up land purchased in 1996 were successively sold. At the time of purchase, the land in question was designated for agricultural purposes in the urban management plans. As a natural person not carrying out an economic activity, Mr S?aby had purchased it with the intention of farming it and had done so from 1996 to 1998. In 1997, following a change to the urban management plan, the land in question was reclassified as land designated

for holiday home development. In 1999 Mr S?aby divided it into 64 plots and began to sell them. The first plot was sold in 2000.

4. In the case of Mr and Mrs Ku?, plots which were part of their agricultural holding were sold on an occasional basis. More specifically, they carried out 13 plot sale transactions in 2004, including 9 before 1 May 2004, and 14 similar transactions in 2005 and 20 in 2006. Mr and Mrs Ku? purchased their agricultural holding as agricultural land not permitted for development and used the land for farming. On that basis, they registered themselves for VAT under the flat-rate scheme, having received a decision to that effect in 2004 from the tax authorities. Following a change to the local management plan, part of the agricultural land was given over to residential and service development.

5. In each of those two cases, the competent tax authorities concluded that the sale of the land was subject to VAT. Challenging that interpretation, Mr S?aby and Mr and Mrs Ku? respectively brought proceedings before an administrative appeal court.

6. The Naczelny S?d Administracyjny (Supreme Administrative Court) (Poland) has referred three questions to the Court for a preliminary ruling, one concerning Mr S?aby and two concerning Mr and Mrs Ku?, in the respective applications for review of the judgments made by the administrative courts.

7. The question relating to the case between Mr S?aby and the Minister Finansów (Minister for Finance) (Case C?180/10) reads as follows:

‘Is a natural person who carried out an agricultural activity on land and subsequently, on account of a change to urban management plans which occurred for reasons beyond his control, ceased that activity and reclassified his property as private property, divided it into smaller parts (land designated for a holiday home development) and began to dispose of it, on that basis a taxable person for VAT for the purposes of Article 9(1) of Directive 2006/112/EC [(2)] and Article 4(1) and (2) of Sixth Directive 77/388/EEC [(3)] who is liable for payment of VAT on the basis of a trading activity?’

8. The two questions raised in the proceedings between Mr and Mrs Ku? and the Dyrektor Izby Skarbowej w Warszawie (Director of the Fiscal Chamber, Warsaw) (Poland) (Case C?181/10) read as follows:

‘1. Is a flat-rate farmer within the meaning of Article 295(1)(3) of Directive 2006/112 who sells plots of land used for his agricultural activity which are designated in a municipality’s urban management plan for residential and service development and were purchased as agricultural land (VAT-free) covered by Article 16 of that directive, which regards the application of business assets for the taxable person’s private use or for purposes other than those of his business as a supply of goods for consideration only where the tax on those assets was wholly or partly deductible?

2. Must a flat-rate farmer within the meaning of Article 295(1)(3) of Directive 2006/112 who sells plots of land previously used for his agricultural activity which are designated in a municipality’s urban management plan for residential and service development and were purchased as agricultural land (VAT-free) be regarded as a taxable person who is required to account for VAT on that sale under the general rules?’

Relevant legislation

Directive 2006/112 (4)

9. Under Article 2(1)(a) of Directive 2006/112, (5) the supply of goods for consideration within the territory of a Member State by a taxable person acting as such is to be subject to VAT.

10. Article 9(1) of Directive 2006/112 (6) reads as follows:

'"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.'

11. The first paragraph of Article 16 of Directive 2006/112 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.'

12. Article 296(1) of Directive 2006/112 provides:

'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.'

National law

13. Article 15 of the Law on the tax on goods and services of 11 March 2004 ('the Law on VAT') reads as follows:

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

2. Any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions, shall be regarded as an economic activity, even where the activity concerned was carried out only once in circumstances indicating an intention to perform that activity repeatedly. The exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall also be regarded as an economic activity.

…'

14. Article 43 of the Law on VAT provides:

'1. The following transactions shall be exempt from tax:

…

(3) the supply by a flat-rate farmer of agricultural products resulting from his agricultural activity

and the supply of agricultural services by a flat-rate farmer;

…

(9) the supply of land which has not been built on other than building land designated for development.

…’

Assessment

The question referred for a preliminary ruling in Case C?180/10

15. By this question the referring court is seeking to ascertain whether the definition of ‘taxable person’ for VAT purposes contained in Article 9(1) of Directive 2006/112 also applies to a person such as Mr S?aby who, from 2000, (7) successively sold 64 plots of land designated in an urban management plan for a holiday home development.

16. The facts underlying Mr S?aby’s case may be described as follows:

– the land in question was purchased by Mr S?aby in 1996 as agricultural land;

– an agricultural activity was actually carried out on that land from 1996 to 1998;

– in 1997 the land in question was reclassified as land designated for a holiday home development, following a change to the urban management plan, and

– in 1999, having ceased his agricultural activity on the land and reclassified it as private property, Mr S?aby divided it into 64 plots and began to sell them.

17. Given that Article 9(1) of Directive 2006/112 defines ‘taxable person’ by reference to the term ‘economic activity’ or, to put it another way, that the exercise of such an activity presupposes the status of ‘taxable person’, (8) the key issue for answering the question referred involves determining whether the transaction consisting in the successive sale of the building plots constitutes an economic activity.

18. ‘Economic activity’ is defined in the second subparagraph of Article 9(1) of Directive 2006/112 as encompassing all activities of producers, traders and persons supplying services and, in particular, transactions comprising the exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis. ‘Exploitation’ in that context refers, in accordance with the requirements of the principle that the common system of VAT should be neutral, to all those transactions, whatever their legal form may be. (9)

19. It cannot be disputed, in my view, that the sale of building land constitutes one of the means of exploitation of such tangible property, (10) particularly if account is taken of the fact that the sale of building land as the supply of goods for consideration is one of the transactions subject to VAT under Article 2(1)(a) of Directive 2006/112 in conjunction with Article 14(1) thereof.

20. It therefore remains to be established whether the successive sale of the plots was carried out for the purposes of obtaining income therefrom on a continuing basis.

21. In this regard it should not be forgotten that the question whether the activity concerned was carried out for the purpose of obtaining income therefrom on a continuing basis involves a point of fact which must be evaluated by the referring court taking into account all the

circumstances of the case. (11) In the light of the objective character of the scope of the terms ‘taxable person’ and ‘economic activity’, in the context of this appraisal, the purpose and the results of the activity in question bear no relevance. (12)

22. The Court has already explored the issue whether a property had been exploited for the purpose of obtaining income therefrom on a continuing basis in the case which gave rise to the judgment in *van Tiem*. (13) In that judgment the Court held that the grant of building rights over immovable property must be regarded as exploitation of property for the purpose of obtaining income therefrom on a continuing basis, even if those rights had been granted for a specified period.

23. In this case, exploitation of property consists in the successive sale of 64 plots of building land which originally made up agricultural land. It follows from the decision to refer the case that the owner of the land divided the property up into plots for their successive sale.

24. To my mind that very fact, that is to say, that the land was divided up prior to its sale as plots, supports the conclusion that the owner of that land acted with the intention of repeatedly transacting sales of the plots in question and, consequently, of obtaining income therefrom on a continuing basis. That conclusion is based on the repeated nature of those transactions rather than on the volume of the plot sales.

25. That conclusion holds true irrespective of whether the owner of land has purchased it with the intention of reselling it. If one accepts the argument put forward by Mr S?aby, which was also adopted by the national court of first instance, that the key point in the circumstances was that the land sold successively as plots had not been purchased with the intention of reselling it, that would ultimately challenge the principle of neutrality of the common system of VAT which precludes economic operators carrying on the same activities from being treated differently as far as the levying of VAT is concerned. (14) As the Republic of Poland has indeed rightly observed, transactions consisting in the sale of building plots by a person who purchased those plots as agricultural land with the intention of carrying out an agricultural activity on it do not differ from those carried out by a person who purchased agricultural land with the intention of reselling it following a change to the urban management plan.

26. It must therefore be stated that the intention of the purchaser when purchasing land which was subsequently divided up before being resold successively as plots has no bearing on the classification of those sales as economic activity within the meaning of the second subparagraph of Article 9(1) of Directive 2006/112.

27. Given that, in the question referred, the referring court emphasised the fact that the land at issue, prior to its sale, was reclassified as private property in relation to the agricultural activity carried out by the owner of that land, it remains to be examined whether or not Mr S?aby sold that land successively as plots in a private capacity. As is apparent from the case-law, a taxable person performing a transaction in a private capacity does not act as a taxable person and, consequently, such a transaction is not subject to VAT. (15)

28. Admittedly, in accordance with the line of case?law beginning with the *Armbrecht* judgment, (16) where a person subject to VAT sells property part of which he had chosen not to assign to his business but to reserve it for his private use, he does not act, with respect to the sale of that part, as a taxable person. A transaction of that kind is not, therefore, subject to VAT.

29. It should be pointed out, however, that such a division of the property occurs in relation to the activities in respect of which a person is considered to be subject to VAT.

30. In this instance, Mr S?aby classified the land, which was sold successively as plots, as private property in relation to his agricultural activity. None the less, Mr S?aby is considered to be subject to VAT, not in respect of his agricultural activity but in respect of the successive sale of the plots.

31. For that reason, the argument that Mr S?aby classified the property sold as private property is irrelevant in this case.

32. To summarise, in order to establish whether a person is taxable for VAT for the purposes of Article 9(1) of Directive 2006/112, it is for the national court to assess whether exploitation of the property in question by way of its successive sale as plots is carried out for the purpose of obtaining income therefrom on a continuing basis, taking into account all the circumstances of the case, in particular evidence of the intention to carry out those transactions repeatedly. In this regard, it is irrelevant that the property at issue was not purchased with the intention of selling it or that the property at issue was classified by its owner as private property in relation to an activity separate from the activity in respect of which the person is considered to be subject to VAT.

The questions referred in Case C?181/10

33. To my mind, the order of the questions should be reversed, given the link between the question raised in Case C?180/10 and the second question raised in Case C?181/10.

The second question

34. By this question the referring court is seeking to establish, as in Case C?180/10, whether Mr and Mrs Ku? must be regarded as taxable persons required to account for VAT on the 47 transactions relating to the sale of plots of land between 2004 and 2006.

35. Like Mr S?aby, Mr and Mrs Ku? sold plots which had originally been purchased as agricultural land. They used the land concerned for agricultural purposes, even after reclassification of the plots as land designated for residential and service development, following a change to the urban management plan. Unlike Mr S?aby, they registered themselves for VAT subject to the flat-rate scheme on their agricultural activity.

36. In the light of the answer suggested in Case C?180/10, likewise in this case the national court must assess whether exploitation of the property in question by way of its successive sale as plots is carried out for the purpose of obtaining income therefrom on a continuing basis, taking into account all the circumstances of the case, in particular evidence of the intention to carry out those transactions repeatedly.

37. For the sake of completeness, it is necessary to point out that the argument put forward by Mr and Mrs Ku?, that they have no intention of continuing to sell plots in the future, is of no relevance.

38. If, in its appraisal, the national court were to conclude that the sale transactions at issue were carried out for the purpose of obtaining income therefrom on a continuing basis, Mr and Mrs Ku? would be subject to VAT not only on their agricultural activity but also on those transactions *per se*.

39. In such circumstances Mr and Mrs Ku? would be subject to VAT on the respective sales of the plots connected with an agricultural property under the normal arrangements, notwithstanding their status as farmers covered by the flat-rate scheme referred to in Chapter 2 of Title XII of Directive 2006/112. That conclusion is borne out in the case-law of the Court according to which

transactions other than the supply of agricultural products and agricultural services provided by the flat-rate farmer within the framework of agricultural undertakings remain subject to the general scheme under Directive 2006/112. (17)

The first question

40. By this question the referring court is seeking to establish whether Article 16 of Directive 2006/112, under which 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, is to 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, can be applied to a flat-rate farmer within the meaning of Article 295(1)(3) of Directive 2006/112 who sells plots of land used for his agricultural activity which are designated in a municipality's urban management plan for residential and service development and were purchased as agricultural land (VAT-free).

41. In this regard I take the view that Article 16 of Directive 2006/112 does not apply to the transactions carried out by Mr and Mrs Ku?, which consist in the successive sale of the plots making up their agricultural property.

42. As the European Commission has rightly pointed out in its written observations, where parts of an agricultural property which are an integral part of the agricultural undertakings of a flat-rate farmer change their intended purpose and cease to be used for agricultural production in order to facilitate their successive disposal, goods forming part of the business assets of the taxable person in question are none the less being exploited for economic purposes. The taxable person is not, therefore, exploiting goods for his private use or for purposes other than those of his economic activity, as required by Article 16 of that directive.

Conclusion

43. In the light of the foregoing considerations, I propose that the Court should give the following answers to the questions referred to it by the Naczelny S?d Administracyjny:

(1) In order to establish whether a person is subject to value added tax for the purposes of Article 9(1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, it is for the national court to assess whether exploitation of the property in question by way of its successive sale as plots is carried out for the purpose of obtaining income therefrom on a continuing basis, taking into account all the circumstances of the case, in particular evidence of the intention to carry out those transactions repeatedly. In this regard, it is irrelevant that the property at issue was not purchased with the intention of selling it or that the property at issue was classified by its owner as private property in relation to an activity separate from the activity in respect of which the person is considered to be subject to value added tax.

(2) A person is subject to value added tax on the respective sales of the plots connected with an agricultural property under the normal arrangements, notwithstanding his status as a farmer covered by the flat-rate scheme referred to in Chapter 2 of Title XII of Directive 2006/112.

(3) Article 16 of Directive 2006/112 does not apply to a flat-rate farmer within the meaning of Article 295 of the Directive who successively sells plots of land designated for residential and service development which were created by dividing up an agricultural property.

1 – Original language: French.

2 – Council Directive of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1).

3 – Sixth Council Directive of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1; 'the Sixth Directive').

4 – In view of the period in which the facts underlying Case C?180/10 arose, both the Sixth Directive and Directive 2006/112 repealing and replacing the Sixth Directive as from 1 January 2007 apply. For the purposes of this Opinion I shall be referring to the relevant provisions of Directive 2006/112 only, as those provisions are essentially the same as the corresponding provisions of the Sixth Directive.

5 – This provision corresponds to Article 2(1) of the Sixth Directive.

6 – This provision corresponds to Article 4(1) and (2) of the Sixth Directive.

7 – In this regard it should be noted that I am proceeding on the premiss that the sale of the plots of land continued after 1 May 2004, even though this is not expressly stated in the decision to refer the case. If that was not the case, the Court would not be in a position to answer the question referred.

8 – See, by analogy, Case C?32/03 *Fini H* [2005] ECR I?1599, paragraph 19.

9 – Case C?25/03 *HE* [2005] ECR I?3123, paragraph 39, Case C?369/04 *Hutchison 3G and Others* [2007] ECR I?5247, paragraph 32, and Case C?267/08 *SPÖ Landesorganisation Kärnten* [2009] ECR I?9781, paragraph 20.

10 – The Court has already regarded, for instance, the hiring out of tangible property (Case C?230/94 *Enkler* [1996] ECR I?4517, paragraph 21) or the grant of a building right over immovable property by the owner of that property to a third party (Case C?186/89 *van Tiem* [1990] ECR I?4363, paragraph 19) as exploitation of tangible property. However, the activity consisting of the issuing of authorisations which allow the economic operators who receive them to exploit the resulting frequency use rights by offering their services to the public on the mobile telecommunications market in return for remuneration does not constitute exploitation of tangible property (Case C?284/04 *T-Mobile Austria and Others* [2007] ECR I?5189, paragraph 44). The same applies to activities consisting in carrying out public-relations activities, information provision, the staging of events, the supply of advertising material to other groups of a political party and the holding of an annual ball (judgment in *SPÖ Landesorganisation Kärnten*, cited in footnote 9, at paragraphs 18 and 21).

11 – See, to that effect, *Enkler* (cited in footnote 10, at paragraphs 24 and 30).

12 – See, to that effect, Case C?223/03 *University of Huddersfield* [2006] ECR I?1751, paragraph 47, and *T-Mobile Austria and Others* (cited in footnote 10, at paragraph 35).

13– Cited in footnote 10.

14 – Case C?288/07 *Isle of Wight Council and Others* [2008] ECR I?7203, paragraph 42.

15 – Case C?291/92 *Armbrecht* [1995] ECR I?2775, paragraphs 16 and 17, and Case C?415/98 *Bakcsi* [2001] ECR I?1831, paragraph 24.

16 – Cited in footnote 15.

17 – See, to that effect, Case C?321/02 *Harbs* [2004] ECR I?7101, paragraphs 31 and 36, and Case C?43/04 *Stadt Sundern* [2005] ECR I?4491, paragraph 20.