

Case C-299/20

Request for a preliminary ruling

Date lodged:

6 July 2020

Referring court:

Conseil d'État (France)

Date of the decision to refer:

25 June 2020

Appellant:

Icade Promotion Logement SAS

Respondent:

Ministre de l'Action et des Comptes Publiques

CONSEIL D'ÉTAT

(COUNCIL OF STATE, FRANCE)

acting

in its judicial capacity

...
Hearing of 10 June 2020

Delivery on 25 June 2020

Having regard to the following proceedings:

Icade Promotion Logement, a company having the legal form of a *société par actions simplifiée* (simplified joint stock company; 'SAS'), applied to the tribunal administratif de Montreuil (Administrative Court, Montreuil, France, 'the Administrative Court') for the restitution of value added tax ('VAT') in the amounts of EUR 2 826 814 and EUR 2 369 881, which it had paid in respect of the periods 1 January to 31 December 2007 and 1 January to 31 December 2008.

By judgment ... of 27 April 2012, the Administrative Court dismissed its application.

By judgment ... of 18 July 2014, the cour administrative d'appel de Versailles (Administrative Court of Appeal, Versailles, France, 'the Administrative Court of Appeal') dismissed the appeal which the company had brought against that judgment.

By decision ... of 28 December 2016, the Conseil d'Etat (Council of State, France), ruling in its judicial capacity, partially upheld the appeal brought by the company, set aside the judgment of the Administrative Court of Appeal of 18 July 2014 to the extent that it related to the restitution of the VAT relating only to the transactions carried out by that company and referred the case back to the Administrative Court of Appeal to the extent that it had set aside its judgment.

By a second judgment ... of 19 October 2017, the Administrative Court of Appeal dismissed the appeal brought by Icade Promotion Logement against the judgment of 27 April 2012.

By summary appeal, supplementary pleading, reply and fresh pleadings, registered on 20 December 2017, 20 March, 21 September and 16 November 2018 and 7 June 2019 at the secretariat of the judicial section of the Conseil d'Etat, the company Icade Promotion Logement claims that the Conseil d'Etat should:

1. set aside the second judgment;
2. ruling on the substance of the case, uphold its appeal;
3. in the alternative, request a preliminary ruling from the Court of Justice of the European Union on the interpretation of Article 392 of Council Directive 2006/112/EC on the common system of value added tax [OJ 2006 L 347, p. 1];

...

... Icade Promotion Logement claims that the Administrative Court of Appeal:

– distorted the facts in holding that it had not provided any details on the precise nature of the work it had carried out on each of the parcels of land in question prior to their sale and that, consequently, it had no grounds to claim that the sale of those parcels of land had contributed to the production of new buildings within the meaning of Article 257(7) of the code général des impôts (General Tax Code; 'the Tax Code');

– failed to state sufficient reasons for its decision and erred in law in holding that its transactions involving the sale of parcels of land to individuals fell not within the scope of the VAT scheme for immovable property provided for in Article 257(7) of the ... 'Tax Code' but within the scope of the scheme of the VAT on profit margin provided for by Article 257(6);

- erred in law in holding that French legislation, in making land subdivision operations carried out by local authorities exempt from VAT, pursuant to Article 261(5) of the Tax Code, while those same operations when carried out by private actors remained subject to the VAT margin scheme, did not infringe the principle of VAT neutrality;
- erred in law in relying on the fact that land purchase transactions are not subject to VAT to infer that the application of the margin taxation scheme provided for by Article 257(6) of the Tax Code to transactions for the sale of land was in conformity with Article 392 of Directive 2006/112 ...;
- erred in law in holding that, to the extent that it provides that the VAT margin scheme may apply to supplies of buildings and building land purchased for resale, Article 392 of Directive 2006/112 ... is neither intended to exclude – nor has the effect of excluding – from the VAT margin scheme purchases of undeveloped land before it is resold as building land.

By three statements of defence, registered on 3 August and 10 October 2018 and 24 March 2020, the ministre de l’action et des comptes publics (the Minister for Action and Public Accounts) contends that the appeal should be dismissed. The Minister maintains that the grounds put forward by the appellant company are unfounded and that there is no need to request a preliminary ruling from the Court of Justice of the European Union.

Having regard to the documents in the file;

Having regard to:

- Directive 2006/112 ...;
- the Tax Code and the livre des procédures fiscales (the Book on Tax Procedures; ‘the LPF’);
- the code de justice administrative (Code of Administrative Justice) and Order No 2020-305 of 25 March 2020;

...

And having regard to the following facts:

1. It is apparent from the documents in the file submitted to the court dealing with the substance of the case that Icade Promotion Logement, whose business consists in land development, applied to the transactions for the sale of building land to individuals which it carried out between 1 January and 31 December 2007 and between 1 January and 31 December 2008 the VAT margin scheme resulting from the combined provisions of Article 257(6) and Article 268 of the Tax Code. On the basis of Article L. 190 of the LPF, it applied to the tax authorities for the restitution of the tax it had accordingly paid, amounting, according to its own

calculations, to EUR 2 826 814 in respect of the period 1 January to 31 December 2007 and to EUR 2 369 881 in respect of the period 1 January to 31 December 2008. The tax authorities having dismissed its application, Icade Promotion Logement brought the dispute before the Tax Court. It brought an appeal in cassation against the second judgment delivered by the Administrative Court of Appeal in that dispute, by which that court, without ruling on the question of admissibility, dismissed the company's claim for restitution as unfounded.

2. On the one hand, according to Article 12 of Directive 2006/112 ...: '*1. Member States may regard as a taxable person anyone who carries out, on an occasional basis, a transaction relating to the activities referred to in the second subparagraph of Article 9(1) and in particular one of the following transactions: ... (b) the supply of building land ...*'. Article 135 of the directive provides that: '*1. Member States shall exempt the following transactions: ... (k) the supply of land which has not been built on other than the supply of building land as referred to in point (b) of Article 12(1) ...*'. According to Article 392 of the directive: '*Member States may provide that, in respect of the supply of buildings and building land purchased for the purpose of resale by a taxable person for whom the VAT on the purchase was not deductible, the taxable amount shall be the difference between the selling price and the purchase price.*'
3. On the other hand, Article 257 of the Tax Code, in the version applicable to the tax periods at issue, provides: '*The following shall also be subject to value added tax: ... (6) Without prejudice to the provisions of paragraph 7: (a) Transactions relating to immovable property ... the income from which must be included in the taxable amount for the purposes of income tax on industrial or commercial profits; ... (7) Transactions contributing to the production or supply of buildings. Such transactions are taxable even when of a private nature. 1. The following, in particular, are included: (a) The sale ... of building land, of property treated as building land in accordance with point (A) of Article 1594-0 G ...; The first subparagraph shall apply, in particular, to land in respect of which, within four years of the date of the relevant deed of purchase, the purchaser ... obtains a building permit or commences the necessary works for the construction of a building or group of buildings or for the construction of new premises above existing buildings. The present provisions shall not apply to land purchased by a natural person for the purpose of the construction of a building which that person is to use for residential purposes. ...*'. Article 268 of the Tax Code, in the version applicable to the tax periods at issue, provides: '*In relation to the transactions referred to in Article 257(6), the taxable amount for value added tax purposes shall be the difference between: (a) the price charged together with relevant associated charges, or the market value of the property if greater than the price charged together with relevant associated charges, and (b) ... the amount which the seller has paid for any reason for the purchase of the property ...*'.
4. It follows from the provisions of paragraph 7 of Article 257 of the Tax Code cited above that that paragraph was not applicable to the sale of building land purchased by a natural person for the purpose of the construction of a building which the

latter was to use for residential purposes. Consequently, such transactions were subject to VAT on the basis of the provisions of paragraph 6 of the same article, when they were carried out by persons falling within the scope of that paragraph. In such cases, pursuant to Article 268 of the Tax Code, the tax was levied not on the sale price of the land but on the margin achieved by the seller.

5. Icade Promotion Logement maintained before the Administrative Court of Appeal that it had made purchases of land that had not been built on, which fell outside the scope of VAT, for the purpose of reselling it without having constructed buildings on it. It had then divided the land it had purchased into parcels and carried out works to install various services for each of the parcels (roads, drinking water, electricity, gas, sewage, telecommunications), before selling the serviced parcels to natural persons, as building land, for the construction of residential buildings. In disputing the application to those sales of VAT on the margin, Icade Promotion Logement argued, on the basis of the combined provisions of Article 257(6) and Article 268 of the Tax Code, that the application of the margin taxation scheme to those transactions was incompatible with Article 392 of Directive [2006/112], in two respects.
6. In the first place, according to Icade Promotion Logement, Article 392 of Directive [2006/112] permits the Member States to make the supply of building land subject to a margin taxation scheme only where the taxable person that carries out the supply has paid VAT when purchasing the land without having any right to deduct it. In response to that argument, the Administrative Court of Appeal found that the absence of a 'right of deduction' during the purchase mentioned by Article 392 of Directive [2006/112] covers cases where the purchase has not been subject to VAT. Icade Promotion Logement maintains that the Administrative Court of Appeal erred in law on this point, arguing in particular that the English-language version of Article 392 of Directive [2006/112] clearly restricts the option of applying a margin taxation scheme to cases where the purchase of the property subsequently resold has been subject to VAT, without the person who resells the property being able to deduct that tax.
7. The response to this ground alleging an error of law depends on whether Article 392 of Directive [2006/112] – which, as a derogating provision, must be applied strictly – must be interpreted as reserving the application of the margin taxation scheme to transactions for the supply of immovable property the purchase of which has been subject to VAT, without the taxable person who subsequently resells the property having the right to deduct that tax, or whether it permits, more broadly – as the French-language version of the provision suggests – the application of such a scheme to transactions for the supply of immovable property the purchase of which has not been subject to VAT, either because the purchase falls outside the scope of VAT or because, though falling within the scope of VAT, it is exempt from it.
8. In the second place, according to Icade Promotion Logement, Article 392 of Directive [2006/112] permits the Member States to make the supply of building

land subject to a margin taxation scheme only where the taxable person who carries out the supply does no more than purchase and resell the land as it is. In response to that argument, the Administrative Court of Appeal held that the reference in Article 392 of Directive [2006/112] to the supply of building land ‘purchased for the purpose of resale’ is neither intended to exclude, nor has the effect of excluding, purchases of land that has not been built on before the resale of such land as building land. Icade Promotion Logement maintains that the Administrative Court of Appeal erred in law on this point, arguing in particular that the margin taxation scheme may not be applied to transactions for the sale of immovable property that has been developed following its acquisition.

9. The response to this second plea depends on whether Article 392 of Directive [2006/112], which, as a derogating provision, must be applied strictly, must be interpreted as excluding the application of the margin taxation scheme to transactions for the supply of building land in the following two cases: either where the land, purchased as land that has not been built on, becomes building land in the time between it is purchased and resold by the taxable person; or where, in the time between being purchased and resold by the taxable person, it is developed, in the sense that it is divided into parcels or works are carried out in order to install services (roads, drinking water, electricity, gas, sewage, telecommunications).
10. The issues mentioned in paragraphs 7 and 9 are decisive to the resolution of the present dispute and exhibit serious difficulties of interpretation, in the absence of case-law of the Court of Justice of the European Union shedding light on the purpose and scope of the provisions at issue. Consequently, it is necessary to refer the matter to the Court pursuant to Article 267 [TFEU] and, pending the Court’s ruling, to stay the proceedings on the appeal brought by Icade Promotion Logement.

DECIDES:

Article 1: The appeal proceedings brought by Icade Promotion Logement are stayed pending a ruling by the Court of Justice of the European Union on the following questions:

‘1. Is Article 392 of [Council] Directive [2006/112/EC] of 28 November 2006 [on the common system of value added tax] to be interpreted as reserving the application of the margin taxation scheme to transactions for the supply of immovable property the purchase of which has been subject to VAT, without the taxable person who subsequently resells the property having the right to deduct that tax, or does it permit that scheme to be applied to transactions for the supply of immovable property the purchase of which has not been subject to VAT, either because that purchase falls outside the scope of VAT or because it falls within the scope of VAT but is exempt from it?’

2. Is Article 392 of Directive [2006/112] to be interpreted as excluding the application of the margin taxation scheme to transactions for the supply of building land in the following two cases:

(a) where that land, purchased as land that has not been built on, becomes building land in the time between it is purchased and resold by the taxable person;

(b) where that land, in the time between it is purchased and resold by the taxable person, is developed, in the sense that it is divided into parcels or works are carried out in order to install services (roads, drinking water, electricity, gas, sewage, telecommunications)?

...

WORKING DOCUMENT