

**Case C-594/23****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:**

26 September 2023

**Referring court:**

Vestre Landsret (Denmark)

**Date of the decision to refer:**

20 September 2023

**Appellant:**

Skatteministeriet (Danish Ministry of Taxation)

**Respondents:**

Lomoco Development ApS

Holm Invest Aalborg A/S

I/S Nordre Strandvej Sæby

Strandkanten Sæby ApS

**Subject matter of the main proceedings**

The dispute in the main proceedings has been brought against the decision of the Landsskatteret (National Tax Tribunal, Denmark), by which it held that the supplies of land at issue in the main proceedings are not supplies of building land and thus are not transactions subject to VAT under Article 135(1)(j), and Article 12(1)(a) and (2), on the one hand, and under Article 135(1)(k), and Article 12(1)(b) and (3), on the other, of the VAT Directive. The appeal in the main proceedings challenging that decision has been brought by the Skatteministeriet, which claims that the land concerned is building land and that the supply is for that reason subject to VAT.

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

Interpretation of the term ‘building land’ (see Article 135(1)(j), and Article 12(1)(a) and (2); Article 135(1)(k), and Article 12(1)(b) and (3));

The reference is made pursuant to Article 267 TFEU

### **Question referred for a preliminary ruling**

Is it compatible with Article 135(1)(j), and Article 12(1)(a) and (2), on the one hand, and with Article 135(1)(k), and Article 12(1)(b) and (3), on the other, of Directive 2006/112 for a Member State, in circumstances such as those in the main proceedings, to consider a supply of land on which, at the time of supply, a pre-cast foundation has been constructed and on which a residential building is only subsequently constructed by other owners to be a sale of building land subject to VAT?

### **Provisions of EU law cited**

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1)

Treaty on the Functioning of the European Union, Article 267.

C-349/96, *Card Protection Plan*, (EU:C:1999:93)

C-400/98, *Breitsohl*, (EU:C:2000:304, paragraphs 46 and 54)

C-315/00, *Rudolf Maierhofer*, (EU:C:2003:23)

C-308/16, *Kozuba Premium Selection*, (EU:C:2017:869, paragraph 31)

C-71/18, *KPC Herning*, (EU:C:2019:660, paragraph 54)

C-299/20, *Icade Promotion*, (EU:C:2021:783), paragraphs 34, 35, 51, 57 and 58

### **Provisions of national law cited**

- 1 The Law on VAT; Consolidated Law No 966 of 14 October 2005, as subsequently amended: Paragraph 13(1)(9)(a) and (b), and Paragraph 13(3)
- 2 Regulation No 814 of 24 June 2013: Paragraphs 57 and 59
- 3 Regulation No 808 of 30 June 2015: Paragraphs 54 and 56, and Paragraph 134(3) and (4)

- 4 Paragraph 13(1)(9) of the Law on VAT (Consolidated Law No 966 of 14 October 2005, as subsequently amended), in the version applicable at the time when the foundations of the building land at issue in the main proceedings were cast, exempted supplies of immovable property from tax. That provision of the Law on VAT was based on the standstill provision in Article 371 of the VAT Directive, in conjunction with Annex X, Part B, point 9, thereto, which continued Article 28(3)(b) of the Sixth Directive, in conjunction with Annex F, point 16, thereto.
- 5 That VAT exemption was partially repealed on 1 January 2011 by Law No 520 of 12 June 2009, which inserted an amendment in Paragraph 13 of the Law on VAT, which also authorised the skatteminister (Minister for Taxation) to issue a VAT regulation on the further definition and delimitation of immovable property. From that time onwards, paragraph 13 stipulated that the VAT exemption for supplies of immovable property does not include the supply of building land, regardless of whether it has been developed, and the separate supply of land which has been built on. The amending law came into force on 1 January 2011.
- 6 According to the explanatory notes to that law, no transitional provisions were proposed, as it was stated that the law would apply only to new properties where the construction or extension/conversion starts after the entry into force of the law. The time at which new construction is considered to start is when the casting of foundations begins.
- 7 The skatteminister subsequently issued a VAT regulation on the definition of immovable property. Two different versions of the VAT regulation applied at the time of the transfer of the building plots at issue in the main proceedings: the regulation of 24 June 2013 (in respect of the transfers that took place on 15 June 2015) and the regulation of 30 June 2015 (in respect of the other supplies in the form of non-cash contributions on 25 August 2015).
- 8 It is apparent from Paragraph 54(1) of the 2015 regulation that the term ‘building’ in Paragraph 13(1)(9)(a) of the Law on VAT is to be understood as meaning structures fixed to or in the ground that have been completed for their intended purpose. According to Paragraph 56(1) of that regulation, the term ‘building land’ is to be understood as meaning an area which has not been built on which is designated for purposes that enable the construction of buildings. It is also apparent from Paragraph 134(3) and (4) of that regulation that the liability to VAT provided for in Paragraph 13(1)(9)(a) of the Law on VAT, as amended, applies to new buildings and new buildings and the land on which they stand, where construction began on or after 1 January 2011.
- 9 The case-law of the Landsskatteret
- 10 On 29 September 2017, the Landsskatteret ruled in a case in which the issue was similar to that in the present case. In its decision, the Landsskatteret held that a plot of land with a foundation built before 1 January 2011 could be sold free of

VAT on the ground that construction had begun prior to 1 January 2011, at a time when the rules prior to Law No 520 of 12 June 2009 applied. The Skatteministeriet did not challenge that decision before the courts.

- 11 On 14 February 2022, the Landsskatteret ruled in another case in which the issue was similar to that in the present one. In its decision, the Landsskatteret ruled that four plots of land with foundations, where the construction of the foundations had begun before 1 January 2011, could be sold free of VAT on the ground that construction had begun before 1 January 2011, when the rules prior to Law No 520 of 12 June 2009 applied. The Skatteministeriet lodged an appeal against that decision of 14 February 2022. According to the information provided by the Skatteministeriet, proceedings in that case have been stayed pending the answer of the Court of Justice of the European Union to the question referred for a preliminary ruling in the present case.

### **Brief summary of the facts and procedure**

- 12 The case concerns whether the transfer by I/S Nordre Strandvej Søbys ('Interessentskabet') (the Partnership) of 16 plots of land on which foundations for residential buildings had been cast on the respective dates of supply in 2015 constitutes either supplies of 'building land' which are subject to VAT or supplies, before first occupation, of buildings or parts of buildings and of the land on which the buildings stand, which, if the latter, are covered by the VAT exemption applicable until 1 January 2011, because the casting of the foundations was in all cases started and completed before 1 January 2011.
- 13 In 2006, the Interessentskab acquired land which had previously been used as a campsite in a coastal area. In 2008, the Interessentskab subdivided a number of plots of land from this land. Several of the subdivided plots were developed in January 2009 with the establishment of connections for electricity, water, heating and sewerage.
- 14 In the autumn of 2010, on the basis of building permits which the Interessentskab had obtained from the municipal building authority, foundations were cast on some of the subdivided plots. The casting of the foundations began and was completed before 1 January 2011.
- 15 The Interessentskab transferred 16 plots of land with pre-cast foundations to a private limited company by way of a non-cash contribution on 1 January 2015. Subsequently, plots have been sold by the successors of that limited liability company to private individuals.
- 16 By contracts of sale signed on 15 June 2015 and 26 October 2015 respectively, the Interessentskab also sold two plots of land with foundations to individuals. The Interessentskab sold another plot of land with a foundation to a private individual in respect of which there is no signed contract of sale, but which, according to the contract of sale, was sold by part-exchange on 1 October 2015. It is apparent from

the contracts of sale that the purchasers took on the properties with a building project in progress whereby, at the time of the conclusion of the contracts of sale, a plinth had been established for the building project in progress, and that the purchasers, as part of the overall transaction, received a sketch project showing the completed construction of the property.

- 17 In respect of five of the plots in question, residential buildings have been constructed on foundations cast in 2010 after the supply by the Interessentskab in 2015. In respect of eight plots of land, residential buildings have been built on the land, but the buildings were not constructed on foundations cast in 2010; foundations were on the land in 2015 when the Interessentskab made the supply. As regards the remaining three plots, the foundations cast in 2010 are still in place, but residential buildings have not yet been constructed on them.
- 18 By decision of 28 September 2017, SKAT (the Danish tax authority) increased the VAT payable by the Interessentskab, making it liable inter alia for VAT on the 16 plots. SKAT was of the opinion that the supply of the 16 plots with foundations constituted a supply of 'building land' subject to VAT pursuant to Paragraph 13(1)(9)(b) of the Law on VAT. That decision was challenged before the Landsskatteret. In its decision of 1 September 2021, the Landsskatteret found that the supply of those 16 plots of land were not transactions subject to VAT under Paragraph 13(9)(b) of the Law on VAT and Paragraph 4(b) of the Law on VAT, but rather transactions exempt from VAT under Paragraph 13(1)(9) of the Law on VAT previously in force, which exempted from VAT all supplies of immovable property.
- 19 In its decision, the Landsskatteret took the view that it was established that the Interessentskab had started casting the foundations of the 16 plots before 1 January 2011 and that the plots in question were acquired before the submission of Draft Law No 203 of 22 April 2009, which proposed the introduction of VAT on supplies of immovable property, and that the planning had begun before that draft law was submitted.
- 20 By application of 1 December 2021, the Skatteministeriet brought an action challenging the Landsskatteretten's decision before the Retten i Aalborg (Aalborg District Court), which referred the case to the Vestre Landsret (High Court of Western Denmark) in view of the principles at issue in the case.
- 21 By order of 23 November 2022, the Vestre Landsret decided to refer a question to the Court of Justice of the European Union for a preliminary ruling under Article 267 TFEU.

### **Principal arguments of the parties in the main proceedings**

- 22 The **Skatteministeriet** submits that the case in the main proceedings concerns building land which is subject to VAT and that the fact that foundations have been built on that land does not change that situation. According to the

Skatteministeriet, it follows from Article 2(1)(a) of the VAT Directive that the supply of goods for consideration within the territory of a Member State by a taxable person acting as such is subject to VAT. That directive also allows Member States to exempt 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). The Skatteministeriet also emphasises that the definition of which land is to be regarded as ‘building land’ requires Member States to comply with the objective of Article 135(1)(k) of the VAT Directive, the sole purpose of which is to exempt from VAT supplies of land which has not been built on and is not intended to support a building, and it follows from this, in conjunction with Article 2(1)(a) of that directive, that any supply of building land made for consideration by a taxable person acting as such must, in principle, be subject to VAT.

- 23 Member States’ discretion with regard to the definition of the term ‘building land’ is limited by the scope of the term ‘building’, which has been defined very broadly by the EU legislature in the first subparagraph of Article 12(2) of the VAT Directive as including ‘any structure fixed to or in the ground’. However, not every object is to be regarded as a ‘building’ within the meaning of the VAT Directive simply because it is fixed to the ground.
- 24 According to a common linguistic understanding, the Danish word ‘konstruktion’ includes, for example, a building. Such a common linguistic understanding is also common to the term ‘structure’ in the English version of the VAT Directive and to the term ‘construction’ in the French version. The same is true of the term ‘Bauwerk’ in the German version, which is used as the defining word for ‘Gebäude’. A structure in the form of a ‘building’ is thus, according to a common linguistic understanding, characterised by the fact that it is built and composed of various individual parts (building parts), which together form a structure intended for a purpose.
- 25 Moreover, a foundation for a residential building cannot be regarded as ‘parts of a building’ within the meaning of the VAT Directive, since a supply of ‘parts of a building’ can be considered to exist only if the part of the building supplied can be occupied (put into use) and is thus completed, which in practice is the case when there is a phased supply of, for example, apartments in a residential building.
- 26 The **Interessentskab** submits that the land supplied consists of buildings or parts of buildings and the land on which they stand, within the meaning of the VAT Directive, which are exempt from VAT.
- 27 The **Interessentskab** has asserted that the land on which it cast and completed foundations before 1 January 2011 changed its nature for VAT purposes from building land to buildings and the land on which they stand. That change occurred at the time when the casting of foundations on the land in question began, which was in autumn 2010. In any event, the change occurred at the latest at the time when the foundations were completed, which was before 1 January 2011.

- 28 The Interessentskab is also of the opinion that there is no VAT liability in respect of the 16 building plots, as the construction, namely the casting of the foundations, had started before 31 December 2010.
- 29 The supplies of plots of land with pre-cast foundations made by the Interessentskab in 2015 must therefore be regarded for VAT purposes as buildings or parts of buildings and the land on which they stand. The foundations of the 16 plots were fully functional at the time of supply in 2015, as the parties agree. Since VAT is payable only in respect of buildings or parts of buildings and the land on which they stand where construction began after 31 December 2010, the supplies are exempt from VAT. Under Danish law, the starting date for new construction is the date on which casting of the foundations begins. As pre-cast foundations had been constructed on the land in question which is the subject of the main proceedings before 1 January 2011, there is therefore no legal basis for charging VAT on the supplies, as structures fixed to or in the ground had been established on the land before 1 January 2011.
- 30 The first sentence of Article 12(2) of the VAT Directive defines what is to be understood by a building for VAT purposes. The term building is defined in the first sentence of Article 12(2) as ‘any structure fixed to or in the ground’. Pre-cast foundations meet the definition in the first sentence of Article 12(2) of the VAT Directive. A pre-cast foundation is, first of all, a ‘structure’. Second, a pre-cast foundation is ‘fixed to or in the ground’ because it cannot be moved immediately. Third, a pre-cast foundation is covered by the broad scope of the term building, which specifically covers ‘any’ structure fixed to or in the ground.
- 31 A foundation is a structure fixed to or in the ground and is therefore a building for VAT purposes pursuant to the first sentence of Article 12(2) of the Directive. The fact that the Danish implementation of this provision (see the VAT Regulation) contains additional conditions stating that structures fixed to or in the ground must also be completed for the purpose for which they are intended before they can be classified as buildings for VAT purposes does not mean that they should not be regarded as buildings for VAT purposes.

#### **Brief summary of the basis for the request for a preliminary ruling**

- 32 The Court of Justice has held that the Member States’ discretion with regard to the definition of the term ‘building land’ is limited by the scope of the term ‘building’, which, according to the Court, has been defined very broadly by the EU legislature in Article 12(2) of the VAT Directive as including ‘any structure fixed to or in the ground’ (see the judgment in *KPC Herning*, paragraph 54, and the judgment in *Icade Promotion*, paragraph 51).
- 33 The parties agree on the need to refer to the Court of Justice of the European Union a question on how the term ‘building land’ in Article 12(1)(b) of the VAT Directive is to be delimited in relation to the term ‘building’ and the land on

which the building stands under Article 12(1)(a) and the first sentence of Article 12(2) of the VAT Directive.

- 34 The Vestre Landsret takes the view that the case-law of the Court of Justice has not yet clarified the criteria and elements of interpretation that must be taken into account when assessing whether a ‘building’ can be considered to exist, including whether a plot of land with a pre-cast foundation is to be regarded as building land under Article 12(3) of the VAT Directive or as a building or part of a building and the land on which the building stands before first occupation under Article 12(2) of the VAT Directive, that would enable it – without a reference for a preliminary ruling – to decide whether a plot of land which, at the time of supply, is provided with a pre-cast foundation for a residential building, and on which a residential building is also subsequently constructed, is to be regarded as ‘building land’ within the meaning of the VAT Directive or as ‘a building or parts of a building and ... the land on which it stands’, within the meaning of the Directive.
- 35 For those reasons, the Vestre Landsret has referred the above question to the Court of Justice for a preliminary ruling. The main proceedings are stayed pending the answer of the Court of Justice.