

Case C-729/21

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:

1 December 2021

Referring court:

Naczelny Sąd Administracyjny (Poland)

Date of the decision to refer:

27 July 2021

Appellant in the appeal on a point of law:

W. Sp. z o. o.

Respondent in the appeal on a point of law:

Dyrektor Izby Administracji Skarbowej w Łodzi

Subject matter of the main proceedings

Classification of a transaction as the purchase of a part of an undertaking not subject to VAT or as the purchase of assets subject to VAT.

Subject matter and legal basis of the request

The VAT Directive; Article 267 TFEU

Questions referred for a preliminary ruling

1. Must the provisions of EU law concerning VAT be interpreted as allowing the application of a provision of national law – such as Article 6(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 2021, item 685; ‘the Law on VAT’) – which excludes taxation of a supply of an organised part of an undertaking without making the application of that exclusion subject to the condition referred to in Article 19 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value

added tax (OJ 2006 L 347, p. 1, as amended), that is to say, legal succession between the seller and the purchaser?

2. If the answer to the first question is in the affirmative, do all the assets of that organised part of the seller's property have to be transferred for the exclusion referred to in Article 6(1) of the Law on VAT to apply and does a change in this respect (in particular the non-conclusion of agreements concerning the insurance and management of the property being transferred) mean that there has been a taxable supply of goods?

Provisions of European Union law relied on

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax ('the VAT Directive'): Article 2(1)(a) and Article 19

Provisions of national law relied on

Ustawa o podatku od towarów i usług (Law on the tax on goods and services) of 11 March 2004 (Dz. U. of 2011, No 177, item 1054, as amended; 'the Law on VAT'):

Article 6

The provisions of this Law shall not apply to:

(1) a transaction for the sale of an undertaking or an organised part of an undertaking;

Article 2(27e)

For the purposes of the following provisions: [...] 'an organised part of an undertaking' shall mean an organisationally and financially separate group of tangible and intangible assets within an existing undertaking, including liabilities, used to perform specific economic tasks, which at the same time could constitute an independent undertaking performing those tasks independently.

Ustawa – Kodeks cywilny (Law establishing the Civil Code) of 23 April 1964 (consolidated text, Dz. U. of 2020, item 1740, as amended; 'the Civil Code'):

Article 55¹

An undertaking is an organised group of intangible and tangible assets used to carry on an economic activity.

It includes, inter alia:

- (1) a designation identifying the undertaking or its separate parts (undertaking's name);
- (2) ownership of immovable or movable property, including equipment, materials, goods and products, and other rights in rem in immovable or movable property;
- (3) rights arising from agreements relating to the leasing, letting or hiring out of immovable or movable property and rights to use immovable or movable property arising from other legal relationships;
- (4) claims, rights in securities, and cash;
- (5) concessions, licences and permits;
- (6) patents and other industrial property rights;
- (7) proprietary copyrights and related property rights;
- (8) trade secrets;
- (9) books and documents connected with carrying on an economic activity.

Succinct presentation of the facts and procedure and essential arguments of the parties

- 1 At the heart of the dispute is the assessment of what constituted the subject of the purchase contract concluded by W. Sp. z o.o. ('the Company'), documented by an invoice of 30 August 2016 – the purchase of an organised part of an undertaking, or the purchase of an asset in the form of immovable property together with all its appurtenances and rights pertaining thereto.
- 2 By the decision contested in the present case, the Dyrektor Izby Administracji Skarbowej (Director of the Tax Administration Chamber) ('the [tax] authority of second instance') upheld the decision of the Dyrektor Urzędu Kontroli Skarbowej (Director of the Tax Inspection Authority) ('the [tax] authority of first instance'), which fixed the Company's VAT liability for August 2016. The tax authorities questioned the Company's right to reduce the tax due by the input tax in the amount of 23 155 572 Polish zlotys (PLN) shown on an invoice documenting the purchase of immovable property, namely a shopping centre. The tax authorities considered that the invoice issued by the seller, P. sp. z o.o. ('the Seller'), concerned the sale of an entire undertaking (in the view of the [tax] authority of first instance) or at least an organised part of an undertaking (in the view of the [tax] authority of second instance). Consequently, Article 6(1) of the Law on VAT was applied to the transaction and it was considered that the transaction was not subject to any VAT at all. The Company's right to deduct the input VAT was subsequently challenged.

- 3 The Company brought an action before the appropriate wojewódzki sąd administracyjny (regional administrative court) ('the court of first instance').
- 4 The court of first instance cited Article 2(27e) of the Law on VAT, noting that the legal definition of an organised part of an undertaking emphasises two conditions. First, the tangible and intangible assets must be sufficient to perform specific economic tasks. Second, they must be organisationally and financially separate. The legal definition thus places emphasis on the functioning of the separate part of the undertaking, which must be able to carry on an economic activity.
- 5 Pursuant to the contract, the Seller sold to the Company immovable property, located on built-on land, as well as movable property, free from any encumbrances, other than permitted encumbrances, for the price of EUR 23 200 000, plus VAT at the rate in force on the closing date in the amount of PLN 23 155 572 (the equivalent of EUR 5 336 000).
- 6 As part of the stated price, the Seller transferred to the Company all its rights and claims arising from:
 - documents securing lease agreements,
 - unexpired construction warranties,
 - intellectual property agreements,
 - lease agreements for individual premises in the shopping centre building which will not be transferred to the buyer by operation of law,
 - an agreement concerning the construction and use, free of charge, of a power connection.
- 7 In the contract, the Seller and the Company declared that the immovable property (together with its associated rights) does not constitute an undertaking or an organised part thereof and the transaction does not constitute a sale or other type of transfer of the Seller's undertaking (or an organised part thereof). Under the contract, the transfer of the immovable property constituted the sale of an asset. The parties to the contract further declared that the transaction constitutes a supply of goods for consideration for the purposes of Article 5(1) of the Law on VAT. Since the sale of built-on land is exempt from VAT under Article 43(1)(10) of the Law on VAT, the parties to the contract declared that they waive the VAT exemption and opt to pay VAT on the transaction pursuant to Article 43(10)(2) of the Law on VAT. It is common ground that the invoice was paid and the VAT was settled.
- 8 It has been established that the Company, founded in 2015, did not carry on any operational activity before the date on which the immovable property was purchased. The Company did not receive any sales revenue until after that purchase. The rental of retail space in the shopping centre and the management of

that facility became the subject of the Company's activity after the purchase of the immovable property. The Company did not employ any staff. Following the purchase, it did not interrupt the economic functioning of the facility and used it in the same way as the Seller.

- 9 The court of first instance accepted the [tax] authorities' position that the subject of the sale was an organised part of an undertaking. The most important asset was the built immovable property in which the Seller carried on its economic activity by leasing retail space. Thus, the concluded lease agreements were the key assets. The contract shows that, in addition to the sale of the immovable property it was the parties' intention to transfer the rights and obligations essential for carrying on economic activity and for uninterrupted functioning in future. Thus, the Company carries on an economic activity using the purchased assets to the same extent and in the same way as the previous owner.
- 10 That court pointed out that the facts determine which specific assets must be the subject of the contract in order to permit a finding that there has been a sale of an organised part of an undertaking.
- 11 The [tax] authorities were correct in finding that the intention of both parties to the contract was to adjust the lease agreements concluded previously so as to ensure complete and uninterrupted succession with regard to those agreements.
- 12 The court noted that the subject of the transaction was not the entire undertaking since certain agreements were not transferred as part of that transaction. However, it found that the subject of the transaction at issue constituted the minimum necessary for the economic activity to continue unchanged. Immediately after the purchase, the Company concluded new agreements with the previous utility suppliers. While the agreement regarding the management of the immovable property was concluded with a different entity from the previous one, its scope was the same.
- 13 In summary, the court of first instance found that the fact that there was a change in the entity managing the shopping centre and new agreements were concluded regarding the supply of utilities and day-to-day administration is not a crucial factor in determining whether the subject of the transaction was an organised part of an undertaking or immovable property.
- 14 The Company lodged an appeal on a point of law against the judgment of the court of first instance.

Succinct presentation of the reasoning in the request for a preliminary ruling

- 15 The first question referred concerns the uncertainty as to whether the exclusion, under Polish law (Article 6(1) of the Law on VAT), of taxation of a supply of an undertaking or an organised part thereof satisfies the condition laid down in

Article 19 of the VAT Directive as regards ‘legal succession’ between the transferor and the person to whom the goods are transferred.

- 16 Although the rules laid down in Article 19 of the VAT Directive are optional for Member States, the interpretation of the concepts contained therein should be uniform and the Member States’ freedom in interpreting those concepts remains limited. However, the concept of succession, that is to say legal succession as the purchaser entering into all/some of the rights and obligations of the seller, is not defined. There is no definition of that concept in the VAT Directive. Under Polish law it is also interpreted differently in different branches of law. In the Polish law common to tax matters, the basic rules relating to tax succession are set out in the *Ordynacja podatkowa* (Tax Code). Those provisions have the character of *lex generalis* in relation to the solutions adopted in specific tax laws as *lex specialis*. In the Law on VAT, such rules are referred to in Article 91(9) concerning the possibility of the purchaser of (an organised part of) an undertaking making adjustments in accordance with the rules on which the seller was previously entitled to rely.
- 17 In case-law, when applying Article 6(1) of the Law on VAT, the existence of an undertaking is generally assessed from the perspective of civil-law rules, including the definition of an undertaking contained in Article 55¹ of the Civil Code; a definition used by the rules on income tax and from which the definition of ‘organised part of an undertaking’ contained in Article 2(27e) of the Law on VAT is also derived. From that point of view, an organisationally and functionally separate group of tangible and intangible assets, including liabilities, capable of independently carrying on an economic activity is regarded as (a part of) an undertaking.
- 18 It appears that the main purpose of the rules contained in Article 19 of the VAT Directive was to simplify the conduct of transactions for the sale of an undertaking, which are complicated on account of the many assets which make up an undertaking or a part thereof.
- 19 The referring court notes that the current line of interpretation regarding the conditions for exclusion from VAT where all or some assets are transferred is determined by the position set out in the judgments of the Court of Justice of 27 November 2003, *Zita Modes Sàrl* (C-497/01, EU:C:2003:644), and of 10 November 2011, *Finanzamt Lüdenscheid* (C-444/10, EU:C:2011:724). It requires that the assets transferred in that transaction be sufficient for the purchaser to be able independently to carry on an economic activity on the basis of the assets acquired, including tangible and intangible assets. Emphasis is placed primarily on the capacity of such property to serve as a basis for independently carrying on an economic activity.
- 20 This broad view creates significant problems in drawing a line between the sale of assets or some of those assets, on the one hand, and the sale of an undertaking or an organised part thereof, on the other. The referring court expresses doubts as to

the nature of the condition relating to ‘legal succession’ when interpreting the provisions of national law, that is to say, whether such succession is to be understood as having a particular form (as in the national rules referred to above) or in a broad sense (as regards a property ownership right, each buyer is in essence the legal successor in relation to that right). On the latter interpretation of succession, account must be taken of the fact that many acquired assets belonging to an undertaking constitute a sufficient basis for performing an independent economic activity. It is sufficient to acquire one or more of the premises let by the seller (together with a valid lease or tenancy agreement) in order to continue an independent economic activity on that basis.

- 21 Under Polish law, in this regard doubts also arise concerning the relationship between civil law, from which the concept of undertaking is derived, and tax law. The issue is of particularly significant practical relevance to taxable persons. The present case constitutes an example of one of the many procedures conducted by the tax authorities culminating in disputes before the administrative courts. They concern the verification of the declarations of taxable persons who carried out transactions in the knowledge that the subject of those transactions was immovable property and the tax authorities then considered that the transaction satisfied the conditions laid down in Article 6(1) of the Law on VAT. Those transactions give rise to no doubt as regards their legality and reliability. VAT on such transactions is settled without reservation. In view of the high transaction costs, the amount of the input tax in the invoice is also high. Crucially, these entities usually try to show that the transaction was subject to VAT as the sale of a specific asset which is nevertheless an asset. This applies to the sale of modern office blocks or – as in the present case – shopping centres.
- 22 In the event of a finding by the Court of Justice that the solution introduced by the Polish legislature in Article 6(1) of the Law on VAT excluding taxation of the supply of an organised part of an undertaking satisfies the condition relating to legal succession between the seller and the purchaser laid down in Article 19 of the VAT Directive, the issue set out in the second question arises. The referring court is seeking guidance concerning interpretation which would allow it better to draw a line between the supply of immovable property and the supply of an organised part of an undertaking. In this regard, the question arises as to whether, in the case of the sale of an organised part of an undertaking, it is necessary that all the tangible and intangible assets which make up that separate part of the undertaking be transferred to the purchaser, or whether it is sufficient that only the essential, necessary assets of that separate part or some minimum amount which is sufficient for its functioning are transferred.
- 23 Aware that the solution to the second problem cannot be universal in nature and depends on specific findings of fact, the referring court observes that solutions which enable the status of the object traded to be determined on a case-by-case basis, based on a wide margin of interpretation, place taxable persons carrying out high-value transactions in the uncomfortable position of never being entirely certain whether the transaction concerned is subject to VAT or not.

- 24 Assuming that, under Polish law, legal succession on the sale of an organised part of an undertaking consists in the sale of an organisationally and financially separate group of tangible and intangible assets, including liabilities, used to perform specific economic tasks, which may constitute an independent undertaking, it remains important to distinguish between two possibilities. The first concerns the assessment of a situation in which the subject of an undertaking's economic activity will be the creation of immovable property, such as that being assessed in the present case (a shopping centre), through its construction, development by means of the conclusion of appropriate agreements and organisation of operation of the facility, and subsequently the sale of the immovable property thus organised in order to use the proceeds to create another such facility. The consequence of a finding that the subject of that activity is, in principle, the trading of undertakings (that being its essence) would be that such supplies would not be taxed on each occasion, which does not appear to be consistent with the objective of leaving transactions for the sale of an undertaking or an organised part thereof outside the scope of VAT.
- 25 If, however, it were found (second option) that the object traded can be created and developed (obviously in order to increase its market attractiveness) immovable property, then the basic question remains whether the differentiation of the subject of the supply could be determined by the individual elements of an agreement for the transfer of ownership, such as the purchaser's discontinuation of the legal predecessor's agreements regarding insurance or of the agreement regarding the management of the immovable property by the previous entity. In the view of the referring court, agreements concerning the supply of utilities cannot be of decisive importance since they are often subject to different administrative rules specific to the provision of public services.
- 26 The aspect of the contract with the entity managing such a complex immovable property infrastructure, which determines the proper functioning of the shopping centre, appears to be particularly important. In the factual situation of the case, neither the Seller nor the Company had staff of their own, which means that they did not independently manage the immovable property in question. From the point of view of the functioning of such specific immovable property, the aspect of its management seems particularly significant. However, the purchase of an organised part of an undertaking without the previous insurance agreement being continued indicates a lack of legal succession as regards all aspects of an organised part of an undertaking.
- 27 If, on the other hand, the assets acquired are to be assessed solely in the context of the capacity independently to carry on an economic activity to the same extent, the tangible and intangible assets sold, even without continuation in terms of the above insurance or management agreements, certainly allowed an economic activity to be carried on independently using those assets. In this context, the lack of any further transfer of a number of other tangible and intangible assets would probably not have deprived the shopping centre of such capacity to continue its activity.