

OPINION OF ADVOCATE GENERAL

WATHELET

delivered on 28 February 2013 (1)

Case C-62/12

Galin Kostov

v

Direktor na Direktsia 'Obzhalvane i upravljenje na izpalnenieto' – Varna pri Tsentralno upravljenje na Natsionalnata agentsia za prihodite

(Request for a preliminary ruling from the Administrativen sad – Varna (Bulgaria))

(Common system of value added tax – Concept of a taxable person – Levying of VAT on a natural person for providing occasional services unconnected with his profession as bailiff)

I – Introduction

1. This reference for a preliminary ruling is concerned with the concept of a taxable person for the purposes of value added tax ('VAT') under the rules laid down by Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax ('the VAT Directive'). (2) The reference has been made in the context of a dispute in which a private bailiff concluded an agency contract under which he acquired for his principal properties in Bulgaria, an activity which, according to the referring court, has no connection with the exercise of his profession.

2. The question which arises is whether that bailiff must be regarded as a 'taxable person' within the meaning of Article 9(1) of the VAT Directive and must accordingly pay VAT on the transactions linked to the agency contract.

II – Legal framework

A – European Union law

3. According to Article 2 of the VAT Directive:

'1. 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;

...

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

...'

4. Article 9 of the VAT Directive provides as follows:

'1. "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 there from on a continuing basis shall in particular be regarded as an economic activity.

2. In addition to the persons referred to in paragraph 1, any person who, on an occasional basis, supplies a new means of transport, which is dispatched or transported to the customer by the vendor or the customer, or on behalf of the vendor or the customer, to a destination outside the territory of a Member State but within the territory of the Community, shall be regarded as a taxable person.'

5. Article 12(1) of the VAT Directive provides:

'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.'

6. Article 14 of that directive provides:

'1. "Supply of goods" shall mean the transfer of the right to dispose of tangible property as owner.

2. In addition to the transaction referred to in paragraph 1, each of the following shall be regarded as a supply of goods:

...

(c) the transfer of goods pursuant to a contract under which commission is payable on purchase or sale.

...'

B – *Bulgarian law*

7. The Administrativen sad – Varna (Administrative Court, Varna, Bulgaria) relied on the following provisions of the Law on value added tax (Zakon za danak varhu dobavena stoynost; ‘the ZDDS’).

8. According to Article 2 of the ZDDS:

‘The following shall be subject to [VAT]:

1. any supply of goods or services for consideration;

...’

9. According to Article 3 of the ZDDS:

‘(1) “Taxable person” shall mean any person who carries out an independent economic activity, whatever the purpose or results of that activity.

(2) “Independent economic activity” shall mean the activities of producers, traders and persons supplying services, including mining and agriculture, as well as the exercise of a profession, including the professions of private bailiff and notary. “Independent economic activity” shall also mean any activity carried out on a systematic or professional basis for consideration, including the exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis. ...’

10. Article 6(2)(4) of the ZDDS classifies ‘the actual making available of goods to a person who is acting in his own name and on behalf of another person’ as a supply of goods.

11. According to Article 8 of the ZDDS, a service for the purposes of that law is anything which has a value and which is distinct from goods and from money in circulation and foreign currencies which are used as means of payment.

III – The dispute in the main proceedings and the questions referred

12. Mr Kostov is a self-employed private bailiff in Bulgaria. He is registered for the purposes of VAT pursuant to Article 96(1) of the ZDDS.

13. On 13 November 2008, Mr Kostov concluded an agency contract with the company Bon Marin AD (‘the contract at issue in the main proceedings’). Under that contract, Mr Kostov undertook, as agent for Bon Marin AD, to make bids in the context of three auctions of three plots of partially built-upon land which were owned by the State under private law, were managed by the Ministry of Defence and covered an area of approximately 40 000 m². (3) He also undertook to transfer ownership in those properties to Bon Marin AD in the event of a successful bid.

14. The principal, Bon Marin AD, undertook to provide the financial resources required for the purchases envisaged by the contract, to acquire ownership of the properties obtained by Mr Kostov in performing the contract of agency and to pay him the agreed remuneration in the amount of BGN 50 000 (approximately EUR 25 500).

15. That remuneration was paid on the same day as that of signature of the contract at issue in the main proceedings, which also provided that Mr Kostov would retain the remuneration in the event that the bids were unsuccessful.

16. In May 2009, Mr Kostov acquired from the State ownership of the properties referred to in

the agency contract.

17. On 30 June 2009, with the agreement of the agent, Bon Marin AD assigned to Bleyk Siy Kapital EOOD all of its rights and obligations under the contract at issue in the main proceedings.

18. The VAT dispute arose from a tax adjustment notice drawn up by the tax inspectorate with responsibility for the city of Varna. According to that notice, Mr Kostov had received his remuneration of BGN 50 000 in consideration for a taxable supply of services within the meaning of Article 12 of the ZDDS, had made the supply as a taxable person for VAT purposes and was therefore required to pay VAT on that amount.

19. Following an administrative appeal, the tax adjustment notice was upheld by the Direktor na Direktsia 'Obzhalvane i upravlentie na izpalnenieto' – Varna pri Tsentralno upravlentie na Natsionalnata agentsia za prihodite (Director of the 'Appeals and Enforcement Management' Directorate, Varna, at the Central Administration of the National Revenue Agency; 'the defendant in the main proceedings').

20. Mr Kostov brought an action against that notice, claiming that he had provided the service on an occasional basis and not in connection with his economic activity as a self-employed private bailiff, the only activity for which he was registered for VAT.

21. In those circumstances, the Administrativen sad – Varna decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Is a natural person who is registered for VAT by reason of his activity as a private bailiff to be regarded as a taxable person within the meaning of Article 9(1) of [the VAT] Directive ... and required, pursuant to Article 193 of [the VAT] Directive ..., to pay VAT in respect of a service which he has provided on an occasional basis and not in connection with his activity as a private bailiff?'

IV – The procedure before the Court

22. The request for a preliminary ruling was lodged at the Court on 7 February 2012. Written observations have been submitted by the defendant in the main proceedings, the Bulgarian and Romanian Governments and the European Commission.

V – Analysis

A – Preliminary remarks

23. Whereas the referring court, the defendant in the main proceedings and the Bulgarian and Romanian Governments base their arguments on the existence of an agency contract and a supply of services by the agent, the Commission considers that the present case is concerned with a contract under which commission is payable within the meaning of Article 14(2)(c) of the VAT Directive, since, although Mr Kostov was acting on behalf of Bon Marin AD, he acted not in the name of that company, but in his own name. In the Commission's view, the present case therefore concerns a supply of goods.

24. According to the Commission, there were therefore two transactions, one a commission-purchase (acquisition of the properties by Mr Kostov) and the other a commission-sale (supply of the properties by Mr and Mrs Kostov (4) to Bleyk Siy Kapital EOOD), and whether those transactions are subject to VAT is thus dependent on the applicability or otherwise of the exemptions for transactions relating to the supply of buildings or of land which has not been built on provided for in Article 135(1)(j) and (k) of the VAT Directive.

25. It is to be remembered in this regard that it is not for the Court of Justice to rule on the interpretation and applicability of provisions of national law or to establish the facts relevant to the decision in the main proceedings. The Court must take account, under the division of jurisdiction between the Courts of the European Union and the national courts, of the factual and legislative context, as described in the order for reference, in which the question put to it is set. (5)

26. Accordingly, it is for the referring court, which clearly refers to an agency contract in its order for reference, to characterise the contract at issue in the main proceedings. If, on the basis of Bulgarian law, and pursuant to that contract, Mr Kostov participated in the auctions while acting in his own name and on behalf of Bon Marin AD, and consequently it is necessary to find that there was a contract under which commission is payable, the VAT rules applicable would therefore be those relating to a supply of goods, and, in particular, Articles 14(2)(c) and 135(1)(j) and (k) of the VAT Directive. For my part, I shall argue in this Opinion on the basis of the premiss of the referring court, that is to say that there is an agency contract and therefore a supply of services.

B – *Substance*

1. Principal argument

27. By its question, the referring court seeks to ascertain whether a person taxable for VAT purposes in his capacity as a member of a profession is subject to VAT solely in respect of transactions forming the subject-matter of his usual economic activities or also in respect of any other economic transaction for which he receives consideration, even in cases where that latter activity is carried out only on a purely occasional basis.

a) Do the services provided by Mr Kostov relate to the carrying out of an ‘economic activity’ within the meaning of Articles 2 and 9(1) of the VAT Directive or solely to his private sphere?

28. According to the case-law of the Court, for an activity to be subject to VAT it must be carried out with a business or commercial purpose characterised by, in particular, a concern to maximise returns on capital investment. (6)

29. According to that case-law, “‘economic activity’ must therefore be construed as meaning an activity likely to be carried out by a private undertaking on a market, organised within a professional framework and generally performed in the interest of generating profit’. (7)

30. It is clear from the order for reference that, in the main proceedings, Mr Kostov provided his services to Bon Marin AD and to its successor, Bleyk Siy Kapital EOOD, in consideration for a fee of BGN 50 000. There is nothing in the case-file to indicate that Mr Kostov undertook that activity for any reason other than to generate a profit or that the remuneration is merely a reimbursement of the expenses incurred by the agent.

b) Did Mr Kostov carry out that activity as a ‘taxable person acting as such’ (Article 2 of the VAT Directive), even though it does not form part of the usual activities of his profession as a bailiff?

31. It is clear from the order for reference that, pursuant to Article 2 of the Law on private bailiffs (Zakon za chastnite sadebni izpalniteli), private bailiffs have been entrusted by the State with the enforcement of private claims which have been established in an enforcement order. In concluding and performing the contract at issue in the main proceedings, Mr Kostov therefore did not act in his capacity as a private bailiff and did not exercise the prerogatives conferred on him by law as a private bailiff.

32. As the Commission has pointed out in its written observations, the wording of Article 9 of

the VAT Directive does not allow a restrictive interpretation which would exclude activities carried out by a taxable person from liability to tax solely because they do not form part of his usual activity.

33. A taxable person for VAT purposes is therefore subject to VAT not only for the activities which he declares as being usual activities but also for any paid activity which is, within the meaning of Article 9(1) of the VAT Directive, an 'activity of producers, traders or persons supplying services', including activities which do not form part of his usual activities.

34. Moreover, as pointed out by the defendant in the main proceedings, a different interpretation would have the unacceptable consequence that persons carrying out an economic activity independently could change their status in an arbitrary way for the purposes of application of the VAT Directive, that is to say sometimes being taxable persons and at other times being non-taxable persons, depending on the varying degree of closeness of the connection with the principal activity.

c) What is the effect for the purposes of VAT of the fact that the services at issue were only occasional?

35. Without providing a definition of the term, the legislation and the case-law of the Court provide a number of elements which indicate that there are specific VAT rules for 'occasional' transactions.

36. As regards the actual wording of the VAT Directive, Articles 9 and 12 are noteworthy in that regard.

37. The second subparagraph of Article 9(1) of the VAT Directive, after defining economic activity as being '[a]ny activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions', provides an example thereof, stating that '[t]he 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'.

38. The concept of 'continuing' used in Article 9 cannot, however, be construed as excluding the imposition of VAT on activities carried out on an occasional basis.

39. Furthermore, that concept of 'continuing' is used in the VAT Directive only in relation to a specific example of economic activity, that is to say, the exploitation of tangible or intangible property, and is applied not to the activity itself but to the income obtained from that particular activity.

40. As for Article 12 of the VAT Directive, (8) it allows (and therefore does not require) the Member States to 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)', citing, purely by way of example ('in particular'), 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.

41. In so far as the Republic of Bulgaria has not made use of that option under Article 12 of the VAT Directive, that provision may be interpreted in two ways, that is to say:

- where Member States have not made use of the option under Article 12, transactions which relate to the activities referred to in Article 9 of the VAT Directive and are carried out on an occasional basis are not subject to VAT. Subject to the definition of the occasional nature of an economic activity, this could be the case with the supply of services by Mr Kostov;
- as Article 12 allows the Member States to ‘regard as a taxable person’ anyone who carries out, on an occasional basis, a transaction relating to the activities referred to in Article 9 of the VAT Directive, this can, by definition, concern only persons who are not already subject to VAT. That option already existed in Sixth Directive 77/388/EEC (9) which stated in Article 4(3) that the Member States could ‘also treat as a taxable person’ (10) anyone who carries out, on an occasional basis, a transaction relating to the activities of producers, traders and persons supplying services, including mining and agricultural activities and activities of the professions. Those provisions cannot concern Mr Kostov. Since he is a taxable person, there is no need to have recourse to Article 12 in order to ‘regard’ him as such. That interpretation, which I favour and which is supported by the Commission in its written observations, (11) the other parties making no reference to Article 12, is reconcilable with the very broad scope which the European Union legislature intended to give to VAT and with another position of the Commission, namely that there is a presumption that a taxable person for VAT purposes is subject to VAT in connection with all his economic activities, unless they fall within the sphere of his private activities, which it would be for him to establish.

42. The case-law of the Court also warrants attention. I shall cite *Enkler*, *S?aby and Others* and *R?dlihs*. (12)

43. In *Enkler*, Ms Enkler had requested to be subject to VAT in order to deduct that tax on the purchase of a motor caravan which she had, however, used almost solely for private purposes, since its hire to third parties accounted for only 18 days out of three tax years and less than 15% of the kilometres covered.

44. At first sight, a reading of paragraph 20 of *Enkler* (a judgment delivered under the Sixth Directive but on the basis of provisions which, at least in substance, were virtually unchanged by the VAT Directive (13)) seems to me to provide a clear response in stating that: ‘[f]irst, a comparison of Article 4(2) [now Article 9(1) of the VAT Directive] with Article 4(3) [now Article 12 of the VAT Directive] of the Sixth Directive shows that the concept of economic activity referred to in both the first and second sentences of Article 4(2) does not include activities carried out on an occasional basis’.

45. However, in the remainder of that judgment, the Court did not use the concept of occasional activities to answer the question raised by the referring court, since the dispute concerned rather the difference between an activity carried out as a trader and a purely private activity (paragraphs 16, 17 and 18 of that judgment).

46. In that context, it is important to emphasise that the Court did not itself rule on whether the transactions carried out by Ms Enkler were an ‘economic activity’ within the meaning of the VAT Directive in stating, with a view to resolving that issue, that it was necessary to take into account various elements, including the nature of the goods concerned, the connection with usual economic activities, the duration of the activities, the number of customers or the amount of earnings (paragraphs 24 to 29 of that judgment).

47. The issue in *S?aby and Others* was the possibility of making the sale of agricultural land purchased VAT-free by a farmer subject to VAT after it was reclassified as land for development following a change in town planning.

48. In examining the situation in which the Member State at issue (in that case the Republic of Poland) had not made use of the option under Article 12 of the VAT Directive to make persons carrying out a transaction on an occasional basis subject to VAT, the Court again examined 'all the circumstances' (14) of the case in order to classify the sale of the land at issue either as the mere exercise of the right of ownership by its holder, therefore acting in a private capacity, or as an economic activity carried out by a taxable person, and did so without any further use of the expression 'occasional activity'.

49. More specifically, the Court (in paragraphs 37 and 38 of that judgment) points out that the number and scale of the transactions are not in themselves decisive. In that regard, it is to be noted that *S?aby and Others* was concerned with the sale of a single plot of land but, depending on the circumstances, its classification for VAT purposes could vary.

50. Accordingly, in paragraph 50 of that judgment, the Court stated that '[a] natural person who carried out an agricultural activity on land that was reclassified, following a change to urban management plans which occurred for reasons beyond his control, as land designated for development must not be regarded as a taxable person for VAT for the purposes of Articles 9(1) and 12(1) of the VAT Directive when he begins to sell that land if those sales fall within the scope of the management of the private property of that person'. (15)

51. On the other hand, according to the Court, (16) the transactions at issue become taxable for the purposes of VAT if it is found that, for the purpose of concluding them, that person takes 'active steps ... to market property' by mobilising 'resources similar to those deployed by a producer, a trader or a person supplying services within the meaning of the second subparagraph of Article 9(1) of the VAT Directive'.

52. In *R?dlihs*, in the context of the second subparagraph of Article 9(1) of the VAT Directive, the Court distinguished between the case in which an individual uses property in such a way that his activity is to be regarded as 'economic activity', that is to say, normally, where the property at issue is suitable only for economic exploitation, and the case in which property is, by reason of its nature, capable of being used for both economic and private purposes. (17) Without confusing that distinction with the concept of 'occasional activity', the Court ruled that, where, in the second case, the person concerned takes active steps in management by mobilising resources similar to those deployed by a producer, a trader or a person supplying services, the activity at issue must be regarded as an 'economic activity' within the meaning of Article 9(1) of the VAT Directive. (18)

53. It is clear from the foregoing that, as pointed out by the Commission, the VAT Directive contains no exemption from VAT for occasional activities carried out by a taxable person, in so far as such activities do not fall within the sphere of his private activities or are not carried out within the scope of the management of his private property.

54. Indeed, if occasional activities carried out by a taxable person were in principle excluded from liability to VAT, that could undermine the principles of neutrality and equal treatment of economic transactions which require that all taxable persons are subject to VAT in the same way for the same activities. (19) Furthermore, it is settled case-law that, as I have pointed out in point 41 of this Opinion, the VAT Directive confers a very wide scope of application on VAT, covering all economic activities of producers, traders and persons supplying services. (20)

55. Accordingly, transactions such as those carried out by Mr Kostov must be subject to VAT.

2. In the alternative

56. In the alternative, if the Court should hold that, in principle, occasional activities carried out both by non-taxable persons and by taxable persons are not taxable for VAT purposes, save where Article 12 is used, it would then be necessary to identify the criteria which should be used by the referring court in order to determine whether the transactions at issue are to be classified in that way.

57. On the basis of the criteria set out in *Enkler*, *S?aby and Others* and *R?dlihs*, I therefore consider that the following elements in particular should be taken into account in the present case:

- even though the referring court considers that the transactions at issue in the main proceedings ‘are provided not in connection’ with Mr Kostov’s activity as a private bailiff, it is none the less necessary to point out, as emphasised by the defendant in the main proceedings and the Bulgarian Government, that they are not entirely unrelated to the professional training and qualifications of the person concerned and the relationship of trust which must exist between an economic operator and an agent entrusted with successfully completing purchases of immovable property;
- as in *S?aby and Others*, the fact that a single contract is at issue is not decisive;
- it ought to be noted that the other parties to the contract with Mr Kostov are companies, that the buildings purchased probably have an industrial or commercial use and are of considerable economic value, as is Mr Kostov’s remuneration, which should be compared with the rest of his professional income (in that regard, the Commission notes in its observations that the fees in the amount of BGN 50 000 paid to Mr Kostov constitute several years’ annual salary in Bulgaria (21)); and
- the contract at issue in the main proceedings allowed Mr Kostov to keep his remuneration whatever the outcome of the auctions.

58. It is for the national court to consider all the relevant factors in the case-file in the main proceedings and to carry out an overall assessment, in order to determine whether or not the activities at issue were occasional in nature.

VI – Conclusion

59. In the light of the foregoing considerations, I propose that the Court reply as follows to the question submitted for a preliminary ruling by the Administrativen sad – Varna:

- Primarily

A natural person who is registered for value added tax by reason of his activity as a private bailiff must be regarded as a taxable person within the meaning of Article 9(1) of Directive 2006/112/EC of 28 November 2006 on the common system of value added tax and therefore required to pay value added tax on a service which he has provided on an occasional basis and not in connection with his activity as a private bailiff.

- In the alternative

In order to decide whether a natural person who is registered for value added tax by reason of his

activity as a private bailiff may be excluded from the requirement to pay value added tax on a service which he has provided, since it was provided on an occasional basis and not in connection with his usual activity, the referring court must assess all the circumstances of the case, and, in particular, the following elements, though none of them is in itself decisive:

- the nature and the intended use of the property to which the transactions relate;
- the connection of the transactions with the profession of the person concerned and, in the event that they do not form part of that person's specific activities, any connection with the professional training and qualifications of the person concerned which are capable of being decisive in creating a relationship of trust required successfully to complete the transactions at issue;
- the number and type of customers;
- the scale of the transactions; and
- the conditions to which the remuneration is subject and the amount thereof.

1 – Original language: French.

2 – OJ 2006 L 347, p. 1.

3 – The first plot of land covers an area of 12 387 m² and includes seven buildings whose total area is 2 314 m². The second plot covers an area of 12 471 m² and includes six buildings (five warehouses and a repair shop) whose total area is 3 843 m². The third plot covers an area of 15 186 m² and includes four warehouses whose total area is 6 147 m².

4 – Since, as the referring court points out, the properties became part of the community of property of Mr and Mrs Kostov under Article 19(1) of the Family Code.

5 – See Case C-153/02 *Neri* [2003] ECR I-13555, paragraphs 34 and 35, and Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri* [2004] ECR I-5257, paragraph 42.

6 – Case C-142/99 *Floridienne and Berginvest* [2000] ECR I-9567, paragraph 28.

7 – See, to that effect, point 10 of the Opinion of Advocate General Maduro in Case C-8/03 *BBL* [2004] ECR I-10157. See also point 19 of the Opinion of Advocate General Lenz in Case C-155/94 *Wellcome Trust* [1996] ECR I-3013.

8 – Unlike Article 9(2) of the VAT Directive, which *requires* that 'any person who, on an occasional basis, supplies a new means of transport, which is dispatched or transported to the customer by the vendor or the customer, or on behalf of the vendor or the customer, to a destination outside the territory of a Member State but within the territory of the Community' be regarded as a taxable person.

9 – 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').

10 – Emphasis added.

11 – See Terra, B., and Kajus, J., *A Guide to the European VAT Directives: Introduction to European VAT* (IBFD 2011) Vol. 1, p. 373.

12 – Case C-230/94 *Enkler* [1996] ECR I-4517; Joined Cases C-180/10 and C-181/10 *S?aby and Others* [2011] ECR I-8461; and Case C-263/11 *R?dlihs* [2012] ECR.

13 – *R?dlihs*, paragraph 23.

14 – *S?aby and Others*, paragraph 38.

15 – *Ibid.*, paragraph 50.

16 – *Ibid.*, paragraph 51.

17 – *R?dlihs*, paragraphs 34 and 35.

18 – *Ibid.*, paragraph 36.

19 – Subject to being acquainted with the economic activities of the companies acting as principals, but where it has been established that they acquired the properties for essentially industrial or commercial purposes, their activities should not be treated differently, from the standpoint of the VAT Directive, depending on whether those activities are carried out in conjunction with professionals or non-professionals in the sector.

20 – Case C-473/08 *Eulitz* [2010] ECR I-907, paragraph 24.

21 – According to the Bulgarian National Statistics Institute, the average monthly salary in Bulgaria for the third quarter of 2012 amounted to BGN 754 (approximately EUR 385).