

Case C-182/23

Request for a preliminary ruling

Date lodged:

22 March 2023

Referring court:

Naczelny Sąd Administracyjny (Poland)

Date of the decision to refer:

18 January 2023

Applicant:

Director of the Krajowa Informacja Skarbowa

Defendant:

J.S.

...

DECISION

of 18 January 2023

The Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland) ... [composed of]

upon consideration on **18 January 2023**

at a closed session in the **Izba Finansowa (Finance Chamber)**

concerning an appeal on a point of law brought by the **Director of the Krajowa Informacja Skarbowa (National Tax Information Centre)**

against the decision of the **Wojewódzki Sąd Administracyjny w Warszawie (Regional Administrative Court, Warsaw)**

of **15 October 2018** ...

in the case of the proceedings brought by **J.S.**

in respect of the individual interpretation of the **Director of the National Tax Information Centre**

of **31 October 2017** ...

concerning **value added tax**

decides:

1. pursuant to Article 267 ... [TFEU], to refer the following question to the Court of Justice for a preliminary ruling:

‘Do the provisions of Article 9(1) of Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1, as amended), 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 plot was earlier used for agricultural activities subject to VAT?’

2. ... [stay of proceedings]

GROUND

I. Legal framework

1. EU law:

The provisions of Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1, as amended) (‘Directive 2006/112/EC’):

Article 9(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 therefrom on a continuing basis shall in particular be regarded as an economic activity.

Article 14(1): ‘Supply of goods’ shall mean the transfer of the right to dispose of tangible property as owner.

Article 14(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; ...

2. National law:

Ustawa z dnia 11 marca 2004 r. o podatku od towarów i usług (Law of 11 March 2004 on value added tax) (consolidated text, Dz. U. (Polish Journal of Laws) of 2022, item 931, as amended), ('the Law on VAT'):

Article 7(1): Delivery of the goods referred to in Article 5(1)(1) means the transfer of the right to dispose of goods as the owner, including the following:

(1) transfer by order of a public authority or entity acting on behalf of such an authority, or transfer, by operation of law, of ownership of the goods in exchange for compensation;

Article 15(1): Legal persons, organisational units without legal personality and natural persons performing independent economic activity as referred to in paragraph 2, are, irrespective of the purpose or result of such activity, to be regarded as taxpayers.

Article 15(2): The term 'economic activity' covers all activities of producers, traders or persons supplying services, including entities acquiring natural resources, and farmers, as well as the activities of persons engaged in liberal occupations. The term 'economic activity' shall cover, in particular, activities consisting of the use of goods or intangible assets on a continuing basis for commercial purposes.

II. Facts

1. Procedure before the tax authorities.

1.1. J.S. ('the applicant' or 'the complainant') requested the Director of the National Tax Information Centre ('the DIKS', 'the interpretative body') to issue an individual interpretation of provisions of tax law concerning value added tax. In the application for the issuance of an individual interpretation, he presented the following position in the case.

Since 8 December 2001, the applicant has been running a farm with an area of approximately [...] hectares. Since October 2015, he has been running the farm together with his wife. The object of the farming activity is the production of milk and the breeding of dairy cattle. The applicant has been registered as an active VAT taxpayer since January 2013. Plots No. [...], [...] were purchased by the

applicant on 17 June 2003, while plots No. [...], [...] and [...] were also purchased by the applicant on 11 May 2015. Both the purchase of 17 June 2003 and the purchase of 11 May 2015 were made with a view to expanding agricultural activities. There was no value added tax on the purchase of the plots, with the result that no VAT deduction was made. The purchased land was used exclusively for agriculture as part of agricultural economic activity. The applicant and his wife do not carry out any economic activity other than farming.

As a result of the final decision of the Wojewoda (Regional Governor) to carry out a road construction project, pursuant to Article 12(4)(1) of ustawa z dnia 10 kwietnia 2003 r. o szczególnych zasadach przygotowania i realizacji inwestycji w zakresie dróg publicznych (Law of 10 April 2003 on special rules for the preparation and implementation of projects in the field of public roads (Dz. U. 2015, item 2031 ('the Law on Roads')), the properties taken over for the project, by operation of law, were surveyed and parcelled out, and transferred to the State Treasury. In the light of the above, in the course of the proceedings by Regional Governor M. to issue permission to carry out a road construction project, road plots No. [...] and [...] were parcelled out from plots No. [...] and [...], and road plots No. [...], [...] and [...] were parcelled out from plots No. [...], [...] and [...], and which, on the date when the decision of Regional Governor M. No. [...] of 6 March 2017 became final, became the property of the State Treasury, intended for road construction.

In the light of the above, the Regional Governor initiated proceedings to determine the compensation due the applicant for the plots compulsorily purchased by the State Treasury, and issued corresponding decisions granting compensation. However, the compensation has not yet been paid.

Until the plots were taken over by the State Treasury, they were used for agricultural purposes as grazing and pasture land; however, in connection with the administrative proceedings initiated by Regional Governor M. regarding permission to carry out a road construction project and the related survey and parcelling out of the plots and their planned purchase by the State Treasury for road construction, the applicant did not prepare those plots for harvesting grass for the following year.

Prior to the initiation of the abovementioned proceedings by the Regional Governor, these plots had not been divided into smaller plots, developed with utilities or improved in any other way. They have never been rented, leased or lent to third parties. The applicant did not apply for the conversion of those plots for non-agricultural purposes, in particular, for road purposes, and did not apply for a change in the spatial development plan for these plots, did not seek to determine the route of a road through these plots, and has never been involved in real-estate activities.

Furthermore, the applicant and his wife did not purchase any building plots. The plots compulsorily purchased by the State Treasury were covered by direct

subsidies, but as their intended use was for the construction of a road, they were withdrawn from the subsidies. The applicant and his wife are registered in KRUS (the Kasa Rolniczego Ubezpieczenia Społeczenia (Social Insurance Fund for Farmers)) and pay agricultural tax.

In addition, the applicant did not divide up the land. The parcelling-out took place by operation of law and irrespective of the owner's will as a result of an administrative body issuing a decision to carry out a road construction project under the Law on Roads. In the same manner, irrespective of the owner's intention, there was a loss of ownership.

The local development plan has not changed in any way, whether as a result of parcelling out the land intended for the road or as a result of the road's construction. The acquisition of land for the construction of a road in accordance with the law described above takes place irrespective of the intended use specified in the local spatial development plan.

According to the local spatial development plan, plots ... (before division) were located in the village of G., district G. [...], commune G. and had the following designation:

- from the regional road ... for the widening of the road, the remaining areas are areas of single-family housing development and commercial services marked on the plan with the symbol [...].

The applicant also indicated that plots ... (before division) were marked in the land register as agricultural land and ditches, and that the district authority office had made no changes to the allocation of plots in the land register until the date of the application.

In the light of these facts, the Applicant posed the following questions in the application for interpretation:

(1) Is the applicant, as a result of the State Treasury's compulsory purchase of the land of plots No. ... for road construction under Article 12(4)(1) of the Law on Roads of 10 April 2003 in exchange for compensation, regarded as a person liable to pay VAT?

(2) Will the compensation for the above be subject to value added tax?

At the same time, in the application for an individual interpretation, the applicant presented his own position on the matter, claiming that he should not be deemed liable to pay VAT in the case of the State Treasury's compulsory purchase order for land of plots No. ... for the construction of a road pursuant to Article 12(4)(1) of the Law on Roads of 10 April 2003 in return for compensation, and thus, any compensation paid to him should not be subject to value added tax.

1.2. In the individual interpretation of 31 October 2017, the DKIS considered the applicant's position to be incorrect. It found that the transfer of the ownership of the plots of land specified in application ... to the State Treasury under an expropriation procedure, in connection with their intended use for a public road construction project, should be regarded as a supply made by the applicant as an entity conducting business activity within the meaning of Article 15(2) of the Law on Roads, namely as a VAT taxpayer. In the opinion of the authority, the applicant's supply does not, in this case, constitute an exercise of the right to dispose of private property. The DKIS submitted that, as shown in the application, plots of land ... were used by the applicant, who was a registered active VAT taxpayer, in his business activity. It found that the transfer of ownership of the agricultural land referred to in the application in return for compensation constituted – contrary to what the applicant claimed – a paid delivery of goods, which is subject to the provisions of the Law on VAT based on the cited Article 7(1)(1) of that Law, that is to say, it is subject to taxation. Thus, the DKIS found the position of the applicant to be incorrect.

III. Proceedings before the administrative courts

1. By way of judgment of 15 October 2018, case reference No III SA/Wa 23/18, the Regional Administrative Court in Warsaw overturned the contested individual interpretation.

The court held that the authority did not take into account the argument presented by the complainant that, before the transfer of ownership of the property, the complainant did not use his property as grazing land for economic activity, because he had transferred that land to his private property, was not preparing it for harvesting grass for the following year, and had excluded it from direct subsidies.

The court of first instance found that even if the party had not transferred the agricultural properties specified in the application to private property before the expropriation under the Law on Roads, the taxpayer still could not be assigned the status of a VAT taxpayer in regard to the compensation received under Article 15(2) of the Law on VAT.

In the grounds of the contested judgment, the court highlighted that the complainant had not taken any actions aimed at selling the plots, and that there had in fact been actions independent of his will (expropriation). The court accordingly found that the expropriation of the land on which the complainant ran his farm was unrelated to his agricultural activity, and that the complainant was not a VAT taxpayer and was not engaged in real-estate activities.

2. In the appeal on a point of law, the DIKS has requested that the contested judgment be overturned in its entirety and that the merits of the case be ruled on, or alternatively, that the contested judgment be overturned in its entirety and the case be referred back for reconsideration by the court that had issued it. In

addition, the authority formulated, inter alia, allegations of a breach of the provisions of substantive law, namely Article 15(1)(2) of the Law on VAT, through the erroneous interpretation consisting of the assumption that the complainant, conducting agricultural economic activity in relation to the purchase of real estate on 17 April 2003 and 11 May 2015, and its subsequent sale in connection with an expropriation in exchange for compensation, could not be assigned the status of a VAT taxpayer, whereas these were, in fact, activities related to the applicant's professional agricultural business activity consisting of the commercial use of land (goods) in agricultural activity, and that these activities should be regarded as a paid delivery of goods for commercial purposes, and thus the correct interpretation of the provision in relation to the described event should have led the court to the conclusion that the complainant, acting as a VAT taxpayer, was subject to a tax liability in respect of the compensation received.

IV. Reasons for the National Court (NSA) requesting a preliminary ruling

1. In submitting the request, the Supreme Administrative Court wishes to obtain an answer from the Court of Justice as to whether the position of the interpretative body is correct, namely that the transfer of ownership of real estate expropriated to the State Treasury, in connection with its intended use for a public road construction project, should be regarded as a delivery of goods made by the complainant as an entity conducting business activity due to the fact that the complainant, being a registered active VAT taxpayer, used the real estate in his agricultural activities.

2. At the outset, the Supreme Administrative Court notes that the description of the presented facts did not indicate any activity related to the use of the real estate as personal, private property. Therefore, the referring court omitted the circumstance of the earlier transfer of plots for private purposes, as argued by the court of first instance.

What is crucial, however, is to decide whether the use of plots for agricultural activities taxed under general rules entailed that the handing over of real estate in connection with its expropriation took place as part of agricultural activities liable to VAT. The interpretative body found that the conduct of taxable agricultural activity was of key importance for recognising that the sale of real estate used for this agricultural activity under expropriation was subject to taxation. The court of first instance was of the opposite opinion, and decided that only active economic activities in the field of real estate could result in taxation of the contested sale of real estate under expropriation.

3. There can be no doubt that taxation will arise where the party concerned takes active steps to market property that would allow him to be regarded as a professional (see judgment of the Court of Justice of the European Union of 15 September 2011, delivered in Joined Cases C-180/10 and C-181/10, *Słaby and*

Others, EU:C:2011:589). In the case in question, it is undisputed that the complainant had not taken any actions aimed at selling the plots, and that there had in fact been actions independent of his will (expropriation). Therefore, the court of first instance found that the expropriation of the land on which the complainant ran his farm was unrelated to his agricultural activity, and that the complainant is not a VAT taxpayer and does not run a real-estate business. The facts resulting from the request for interpretation also do not indicate that the complainant undertook such activity in relation to other properties that are not the subject of the expropriation.

National case-law emphasises that a prerequisite for VAT on a given transaction is not the mere fact of an entity being a VAT taxpayer, but the act of being a VAT taxpayer in relation to the specific transaction coming within the scope of the economic activity of the given entity (see judgment of the Supreme Administrative Court of 29 October 2007, case reference number I FPS 3/07, according to which ‘neither the formal status of a given entity as a registered taxpayer, nor the fact that a given activity was performed repeatedly, or once but with the intention of being frequent, can determine the taxation of this activity without each time determining that in relation to this specific activity, this entity acted as a taxpayer of value added tax’).

The position that the expropriation of the disputed plots took place outside the course of business activity is supported by the fact that there was no value added tax incurred when the plots were purchased by the applicant and, therefore, no tax deduction was made.

On the other hand, the interpretative body introduced an important argument, namely that the court of first instance did not take into account the specific nature of the expropriation as a forced act, often carried out against the will and intentions of the entities whose property is purchased under expropriation. In this regard, the complainant’s activity in relation to the disputed plots is not relevant.

However, it is worth noting that the applicant did not undertake activity in real estate trade not only in relation to the disputed plots, but also in relation to other real estate and, furthermore, did not conduct any economic activity other than the agricultural activity subject to VAT.

4. For those reasons, the national court, pursuant to Article 267 TFEU, has decided as per subparagraph 1 of the operative part of this order.

... [stay of proceedings]

... [signatures]