

C-312/19**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date of receipt:**

16 April 2019

Referring court:

Lietuvos vyriausiasis administracinis teismas (Lithuania)

Date of the decision to refer:

10 April 2019

Applicant:

XT

Defendant:

Valstybinė mokesčių inspekcija prie Lietuvos Respublikos finansų ministerijos (State Tax Inspectorate under the Ministry of Finance of the Republic of Lithuania)

Subject matter of the main proceedings

Tax dispute concerning the decision of the Vilniaus apskrities valstybinė mokesčių inspekcija (Vilnius State Tax Inspectorate; ‘the Vilnius STI’) of 3 November 2015 approving the inspection report which, inter alia, requested the applicant to pay the calculated value added tax (‘VAT’) of EUR 39 586.71 and VAT default interest of EUR 11 695 and imposed upon him a VAT fine of EUR 3 959.

Subject matter and legal basis of the request

Request on the basis of the third paragraph of Article 267 TFEU to interpret the provisions of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (‘the VAT Directive’) in so far as they concern the establishing of the ‘independence’ of the activity of a participant in

joint activity and the allocation of tax liabilities between participants in joint activity.

Questions referred for a preliminary ruling

1. Are Article 9(1) and Article 193 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax to be interpreted as meaning that, in circumstances such as those in the case under consideration, a natural person such as the applicant cannot be regarded as having ‘independently’ carried out the (economic) activity in question and as having to pay by himself the value added tax on the contested supplies, that is to say, for the purposes of Article 9(1) and Article 193 of Directive 2006/112/EC, is the taxable person liable for the obligations at issue to be taken to be the joint activity/partnership (the participants in the joint activity collectively; in the instance under consideration, the applicant and his business partner collectively) – which under national law is not regarded as a taxable person and does not enjoy legal personality – and not solely a natural person such as the applicant?
2. If the first question is answered in the affirmative, is Article 193 of Directive 2006/112/EC to be interpreted as meaning that, in circumstances such as those in the case under consideration, VAT is paid individually by each of the participants (in the instance under consideration, the applicant and his business partner) in the joint activity/partnership – which joint activity/partnership is, under national law, not regarded as constituting a taxable person and does not enjoy legal personality – on the part of each payment by way of consideration that is received by them (or is receivable by or owed to them) for the taxable supplies of immovable property? Is Article 287 of Directive 2006/112/EC to be interpreted as meaning that, in such circumstances such as those in this case, the annual turnover referred to in that provision is established by taking into account the entire revenue of the joint activity (received collectively by the participants in the joint activity)?

Provisions of EU law cited

Articles 9(1), 193 and 287 of the VAT Directive.

Provisions of national law cited

The following provisions of the Lietuvos Respublikos pridėtinės vertės mokesčio įstatymas (Law of the Republic of Lithuania on value added tax; ‘the Law on VAT’) are applicable to the facts of the main proceedings:

- Article 2(2): “Taxable person” shall mean a taxable person of the Republic of Lithuania or a foreign State’;
- Article 2(15): “Taxable person of the Republic of Lithuania” shall mean a legal or natural person of the Republic of Lithuania carrying out economic activities of any type, as well as a collective investment undertaking established in the Republic of Lithuania which does not have the status of legal person and acts as an investment fund’;
- Article 71(1): ‘The obligation to register for VAT and calculate VAT and pay it into the budget shall be owed by taxable persons supplying goods and services in the territory of the country ... A person liable to register for VAT must submit an application for registration for VAT.’
- Article 71(2): ‘Notwithstanding paragraph 1 of [Article 71 of the Law on VAT], a taxable person of the Republic of Lithuania shall not be liable to submit an application for registration for VAT and to calculate VAT and pay it into the budget, in the manner laid down ..., where the total annual amount of consideration within the last 12 months for goods supplied and/or services provided in the territory of the country while carrying out economic activities has not exceeded LTL 155 000. VAT shall be begun to be calculated from the month when that limit has been exceeded. No VAT shall be calculated in respect of the goods supplied and services provided the consideration for which did not exceed the specified amount of LTL 155 000. ...’
- Article 71(4): ‘Failure to submit an application for registration for VAT ... shall not exempt a taxable person from the obligation to calculate VAT in respect of the goods and/or services supplied by him ... and pay it into the budget ...’
- Article 79(1): ‘A taxable person ... shall document the supply of goods or services that has taken place by means of a VAT invoice ...’;
- Article 79(5): ‘In the manner and in cases determined by the Government of the Republic of Lithuania or an institution authorised by it, goods or services supplied jointly by several VAT payers may be documented in one invoice.’

The following provisions of the Lietuvos Respublikos civilinis kodeksas (Civil Code of the Republic of Lithuania) are applicable to the facts of the main proceedings:

- Article 6.969(1): ‘By a joint activity (partnership) agreement two or more persons (partners), co-operating by means of their property, work or knowledge, undertake to act jointly for a certain goal or certain activities which do not contravene the law’;

- Article 6.971(1): ‘The property contributed by the partners, which was previously in their ownership, as well as the production during joint activities and the income and fruits from them, shall be in the joint partial ownership of all the partners, unless otherwise established by law or the joint activity agreement’;
- Articles 6.972(1) and (2): While managing joint affairs, each of the partners shall be entitled to act on behalf of all the partners, unless the joint activity agreement provides that joint affairs shall be managed by one of the partners or all the partners together. In the case of relations with third parties, the right of a partner to conclude the transactions on behalf of all the partners shall be affirmed by a power of attorney issued by the remaining partners, or by the joint activity agreement;
- Article 6.974(1): ‘The allocation of joint expenses and joint losses related to the joint activity shall be established by the joint activity agreement. If there is no such agreement, each partner shall be liable for joint expenses and joint losses in proportion to the amount of his share’;
- Article 6.975(3): ‘If the joint activity agreement is related to the commercial activity of the partners, all the partners shall be jointly and severally liable under the joint obligations, irrespective of the basis upon which those obligations arise’.

Succinct presentation of the facts and procedure in the main proceedings

- 1 It has been established in the case that on 19 February 2010 the applicant and another natural person (‘the business partner’) concluded a joint activity agreement for the purpose of cooperation in constructing a residential property in or around Vilnius.
- 2 On 25 April 2010 the applicant together with his business partner decided to purchase a parcel of agricultural land of 0.5 ha in the District of Vilnius. On 27 April 2010 the applicant and the owners of that parcel of land signed a sale contract for the parcel of land. The business partner contributed 70% and the applicant contributed 30% of the transaction amount. They made a decision to register ownership of the parcel of land in the applicant’s name.
- 3 On 5 May 2010 the applicant and the business partner decided to build a complex of five buildings, to oblige the applicant to deal with all documents required for the construction and to appoint the private limited company Konsela (‘Konsela UAB’), the director of which was the applicant, to manage the construction.
- 4 On 2 November 2010 the applicant received a construction permit issued in his name from the Vilnius District Municipal Authority giving permission to construct five buildings on the parcel of land of 0.5 ha. On 22 April 2010 the construction works contract was concluded, signed by the applicant, as the client,

and the representative of Konsela UAB. The contractor issued a VAT invoice for the construction of Buildings Nos 1 to 4 on 15 February 2011 and for the construction of Building No 5 on 11 February 2013.

- 5 By decision of 2 December 2010 the applicant and the business partner decided to sell Building No 1 with a part of the parcel of land and to use the amount received for construction, together with the contractor. That immovable property was sold under a sale contract of 14 December 2010 between the applicant and the purchasers (natural persons), which provided for the sale of the building and a part of the parcel of land and set the detailed rules for use of the parcel of land.
- 6 On 10 January 2011 the applicant and the business partner concluded an agreement concerning termination of the joint activity agreement of 19 February 2010 and the division of property and liabilities. Under this agreement it was decided to terminate the joint activity agreement and to grant the right to produced assets (Buildings Nos 4 and 5) to the business partner, while the applicant undertook to reimburse the business partner by 2017 the difference between his contributions and the share of the joint assets received in the amount of LTL 300 000 (EUR 86 886). Buildings Nos 1 to 3 fell to the applicant under that agreement.
- 7 Buildings Nos 2 and 3 together with the parts of the parcel of land allocated to them were respectively sold under sale contracts concluded between the applicant and natural persons on 30 May 2011 and 13 November 2012.
- 8 On 1 February 2013 the applicant and the business partner drew up a property transfer (alienation) deed stipulating that, having regard to the agreement of 10 January 2011, the applicant transferred to the business partner Buildings Nos 4 and 5 together with the parts of the parcel of land that were allocated thereto.
- 9 By decision of 6 February 2013 under the joint activity agreement of 19 February 2010, the applicant and the business partner resolved that the applicant would sell Building No 5 and the part of the parcel of land allocated thereto, registered in his name, and immediately transfer the amount received to the business partner. By sale contract of 13 February 2013 that immovable property was sold to a legal person established in Lithuania.
- 10 The applicant and the business partner did not regard those sales of immovable property carried out on 14 December 2010, 30 May 2011, 13 November 2012 and 13 February 2013 (collectively, 'the contested supplies') as (economic) activity subject to VAT, which was why they did not calculate and identify the VAT to be paid by the purchasers (did not issue VAT invoices), did not declare and pay the VAT and did not use a VAT deduction.
- 11 After carrying out a tax inspection in respect of the applicant regarding personal income tax ('PIT') and VAT for 2010 to 2013, the local tax authority classified the contested supplies as a single activity subject to VAT and held the applicant to be a taxable person liable for performance of the VAT obligations relating to (all)

those supplies. Accordingly, by decision of 3 November 2015 approving the inspection report, the Vilnius STI confirmed the additional VAT calculated in the inspection report and the related amounts (the default interest and the fine).

- 12 Having examined a complaint concerning that decision of the local tax authority, the defendant, by decision of 3 March 2016, upheld the decision of the Vilnius STI. The applicant's complaints were also dismissed by decision of the Mokestinių ginčų komisija (Commission on Tax Disputes) of 18 July 2016 and by the decision of the Vilniaus apygardos administracinis teismas (Regional Administrative Court, Vilnius) that is being contested on appeal.
- 13 It should be specifically noted that, when calculating the VAT due, the local tax authority acknowledged on its own initiative the applicant's right to a deduction of VAT under the aforementioned VAT invoices issued by Konsela UAB and calculated the contested VAT amounts payable after deducting the VAT for the acquisition (construction) of the aforementioned buildings.

Grounds of the referring court

- 14 In circumstances such as those of the present case, the question arises first of all whether the taxable person liable for those obligations is to be taken to be constituted by only the applicant or by both participants in the joint activity, that is to say, by the joint activity/partnership (the applicant and the business partner collectively). In the case under consideration the local tax authority and the defendant did not examine and question the reality of the joint activity.

'Independence' of the activity of a participant in joint activity

- 15 The Law on VAT, which is applicable to the legal relations at issue, has been adopted in national law *inter alia* for implementing the VAT Directive, Article 193 of which provides that VAT is to be payable by any taxable person carrying out a taxable supply of goods or services.
- 16 The Court of Justice has stated that Article 9(1) of the VAT Directive gives to the notion of 'taxable person' a broad definition focused on independence in the pursuit of an economic activity to the effect that all persons – natural or legal, both public and private, even entities devoid of legal personality – who, in an objective manner, satisfy the criteria set out in that provision must be regarded as being taxable persons for the purposes of VAT (judgment of 12 October 2016, *Nigl and Others*, C-340/15, paragraph 27).
- 17 Article 9(1) of the VAT Directive shows that one of the necessary attributes of a taxable person is the independence of his economic activity, which must be established by checking whether the person concerned performs his activities in his own name, on his own behalf and under his own responsibility, and whether he bears the economic risk associated with carrying out those activities (see, for example, judgments of 27 January 2000, *Heerma*, C-23/98, paragraph 18; of

18 October 2007, *van der Steen*, C-355/06, paragraph 23; and of 29 September 2015, *Gmina Wrocław*, C-276/14, paragraph 34). The independence of activity must be established taking into account the criteria listed in paragraphs 34 and 35 of the judgment of 29 September 2015, *Gmina Wrocław*, C-276/14.

18 The tax authority's failure to disprove the circumstances pertaining to the aforementioned joint activity agreement and the fact that the case file contains no data disproving those circumstances give rise to doubts regarding the acceptance that the applicant carried out 'independent' economic activity for the purposes of the VAT Directive. Indeed:

(1) as is apparent, for example, from the aforesaid joint activity agreement, the joint assets produced and the liabilities assumed in the course of the activity were allocated between the participants in accordance with an established method, which means that, as the fact of the joint activity has not been disproved, there are probably no grounds for finding that the applicant provided the contested supplies acting solely at his own economic risk;

(2) as the tax authority did not question and even essentially confirmed that the applicant decided together with the business partner on matters relating to the purchase, production (construction) and sale of the items of immovable property at issue, and as the case file does not contain any information to the contrary, the view is to be taken that the applicant also cannot be found to have independently made decisions concerning the supplies provided in the course of the contested activity;

(3) as the tax authority classified the income for PIT purposes – that is to say, in essence, the consideration for the items of immovable property sold – as received by both the applicant and his business partner, the respective income from the contested supplies may be said not to be that of the applicant;

(4) in circumstances such as those in the case under consideration, the mere fact that it was the applicant who was registered in the Immovable Property Register as the owner of the contested immovable property and who concluded the sale contracts does not of itself show that the applicant made independent decisions on the contested supplies;

(5) the view is also to be taken that, as the aforesaid circumstances relating to the involvement of the business partner have not been disproved, the applicant may not automatically be recognised as having independently decided on the transfer of the right to dispose of the assets, that is to say, the supply of the goods (Article 14(1) of the VAT Directive), to the purchasers.

19 In such circumstances the view can reasonably be taken that – on the assumption at this stage of examination of the case that the contested supplies are to be regarded as an economic activity subject to VAT – the criteria for a taxable person set out in Article 9(1) of the VAT Directive could objectively be met by the applicant and the business partner, having acted together under the joint activity

agreement, but not by the applicant alone. The view is therefore to be taken that for the purposes of Article 193 of the VAT Directive the applicant perhaps may not be regarded as liable by himself for the VAT obligations arising from the contested supplies.

- 20 On the other hand, as is apparent from the case file, it was only the applicant who was involved in relations with third parties, including the contested supplies: the parcel of land was purchased, the construction permit was issued and the works contract was concluded in his name; he concluded the sale contracts for the aforesaid buildings and the corresponding parcels of land in his name and those contracts did not refer to the joint activity agreement, so that the view may reasonably be taken that the purchasers involved in the contested supplies were unaware of the business partner. In other words, the actions relating to the construction and the sale of buildings were actually performed solely by the applicant while the business partner in essence only co-financed the purchase of the parcel of land.
- 21 It should be noted that the Court of Justice has stated that it is especially important for the uniform application of the VAT Directive that the notion of ‘taxable person’, defined in Title III thereof, is given an autonomous and uniform interpretation (see judgment of 17 September 2014, *Skandia Sverige*, C-7/13, paragraph 23).
- 22 It is therefore expedient to refer the first question to the Court of Justice for a preliminary ruling.

Allocation of tax liabilities between participants in joint activity

- 23 Should the Court of Justice determine that, for the purposes of Articles 9(1) and 193 of the VAT Directive, both participants in the joint activity, and not only the applicant, are nevertheless to be regarded as a taxable person liable for the obligations at issue, the question arises as to how tax liabilities should be allocated.
- 24 Indeed, as already mentioned, under the general rule laid down in national law, only natural and legal persons, and also the aforesaid collective investment undertakings, are recognised as taxable persons of the Republic of Lithuania. The national provisions relevant to the legal relations at issue do not provide that natural persons acting under a joint activity agreement are to be regarded as a single taxable person within the meaning of the provisions of the Law on VAT; moreover, they do not provide that only one of those natural persons is liable for all obligations associated with the joint (taxable) economic activity where goods are supplied without a VAT invoice being issued as in the case under consideration.
- 25 However, even if in the case under consideration the joint activity/partnership not enjoying legal personality under national law does meet the criteria for a taxable person set out in Article 9(1) of the VAT Directive, the aforesaid national rules

should not negate the obligation of the participants in that joint activity to pay the corresponding VAT.

- 26 The view is to be taken that, where there are no relevant (special) statutory provisions, in the case of economic activity subject to VAT conducted by natural persons as joint activity, VAT on the supply of goods which falls within the scope of that activity and is carried out without a VAT invoice being issued must be calculated and paid by each participant in that activity in the respective proportions.
- 27 As far as those proportions are concerned, it should be noted that VAT is calculated on the taxable amount, which, in accordance with the general rule, is the total consideration obtained or to be obtained by the supplier of goods or services from the purchaser. As the taxable amount is the consideration actually received and the tax authorities may not collect an amount of VAT exceeding the tax which the taxable person received (judgment of 6 December 2018, *Tratave*, C-672/17, paragraph 29), the view is to be taken that in the case at issue the participants in the joint activity are liable for VAT-related obligations to the extent of their shares of the consideration received, which are calculated on the basis of the taxable amount.
- 28 Accordingly, it is also expedient to refer the first part of the second question to the Court of Justice for a preliminary ruling.

Application of Article 287 of the VAT Directive

- 29 The issue of application of Article 71(2) of the Law on VAT is also relevant in the case under consideration, that is to say, whether, in circumstances such as those in the case, the annual (12-month) turnover threshold laid down in that provision the exceeding of which gives rise, under national law, to the obligation to register as a VAT payer and the obligation to calculate and pay VAT applies (1) jointly to the participants in the joint activity (calculated on the basis of the total income of the joint activity) or (2) individually to each participant in the joint activity (calculated on the basis of the income received individually by each participant in the joint activity).
- 30 Article 287(11) of the VAT Directive provides that Member States which acceded after 1 January 1978 may exempt taxable persons whose annual turnover is no higher than, in Lithuania's case, EUR 29 000. It should be noted that Council Implementing Decision 2011/335/EU of 30 May 2011 provisionally increased that amount to EUR 45 000.
- 31 It is to be observed in that regard that, as is apparent from recital 5 of the VAT Directive, a VAT system achieves the highest degree of simplicity and of neutrality when the tax is levied in as general a manner as possible. That seems to imply that where, in circumstances such as those in the case under consideration, joint activity/a partnership (the participants in joint activity collectively) constitutes a taxable person within the meaning of Article 9(1) of the VAT

Directive, the specific obligations of each of the participants should be decided upon by taking into account the annual turnover threshold, set in Article 287 of the VAT Directive, in relation to the extent of the entire joint activity (to the turnover indicated in Article 288 of the VAT Directive) irrespective of how the income received from that activity is allocated between the participants.

- 32 On the other hand, under provisions of national law, joint activities/partnerships, which do not enjoy legal personality, are not regarded as a taxable person. Furthermore, as is apparent from administrative practice, where a taxable supply is carried out by spouses supplying property that is in their joint ownership, they are considered to be separate taxable persons and their turnover for the purposes of national provisions aligned with and/or transposing Article 287 of the VAT Directive is evaluated separately: a spouse is exempt from liability to pay VAT where the share of the supply attributable to him or her does not exceed the aforesaid turnover threshold even if the joint supply carried out by the spouses has exceeded that threshold.
- 33 Accordingly, the second part of the second question is also to be referred to the Court of Justice.