

Case C-655/19**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

30 August 2019

Referring court:

Curtea de Apel Alba Iulia (Romania)

Date of the decision to refer:

22 March 2018

Respondent and applicant at first instance:

LN

Appellants and defendants at first instance:

Administrația Județeană a Finanțelor Publice Sibiu

Direcția Generală Regională a Finanțelor Publice Brașov

Subject of the main proceedings

Appeal brought by the appellant, the defendant at first instance, Administrația Județeană a Finanțelor Publice Sibiu (Regional Public Finance Administration of Sibiu, Romania), in the name and on behalf of the Direcția Generală Regională a Finanțelor Publice Brașov (Regional Directorate-General of Public Finances of Brașov, Romania), in proceedings initiated by the respondent, the applicant at first instance, LN, challenging the judgment delivered by the Tribunalul Sibiu (Regional Court, Sibiu, Romania) annulling an administrative act

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

Request for a preliminary ruling, pursuant to Article 267 TFEU, concerning the interpretation of provisions of Articles 2 and 9 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax

Questions referred

1. Does Article 2 of Directive 2006/112 on the common system of value added tax preclude a transaction, one whereby a taxpayer, as creditor, acquires immovable property in the context of an enforcement procedure and, some time later, sells it in order to recover a sum of money which he had loaned, from being regarded as an economic activity in the form of the exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis?
2. Can an individual who has carried out such a legal transaction be regarded as a taxable person within the meaning of Article 9 of Directive 2006/112?

Provisions of EU law cited

Directive 2006/112: Article 2(1)(a), Article 9(1) and Article 12

Provisions of national law cited

Legea nr. 571/2003 privind Codul fiscal (Law No 571/2003 establishing the Tax Code), published in the *Monitorul Oficial al României* (Official Journal of Romania), Part I, No 927, of 23 December 2003, as amended, in the version in force at the relevant time ('the Tax Code')

- Article 126, pursuant to which transactions which constitute or are treated as a supply of goods carried out in Romania by a taxable person, and which result from one of the economic activities referred to in Article 127(2), are taxable transactions;
- Article 127(1), pursuant to which any person who independently carries out in any place an economic activity as referred to in paragraph 2, whatever the purpose or results of that activity, is a taxable person; Article 127(2), which provides that any activity, including that of a trader, as well as the exploitation of tangible property for the purposes of obtaining income therefrom on a continuing basis is an economic activity; under Article 127(21), the situations in which natural persons selling immovable property become taxable persons must be expressly stipulated in rules;
- Article 152, which establishes a special exemption scheme for small businesses whose annual turnover is below the threshold of EUR 35 000;
- Article 153, which provides, essentially, that taxable persons established in Romania who engage in or intend to engage in an economic activity involving taxable transactions and/or VAT-exempt transactions with a right to deduction, are required to request registration for VAT purposes if, in the course of one calendar year, they reach or exceed the threshold laid down in Article 152(1);

Article 153 also provides that, where a taxable person fails to request registration, the tax authorities may register that person *ex officio*.

HG (Hotărârea Guvernului) nr. 44/2004 pentru aprobarea Normelor metodologice de aplicare a Legii nr. 571/2003 privind Codul fiscal (Government Decision No 44/2004 approving provisions for the application of Law No 571/2003 establishing the Tax Code), published in the *Monitorul Oficial al României*, Part I, No 112, of 6 February 2004, as amended

– the provisions for the application of Article 127 of the Tax Code, set out at paragraph 3, provide as follows:

‘3. ... (3) A natural person who has not already become a taxable person in respect of another activity shall be regarded as carrying on an economic activity involving the exploitation of tangible or intangible property if he acts as such, in an independent manner, and if the activity in question is carried on in order to obtain from it income on a continuing basis within the meaning of Article 127(2) of the Tax Code. ...

(5) Where land and/or buildings are acquired by a natural person for the purposes of being sold, the supply of that property shall be regarded as an economic activity of a continuing nature if the natural person completes more than one single transaction in the course of one calendar year. ... The first such supply shall be regarded as occasional; however, if a second such supply takes place in the course of the same calendar year, the first such supply, while not being subject to tax, shall be taken into account for the purposes of the threshold referred to in Article 152 of the Tax Code. The supply of buildings and land that are exempt from tax in accordance with Article 141(2)(f) of the Tax Code shall be taken into account both for the purposes of establishing the continuing nature of the economic activity and for the purposes of the upper limit for exemption referred to in Article 152 of the Tax Code’;

– the provisions for the application of Article 152(6) of the Tax Code govern the position of taxable persons who exceed the upper limit for exemption but fail to request registration as a taxable person for value added tax purposes under the normal scheme; they are set out in paragraph 62 and provide that, once a taxable person has reached or exceeded the upper limit for exemption but has failed to request registration in accordance with Article 153 of the Tax Code, within the period prescribed by law, the competent tax authorities shall require that taxable person to pay the value added that that he would have had to pay if he had been registered for VAT purposes under the normal scheme in accordance with Article 153 of the Tax Code and shall register him for VAT purposes *ex officio*, in accordance with Article 153(7) of the Tax Code.

Outline of the facts and the main proceedings

- 1 In 2009, LN, the applicant at first instance, a natural person, granted JM various loans totalling EUR 80 400. Repayment of the loans was guaranteed by the granting of mortgages over various immovable properties. The loan was not repaid and consequently three of the properties were auctioned to LN, who was also a creditor.
- 2 In 2010, LN sold for RON 611 364 one of the properties he had acquired at auction and also sold for EUR 1 000 another property which he had purchased in 2005.
- 3 After exceeding the VAT threshold, in 2011 and 2012, LN sold the remaining two properties which he had acquired at auction.
- 4 LN was then the subject of a tax inspection, following which, in 2016, the Administrația Județeană a Finanțelor Publice Sibiu issued a tax inspection report and a tax assessment notice stating that the transactions carried out in 2010 had, by 30 June 2010, resulted in the obtaining of income the value of which meant that the activity was classified as an economic activity carried on in order to obtain from it income on a continuing basis. The tax authority took the view that the two properties which the tax payer had sold in 2010 had not been intended for his personal use, but had been purchased for the purpose of re-selling them and obtaining an income, the manner in which they had been acquired being irrelevant. On the view that LN had exceeded the annual upper limit for VAT exemption laid down in the Tax Code, the tax authority determined the date on which he should have registered for VAT, 10 July 2010, and the date from which he became a taxable person for VAT purposes, 1 August 2010.
- 5 In so far as concerns the properties sold in 2011 and 2012, the tax authority classified the first transaction as exempt from VAT, on the ground that the sale had taken place after 31 December of the year following the year of first entry into possession. It regarded the second transaction as subject to VAT. It found that LN was liable to pay the sum of RON 55 224, including RON 35 145 in VAT, an additional amount of RON 14 807 representing interest on the VAT, and RON 5 272 in late payment penalties.
- 6 LN brought an administrative action before the Tribunalul Sibiu (Regional Court, Sibiu) seeking the annulment of the tax inspection report and tax assessment notice of 2016, as well as annulment of the decision of the Direcția Generală Regională a Finanțelor Publice Brașov (Regional Directorate-General of Public Finances of Brașov) on his appeal against the tax assessment notice. He disputed the classification of the property sale and purchase transactions as an ‘economic activity’ and, consequently, also his registration as a taxable person for VAT purposes.
- 7 The Tribunalul Sibiu (Regional Court, Sibiu) partly upheld LN’s action, holding that the chief characteristic of an economic activity was the obtaining of income

on a continuing basis and that the mere purchase and sale of immovable property did not, in and of itself, constitute an economic activity. The subsequent sale of the properties was regarded by the court solely as an attempt to recover the loan granted in 2009.

- 8 The appellants, the defendants at first instance, have brought an appeal challenging the judgment of the Tribunalul Sibiu (Regional Court, Sibiu) before the referring court, the Curtea de Apel Alba Iulia (Court of Appeal, Alba Iulia).

Main arguments of the parties to the main proceedings

- 9 In its appeal, the appellants request the court to set aside the judgment under appeal, to set the case down for a fresh decision on the merits and to dismiss the applicant's action as unfounded and unlawful. The appellants, the defendants at first instance, submit that the court first hearing the case on the merits erred in holding that the transactions which LN had carried out were not an economic activity.

Outline of the reasons for the reference

- 10 The Curtea de Apel Alba Iulia (Court of Appeal, Alba Iulia), finding there to be no case-law of the Court of Justice on the point, and that the conditions for the application of Article 267 TFEU are met, seeks interpretation of Articles 2 and 9 of Directive 2006/112 so that it may determine whether the applicant may be regarded as a taxable person and whether the subsequent sale of immovable property acquired by a creditor in the course of an enforcement procedure constitutes an economic activity with the purpose of obtaining income on a continuing basis, or whether it is merely an action designed to recover a loan.