

Case C-707/18**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

13 November 2018

Referring court:

Tribunalul Timiș (Romania)

Date of the decision to refer:

30 October 2018

Applicant:

Amărăști Land Investment SRL

Defendants:

Direcția Generală Regională a Finanțelor Publice Timișoara
Administrația Județeană a Finanțelor Publice Timiș

Subject matter of the main proceedings

Action seeking, in substance, the annulment of a decision on an appeal brought by the applicant against a tax assessment notice and a tax inspection report issued by the defendants, the partial annulment of those acts, which imposed on the applicant an obligation to pay additional VAT, and an order requiring the defendants to reimburse the additional sum paid and to pay interest on the same.

Subject matter and legal basis of the request for a preliminary ruling

Pursuant to Article 267 of the Treaty on the Functioning of the European Union, the referring court requests interpretation of Articles 24, 28, 167 and 168(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) with reference to the possibility of classifying certain transactions as ‘investment costs’ in respect of which taxable persons are entitled to deduct VAT.

Questions referred

1. Is Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, and in particular Articles 24, 28, 167 and 168(a) thereof, to be interpreted as meaning that, in the context of a transaction for the sale of immovable property which is not included in the national register of immovable property (Land Register) and which is not registered at the time of the supply, the purchaser, who is a taxable person and who assumes a contractual obligation to carry out, at his own expense, the necessary steps for its first registration in the national register of immovable property, carries out a supply of services to the vendor, or instead a purchase of services relating to his investment in immovable property in respect of which he is entitled to deduct VAT?
2. Is Directive 2006/112, and in particular Articles 167 and 168(a) thereof, to be interpreted as meaning that the costs incurred by a purchaser, who is a taxable person, in connection with the first registration in the register of immovable property of property in respect of which the purchaser has a claim for the future transfer of ownership and which has been supplied to him by a vendor whose ownership of the property is not recorded in the register of immovable property, can be classified as pre-investment operations in respect of which the taxable person is entitled to deduct VAT?
3. Is Directive 2006/112, and in particular Articles 24, 28, 167 and 168(a) thereof, to be interpreted as meaning that the costs incurred by the purchaser, who is a taxable person, in connection with the first registration in the register of immovable property of property which has been supplied to him and in respect of which the purchaser has a contractual claim for the future transfer of ownership from a vendor whose ownership of the property is not recorded in the register of immovable property, are to be classified as the provision of services to the vendor in a context in which the purchaser and the vendor have agreed that the price of the immovable property does not include the value of the land-registration operations?
4. For the purposes of Directive 2006/112, must the costs of administrative operations relating to immovable property which has been supplied and in respect of which the purchaser has a claim for the future transfer of ownership from the vendor, including, but not limited to the costs of first registration in the register of immovable property, necessarily be borne by the vendor, or may such costs be borne, pursuant to an agreement between the parties, by the purchaser or by any other of the parties to the transaction, with the result that that person is entitled to deduct the VAT?

Provisions of EU law and case-law referred to

Directive 2006/112, Article 9(1), Article 24(1), Article 28, Article 167 and Article 168(a)

Judgments of 29 February 1996, *Inzo v Belgische Staat* (C-110/94, EU:C:1996:67) and of 21 March 2000, *Gabalfrisa and Others* (C-110/98 to C-147/98, EU:C:2000:145)

National provisions referred to

Legea nr. 554/2004 a contenciosului administrativ (Law No 544/2004 on contentious administrative proceedings);

Article 8(1), first sentence: ‘A person whose rights recognised by law or legitimate interests have been infringed by a unilateral administrative act, and who is dissatisfied with the response received to his prior complaint, or who has not received a response within the period referred to in Article 2(1)(h), may bring an action before the competent administrative court seeking the annulment, in whole or in part, of the measure, compensation for damage suffered and, where appropriate, compensation for any non-material damage.’

Article 18(1), (3) and (6): ‘When deciding a case as referred to in Article 8(1), the court may, where appropriate, annul the administrative act in whole or in part, order the public authority to adopt an administrative measure, or issue a different document or carry out a specific administrative action ... If the court gives a decision on the application, it shall also give a ruling on the compensation for the material and non-material damage caused, where that has been claimed by the applicant ... In any case, the court may, at the request of the interested party, stipulate in the operative part of its decision a period for performance and impose a penalty as referred to in Article 24(2).’

Legea nr. 227/2015 privind Codul fiscal (Law No 227/2015 on the Tax Code)

Article 271(2): ‘Where a taxable person acting in his own name but on behalf of another person takes part in a supply of services, he shall be deemed to have received or supplied those services himself.’

Article 281(6): ‘In the sale of tangible goods, including immovable property, the date of supply is the date on which the right to dispose of the goods as owner is transferred. By way of exception, in the case of contracts which provide that payment is to be made in instalments or of any other type of contract which stipulates that ownership is to be transferred at the latest at the time of payment of the last due amount, except for leasing agreements, the date of supply is the date on which the goods are handed over to the beneficiary.’

Article 297(4): ‘All taxable persons have the right to deduct tax relating to purchases if they are used for the purposes of the following transactions: (a) taxable transactions; ...’

Normele metodologice de aplicare a Legii nr. 227/2015 privind Codul fiscal, aprobate prin Hotărârea Guvernului nr. 1/2016 (Rules for the implementation of Law No 227/2015 on the Tax Code, approved by Legislative Decree No 1/2016)

Point 67(4): ‘Any person who has the intention, confirmed by objective evidence, of independently commencing an economic activity within the meaning of Article 269 of the Tax Code and who starts to incur costs or to make the preliminary investments needed to commence that economic activity shall be deemed to be a taxable person acting in that capacity who has, in accordance with Article 297 of the Tax Code, the right immediately to deduct the tax due or paid in respect of the costs incurred or investments made for the purposes of the operations which he intends to carry out and which give rise to a right of deduction, without having to wait for the actual carrying out of his activity to begin.’

Legea nr. 287/2009 privind Codul civil (Law No 287/2009 on the Civil Code)

Article 885(1): ‘Subject to legal provisions to the contrary, real rights in immovable property included in the Land Register shall be acquired, both as between the parties and as regards third parties, only by their registration in the Land Register, on the basis of the act or fact justifying their registration.’

Article 886: ‘Unless otherwise provided for by law, any alteration of a real right shall be made in accordance with the rules which govern the acquisition and extinction of real rights.’

Article 888: ‘Registration in the Land Register shall be effected on the basis of a notarial act, a final court decision, a certificate of succession or other act adopted by an administrative authority where so provided for by law.’

Article 893(a): ‘Registration of a real right may be effected only: (a) for persons who, at the date of registration of the application, are registered as the holders of the rights for which the registration is to be made; ...’

Article 1244: ‘Except in such other cases as are provided for by law, agreements which replace or constitute real rights that are to be registered in the Land Register shall be concluded by authentic instrument, failing which they shall be null and void.’

Article 1672: ‘Sellers have the following principal obligations: (1) to transfer ownership in the goods or, as the case may be, of the right sold; (2) to hand over the goods; (3) to guarantee buyers against eviction from the goods and defects in the goods.’

Article 1676: ‘In the sale of immovable property, the transfer of ownership from the vendor to the purchaser shall be subject to the provisions of the Land Register.’

Article 1719: ‘Purchasers have the following principal obligations: (a) to take delivery of the goods sold; (b) to pay the purchase price.’

Brief outline of the facts and the main proceedings

- 1 The applicant was established in 2014 for the purpose of setting up and operating an agricultural holding extending over a surface area of approximately 4 000 hectares. In order to carry out the abovementioned activity, the company is currently purchasing agricultural land by means of a two-stage process. In the first stage, promises to sell and purchase are being entered into between promissory vendors and the applicant, as promissory purchaser, whereunder the applicant acquires a claim to ownership of land. Upon completion of the administrative formalities provided for by law for the conclusion of the contracts, the second stage is carried out, which involves the conclusion of the sale and purchase agreements under which ownership of the land is acquired.
- 2 In order to ensure the proper execution of this investment process, the applicant has availed itself of the services of certain specialists, such as brokers, lawyers and notaries, as well as land-registration and topographic services, in order to verify the legal status of the land to be sold and to complete all the preliminary steps prior to the conclusion of the sale and purchase agreements, and it has thus paid the fees of the relevant parties.
- 3 The applicant has justified the need for these services by reference to the fact that, in the geographical area in which it is operating, land is split into small parcels and is not registered in the Land Registry. In order for a contract for the sale and purchase of land to be validly concluded by authentic instrument, the law requires the land to be registered in the Land Register and that the person who is the vendor in the transaction is the person recorded in the Land Register as the owner of the land. Thus, in the applicant’s case, it is impossible to purchase the land directly and the acquisitions must be structured as the two-stage process mentioned above.
- 4 The land-registration costs relating to the land in question are not invoiced to the promissory vendors and are not actually borne by them. Therefore, in the bilateral promises for the sale and purchase of the land, a clause is included whereby the promissory vendor states that he agrees that the promissory purchaser (the applicant) may carry out at its own expense all the work of gathering information, preparing files and authenticating and registering documents, and all work relating to the Land Register and to the registration of the land in the Land Register, such steps being necessary in order for the land in question to form the subject matter of the notarised sale and purchase agreement.
- 5 The parties agree that the value of the work described above is EUR 750 per hectare. They also include a penalty clause which provides that, if the promissory vendor fails to fulfil his obligation to conclude the sale agreement within the prescribed period, either through his own fault or for any other reason except for

reasons attributable to the applicant, he undertakes to pay the applicant the costs which the latter has incurred in connection with registering the land in the Land Register, together with damages in the sum of EUR 2 000 per hectare.

- 6 In so far as concerns the price stipulated in the contracts, as is apparent from the sale and purchase promises, the parties agree that the applicant is to pay the promissory vendor the full price of the land at the time of the promise, which does not include the value of the land-registration operations, which remains separate.
- 7 On 23 January 2017, the applicant lodged with the tax authorities a request for the reimbursement of VAT in the sum of RON 73 828. Following that, a tax inspection was carried out, concluded by a tax inspection report and a tax assessment notice, both dated 15 March 2017, granting the request for reimbursement in the sum claimed. However, the tax authorities also decided that additional VAT must be paid, in the sum of RON 41 911, on a taxable amount of RON 209 522, corresponding to the value of services provided by the applicant to the vendors. That taxable amount was calculated by multiplying the land area of 74.43 hectares, in relation to which final sale contracts had been concluded by 31 December 2016, by EUR 750 per hectare.
- 8 The tax authorities pointed out that the sum of EUR 750 per hectare was the consideration for the services provided by the applicant to the vendors in return for the supply of the goods. They argued that the applicant had paid a price in return for the land purchases, but had also provided services to the vendors, and that the vendors had to bear the costs of land registration and of the conclusion of notarised sale and purchase agreements. In essence, the tax authorities found, first, that the applicant had provided the services in question (which were transactions subject to VAT) in its own name but on behalf of other persons and had not invoiced their value to the beneficiaries nor collected the relevant VAT. Secondly, the provision of those services had become chargeable at the time of the conclusion of the notarised sale and purchase agreements.
- 9 In the earlier administrative proceedings, the applicant challenged the tax assessment notice concerning the additional VAT that it was required to pay, but its appeal was rejected by the tax authorities. It was in those circumstances that the applicant brought before the national court the annulment action which is the subject of the main proceedings.

The essential arguments of the parties in the main proceedings

- 10 The applicant considers, in essence, that the costs of the work carried out, which it has incurred and which are valued at EUR 750 per hectare, are investment-related costs incurred for the purpose of carrying out taxable transactions, for which it is entitled to deduct the relevant VAT.
- 11 As regards *the first question*, the applicant asserts that, from the time when the sale and purchase promises are entered into, it acquires a claim for the transfer of

ownership of the immovable property. Since it is in possession of, and has a claim over this property and since, implicitly, it is to acquire the real right of ownership of the property, it exploits it. According to the applicant, exploitation must also be understood in terms of the preparatory work carried out in relation to the immovable property. Such preparatory work, including the registration of the property, must be regarded as forming part of its commercial activity, since, in the absence of such registration in the Land Register, the right of ownership of the land cannot be enforced against third parties and cannot form the subject of a sale and purchase agreement, and the applicant would be unable to carry out taxable transactions. In the present case, the taxable transaction which the applicant intends to carry out is specifically the agricultural exploitation of the land which it is currently acquiring.

- 12 As regards *the second question*, the applicant states that the costs incurred for the first registration of the property in the Land Register are not borne by the promissory vendor and are not included in the price of the land, but are own expenses, classified as costs relating to its investment in immovable property. In this connection, the applicant refers to the judgment in *Inzo*, in which the Court of Justice held that, where the tax authority has accepted that a company which has declared an intention to commence an economic activity giving rise to taxable transactions has the status of a taxable person for the purposes of VAT, the commissioning of a profitability study in respect of the envisaged activity may be regarded as an economic activity, even if the purpose of that study is to investigate to what degree the activity envisaged is profitable. The applicant also refers to the case-law of the Court of Justice which shows that there are situations in which the right to deduct VAT on purchases of goods or services made prior to the commencement of the taxable activity (at the investment stage) is recognised, even if the goods or services are subsequently not used in the taxable activity, provided that the intention of the taxable person, at the time of the purchase, to use the goods or services for the subsequent taxable activity is proven.
- 13 As regards *the third question*, the applicant submits that it is necessary to establish whether, for the purposes of Directive 2006/112, a purchaser who is a taxable person and who assumes a contractual obligation to incur costs such as those in the present case is acting as a purchasing agent reporting to the vendor of the immovable property in connection with which the registration in the Land Register is effected.
- 14 As regards *the fourth question*, the applicant considers that this question is relevant from the viewpoint of the parties' right to establish contractually which party — the purchaser or the vendor — must bear the costs of the administrative operations relating to the immovable property that is to be sold and in respect of which the purchaser has a claim against the vendor for the future transfer of ownership. Is it necessary to interpret the provisions of Directive 2006/112 which concern the parties' right to choose, with reference to the question whether the right of that person to deduct VAT on the operations thus carried out is recognised or not.

- 15 The defendants, for their part, take the view that the sum of EUR 750 per hectare represents the consideration for the services provided by the applicant to the vendor in return for the supply of the land. They maintain that the sale price includes the sum of EUR 750 per hectare and that, by means of the reduction of the price, an exchange of goods and services has taken place, that is to say, land-registration services and the costs borne by the applicant in return for the supply of the immovable property in accordance with the law. Consequently, the costs incurred by the applicant were not incurred for the purposes of taxable transactions but were incurred for the vendor. The applicant acted as an agent and, for VAT purposes, is deemed to be the purchaser and reseller of the land-registration services.

Brief outline of the reasons for the request for a preliminary ruling

- 16 Given the diverging views of the parties, which result from their different interpretations of the provisions of Directive 2006/112 in so far as concerns the applicant's right to deduct the VAT on the costs which it incurred, as purchaser and a taxable person, in connection with the first registration in the register of immovable property of land in respect of which it has a claim for the future transfer of ownership, the referring court observes that there are difficulties in the interpretation of that directive in relation to the issues that are before it.
- 17 The referring court points out that European Union law does not expressly govern the legal arrangements for the costs of the initial registration of immovable property in a register of immovable property. Neither Directive 2006/112 nor the case-law relating to it explains whether such costs can be classified as investment-related expenditure or as a supply of services to the vendor.
- 18 In order to resolve the dispute, it is necessary to ascertain whether the operations carried out by the applicant can be classified as 'investment costs' in respect of which taxable persons are entitled to deduct VAT. However, from the interpretation of Directive 2006/112 and from the analysis given in the case-law of the Court of Justice in similar cases, it is unclear to what extent such costs can be classified as pre-investment operations in respect of which taxable persons are entitled to deduct VAT. Although the classification of such operations falls exclusively to national courts, in order to apply the provisions of European Union law correctly to the facts of the case, the referring court considers that it is necessary for the Court of Justice to interpret the provisions in question.