

Provisional text

JUDGMENT OF THE COURT (Eighth Chamber)

11 July 2024 (*)

(Reference for a preliminary ruling – Taxation – Common system of value added tax (VAT) – Directive 2006/112/EC – Article 2(1)(a) – Article 9(1) – Article 14(2)(a) – Taxable supply of goods – Transfer of the ownership of agricultural land, against payment of compensation, by reason of a decision of the public authority – Expropriation)

In Case C-182/23 [Makowit], (i)

REQUEST for a preliminary ruling under Article 267 TFEU from the Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland), made by decision of 18 January 2023, received at the Court on 22 March 2023, in the proceedings

Dyrektor Krajowej Informacji Skarbowej

v

J.S.,

THE COURT (Eighth Chamber),

composed of N. Piçarra, President of the Chamber, N. Jääskinen (Rapporteur) and M. Gavalec, Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- the Dyrektor Krajowej Informacji Skarbowej, by B. Kołodziej and T. Wojciechowski,
- the Polish Government, by B. Majczyna, acting as Agent,
- the European Commission, by M. Herold and M. Owsiany-Hornung, 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 Article 9(1) and Article 14(2)(a) 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 J.S. and the Dyrektor Krajowej Informacji Skarbowej (Director of National Tax Information, Poland) ('the tax authority') concerning an application for annulment of a tax ruling dated 31 October 2017 ('the tax ruling').

Legal context

European Union law

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

4 Article 9(1) of that directive provides:

"Taxable person" shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity.

Any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions, shall be regarded as "economic activity". The exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as an economic activity.'

5 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:

(a) the transfer, by order made by or in the name of a public authority or in pursuance of the law, of the ownership of property against payment of compensation;

...'

6 Article 167 of that directive is worded as follows:

'A right of deduction shall arise at the time the deductible tax becomes chargeable.'

Polish law

7 Article 7(1) of the ustawa o podatku od towarów i usług (Law on the tax on goods and services) of 11 March 2004 (Dz. U. of 2022, item 931), in the version applicable to the dispute in the main proceedings ('the Law on VAT'), provides:

'The supply of goods referred to in Article 5(1)(1) shall be understood as the transfer of the right to dispose of goods as owner, including:

(1) transfer by order made by a public authority or entity acting in the name of that authority, or transfer, in pursuance of the law, of the ownership of property against payment of compensation;

...'

8 Article 15(1) and (2) of that law provides:

‘1. Taxable persons shall mean legal persons, organisational units without legal personality and natural persons pursuing an independent economic activity referred to in paragraph 2, regardless of the purpose or result of such an activity.

2. An economic activity includes any activity of producers, traders or service providers, including the activities of persons who extract natural resources, farmers and persons in the liberal professions. An economic activity includes, in particular, transactions consisting in the exploitation of tangible or intangible property on a continuing basis for the purposes of obtaining income therefrom.’

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

9 J.S. has been running a farm on which he has carried out the breeding of dairy cattle and the production of milk since 2001. He has been registered as a taxable person for value added tax (‘VAT’) purposes since January 2013. In 2003, and then in 2015, he purchased parcels of land to expand that farm. That acquisition had not been subject to VAT nor to a VAT deduction.

10 By decision of the Wojewoda, a public administration authority, on 6 March 2017, ownership of part of the parcels of land on which J.S.’s farm is located was transferred to the Skarb Państwa (State Treasury, Poland) for the purpose of investments in road construction. The Wojewoda also initiated proceedings to decide upon the compensation due to J.S. for the transfer of ownership of the parcels of land acquired by the State Treasury.

11 In that context, J.S. filed an application to the tax authority for a tax ruling to establish, first, whether he should be regarded as a taxable person for VAT purposes as a result of the sale of the parcels of land acquired by the State Treasury for the purpose of investments in road construction and, second, whether the compensation received on that basis should be subject to VAT. In his view, those questions had to be answered in the negative.

12 By the tax ruling, the tax authority considered that the transfer by expropriation of the ownership of the parcels of land to the State Treasury, for the purpose of investments in road construction, should be regarded as a supply of goods for consideration made by J.S., acting as an entity carrying out an economic activity, within the meaning of Article 15(2) of the Law on VAT, that is to say, as a taxable person for VAT purposes.

13 J.S. challenged that ruling before the Wojewódzki Sąd Administracyjny w Warszawie (Regional Administrative Court, Warsaw, Poland), which annulled the tax ruling by judgment of 15 October 2018. In the reasons, that court pointed out that J.S. had not taken any steps to sell the parcels of land at issue and that the expropriation of those parcels had been decided independently of his will. Thus, according to that court, that expropriation was unrelated to J.S.’s agricultural activity and, consequently, he had not acted as a taxable person for VAT purposes when the parcels of land at issue were transferred to the State Treasury.

14 The tax authority brought an appeal on a point of law against that judgment before the Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland), the referring court, claiming, inter alia, that the acquisition, by way of expropriation, of the parcels of land at issue was linked to the carrying out of a professional economic activity by J.S. consisting in the exploitation of those parcels of land in the course of his agricultural activity. Therefore, that acquisition should, according to the tax authority, be regarded as a supply of goods for consideration which must be subject to VAT.

15 The referring court takes the view that the outcome of the dispute before it depends on

whether the transfer of ownership of immovable property by means of an expropriation to the State Treasury, for the purposes of the construction of public roads, must be regarded as a supply of goods made by a taxable person carrying out an economic activity, on the ground that that taxable person had used that property in the course of his or her agricultural economic activity.

16 In the first place, that court states that, in the present case, it is not apparent from the description of the facts which gave rise to that dispute, as provided by the tax authority, that the parcels of land at issue were transferred to the part of J.S.'s property which is not used for farming, since those parcels were still part of the assets of J.S.'s undertaking.

17 In the second place, that court notes that it is apparent, in particular, from the judgment of 15 September 2011, *Saby and Others* (C-180/10 and C-181/10, EU:C:2011:589), that, if an operator takes active steps to market property such that he or she could be regarded as a trader, the goods sold must then be subject to VAT. Nevertheless, that court states that, in the present case, J.S. did not take any steps to sell those parcels. The referring court states that, according to Polish case-law, being a taxable person for VAT purposes alone does not constitute the essential condition for a transaction to be subject to VAT; rather, to that end, it is necessary to have acted as a taxable person for VAT purposes as part of the specific transaction relating to the economic activity of the operator concerned. However, that court states that, in the present case, J.S. was not active in the field of marketing property, in particular to sell the parcels of land at issue and that he carried out no economic activity other than the agricultural activity in respect of which he was a taxable person for VAT purposes.

18 In the third place, that court points out that since VAT was not applied when J.S. was purchasing the parcels, VAT was not deducted on that occasion.

19 In those circumstances, the Naczelny Sąd Administracyjny (Supreme Administrative Court) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Do the provisions of Article 9(1) of [the VAT Directive], in conjunction with Article 14(2)(a) thereof, allow a farmer who is liable to pay VAT under general rules and who transfers the ownership of a plot of land to the State Treasury under an expropriation procedure in exchange for compensation related to the change of its intended use for non-agricultural purposes to be regarded as a taxpayer obliged to pay VAT on that compensation due solely to the fact that the parcel was earlier used for agricultural activities subject to VAT?’

Consideration of the question referred

20 It should be noted as a preliminary point that, according to settled case-law, in the procedure laid down by Article 267 TFEU providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to decide the case before it. To that end, the Court should, where necessary, reformulate the questions referred to it. The Court may also find it necessary to consider provisions of EU law, which the national court has not referred to in its questions (judgment of 7 September 2023, *Groenland Poultry*, C-169/22, EU:C:2023:638, paragraph 47 and the case-law cited).

21 In the present case, in the light of the factors noted by the referring court, the outcome of the dispute in the main proceedings depends on whether a transaction involving the expropriation of parcels of agricultural land, such as that at issue in the main proceedings, against payment of compensation to the original owner of that land, must be subject to VAT.

22 However, it is Article 2(1)(a) of the VAT Directive which lays down the conditions that a supply of goods must satisfy in order to qualify as a transaction subject to VAT.

23 Furthermore, in its question, the referring court also refers to Article 9(1) of the VAT Directive, which defines the concepts of a taxable person and of an economic activity. Nevertheless, it is apparent from the order for reference that the question whether J.S. is a taxable person for VAT purposes and whether he carries out an economic activity is not in dispute.

24 Accordingly, it must be considered that, by its question, the referring court asks, in essence, whether Article 2(1)(a) of the VAT Directive, read in conjunction with Article 14(2)(a) thereof, must be interpreted as meaning that a transfer, by way of expropriation, of the ownership of parcels of agricultural land, against payment of compensation to the owner of that land, must be subject to VAT where that owner is a farmer who is a taxable person for VAT purposes, even if he or she does not carry out any activity relating to the marketing of property and has not taken any steps to effect such a transfer.

25 In that regard, it must be recalled that the VAT Directive establishes a common system of VAT based, inter alia, on a uniform definition of taxable transactions (judgment of 13 June 2018, *Gmina Wrocław*, C-665/16, EU:C:2018:431, paragraph 30 and the case-law cited).

26 Article 2(1)(a) of that directive provides that the supply of goods for consideration within the territory of a Member State by a taxable person acting as such is subject to VAT. It is therefore necessary to examine whether the circumstances described in paragraph 24 of this judgment correspond, first, to the concept of 'supply of goods for consideration' and, second, to that of a 'taxable person acting as such'.

27 In the first place, as regards the concept of 'supply of goods', Article 14(1) of the VAT Directive defines it as the transfer of the right to dispose of tangible property as owner. Article 14(2)(a) of that directive adds that, in addition to the transaction referred to in paragraph 1 of that article, the transfer, by order made by or in the name of a public authority or in pursuance of the law, of the ownership of property against payment of compensation is to be regarded as a supply of goods.

28 As against the general definition set out in paragraph 1 thereof, paragraph 2 of that article constitutes a *lex specialis*, the conditions for the application of which are independent of those in paragraph 1 thereof (see, to that effect, judgments of 13 June 2018, *Gmina Wrocław*, C-665/16, EU:C:2018:431, paragraph 36, and of 25 February 2021, *Gmina Wrocław (Transformation of the right of usufruct)*, C-604/19, EU:C:2021:132, paragraph 55).

29 Thus, in order to qualify as a 'supply of goods', within the meaning of Article 14(2)(a) of the VAT Directive, three cumulative conditions must be satisfied. First, there has to be a transfer of a right to ownership. Second, that transfer has to be by order made by, or in the name of, a public authority or in pursuance of the law. Third, there has to be payment of compensation (judgments of 13 June 2018, *Gmina Wrocław*, C-665/16, EU:C:2018:431, paragraph 37, and of 25 February 2021, *Gmina Wrocław (Transformation of the right of usufruct)*, C-604/19, EU:C:2021:132, paragraph 56).

30 In the present case, as regards the first two aforementioned conditions, it is apparent from the information provided by the referring court that it is not disputed that, first, the parcels of agricultural land at issue in the main proceedings became the property of the State Treasury and, second, that that transfer of ownership is the result of a unilateral decision of the Wojewoda, a public administration authority, adopted on 6 March 2017.

31 As regards the third condition laid down by Article 14(2)(a) of the VAT Directive, that is to say that relating to the payment of compensation, the Court held that, in order to determine whether that condition is satisfied, it is necessary only to establish that the compensation at issue is directly linked to the transfer of ownership and that its payment has become effective (judgment of 25 February 2021, *Gmina Wrocław (Transformation of the right of usufruct)*, C-604/19, EU:C:2021:132, paragraph 61 and the case-law cited).

32 It is apparent from the order for reference that the compensation at issue in the main proceedings is directly linked to the transfer of the ownership of the parcels of agricultural land at issue in the main proceedings to the State Treasury. Provided that the payment of that compensation has become effective, which it is for the referring court to determine, the transaction at issue constitutes a ‘supply of goods’ within the meaning of Article 14(2)(a) of the VAT Directive.

33 As regards the condition that that supply be made ‘for consideration’, set out in Article 2(1)(a) of the VAT Directive, the mere receipt by the taxable person of compensation within the meaning of Article 14(2)(a) of that directive is sufficient for the condition of a transaction for consideration to be satisfied for the purposes of the application of that provision (see, to that effect, judgment of 13 June 2018, *Gmina Wrocław*, C-665/16, EU:C:2018:431, paragraph 44).

34 In the second place, as regards the concept of a ‘taxable person acting as such’ set out in Article 2(1)(a) of the VAT Directive, while J.S. is registered as a taxable person for VAT purposes, the referring court is uncertain as to whether he acted in that capacity when ownership of the parcels of agricultural land at issue was being transferred. In that context, the referring court notes that he does not carry out any economic activity relating to the marketing of property and did not take any steps to sell those parcels.

35 In that regard, it should be noted that a taxable person, within the meaning of the first subparagraph of Article 9(1) of the VAT Directive, acts as such, in principle, only if he or she does so as part of his or her economic activity (judgment of 13 June 2018, *Polfarmex*, C-421/17, EU:C:2018:432, paragraph 37 and the case-law cited). That criterion is satisfied where a taxable person transfers ownership of immovable property allocated to that economic activity in the broad sense (see, to that effect, judgment of 13 June 2018, *Polfarmex*, C-421/17, EU:C:2018:432, paragraph 42).

36 On the other hand, a taxable person who performs a transaction in a private capacity does not act as a taxable person. Consequently, a transaction performed by a taxable person in a private capacity is not, therefore, subject to VAT (judgments of 4 October 1995, *Armbricht*, C-291/92, EU:C:1995:304, paragraphs 17 and 18, and of 8 March 2001, *Bakcsi*, C-415/98, EU:C:2001:136, paragraph 24).

37 In the present case, it is apparent from the documents before the Court that, according to the tax authority, the parcels of agricultural land at issue were part of the assets of J.S.’s undertaking on the date on which ownership thereof was transferred to the State Treasury.

38 It follows that J.S., who is a taxable person for VAT purposes because of his agricultural activity, acted as a taxable person in transferring the ownership of parcels of agricultural land

allocated to his economic activity, even though he does not carry out any activity relating to the marketing of property and did not take any steps to that end.

39 In that regard, it must be added that a condition requiring that the taxable person must have taken active steps would also be incompatible with the effectiveness of Article 14(2)(a) of the VAT Directive, which, by definition, refers to the transfer of the ownership of property which takes place following an order made by or in the name of a public authority or in pursuance of the law (see, to that effect, judgment of 25 February 2021, *Gmina Wrocław (Transformation of the right of usufruct)*, C-604/19, EU:C:2021:132, paragraph 75).

40 Had the referring court found that the transaction at issue in the main proceedings was carried out by J.S. in the course of the management of the part of his property which is not used for farming, it would have to be held that he did not act as a taxable person and that that transaction was not subject to VAT.

41 In the light of the foregoing considerations, the answer to the question referred is that Article 2(1)(a) of the VAT Directive, read in conjunction with Article 14(2)(a) thereof, must be interpreted as meaning that a transfer, by way of expropriation, of the ownership of parcels of agricultural land, against payment of compensation to the owner of that land, must be subject to VAT where that owner is a farmer who is a taxable person for VAT purposes and acting as such, even if he or she does not carry out any activity relating to the marketing of property and has not taken any steps to effect such a transfer.

Costs

42 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 (Eighth Chamber) hereby rules:

Article 2(1)(a) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, read in conjunction with Article 14(2)(a) thereof,

must be interpreted as meaning that a transfer, by way of expropriation, of the ownership of parcels of agricultural land, against payment of compensation to the owner of that land, must be subject to value added tax (VAT) where that owner is a farmer who is a taxable person for VAT purposes and acting as such, even if he or she does not carry out any activity relating to the marketing of property and has not taken any steps to effect such a transfer.

[Signatures]

* Language of the case: Polish.

i The name of the present case is a fictitious name. It does not correspond to the real name of any of the parties to the proceedings.