

Case C-213/24 [Grzera]ⁱ

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:

19 March 2024

Referring court:

Wojewódzki Sąd Administracyjny we Wrocławiu (Poland)

Date of the decision to refer:

28 December 2023

Applicant:

E.T.

Other party to the proceedings:

Dyrektor Izby Administracji Skarbowej we Wrocławiu

Subject matter of the main proceedings

Action against the decision of the Dyrektor Izby Administracji Skarbowej we Wrocławiu (Director of the Tax Administration Chamber in Wrocław, ‘the DIAS’) dated 19 December 2022, regarding value added tax (‘VAT’).

Subject matter and legal basis of the request

Interpretation of Union law pursuant to Article 267 TFEU, in particular Articles 2(1) and 9(1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (‘Directive 2006/112’).

ⁱ The present case has been given a fictitious name which does not correspond to the real names of any of the parties to the proceedings.

Questions referred for a preliminary ruling

1. Must the provisions of Directive [2006/112], and in particular Articles 2(1) and 9(1) of that directive, be interpreted as meaning that a person who sells an immovable property, which was not previously used for economic activity, and commissions the preparation for sale [of that property] to a professional trader who subsequently, as that person's agent, undertakes a series of organised activities with the aim of dividing the property and selling it for a higher price, independently carries out an economic activity?
2. Must the provisions of Directive [2006/112], and in particular Article 9(1) of that directive, be interpreted as meaning that each of the cooperating spouses is to be considered a person who independently carries out an economic activity?

Provisions of European Union law relied on

VAT Directive, Article 2(1), Article 9(1); Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment, Articles 2(1), 4(1), 4(2) and 4(3)(b).

Provisions of national law relied on

Ustawa z dnia 11 marca 2004 r. o podatku od towarów i usług (Law of 11 March 2004 on the Tax on Goods and Services, Dziennik Ustaw (Journal of Laws) of 2017, item 1221, 'the Law on VAT') in the wording in force from 1 January 2017 to 31 July 2021:

Article 15(1): 'Taxable persons are legal persons, organisational units without legal personality and natural persons which independently carry out an economic activity referred to in paragraph 2, regardless of the purpose or result of that activity'.

Article 15(2): 'Any activity of producers, traders or persons supplying services, including mining and agricultural activities and the activities of persons in the professions, shall be regarded as an 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'.

Ustawa z dnia 25 lutego 1964 r. Kodeks rodzinny i opiekuńczy (Law of 25 February 1964 establishing the Family and Guardianship Code, consolidated text: Journal of Laws of 2017, item 682, 'the FGC') in the wording in force from 1 January 2017 to 31 July 2021:

Article 31(1): 'Upon marriage, joint property ownership (statutory joint property ownership) is created between the spouses by operation of law, which covers

property acquired during the marriage by both spouses or by one of them (joint property). Property not covered by statutory joint property ownership constitutes the personal property of each spouse’.

Article 35: ‘During the period of joint property ownership, neither spouse can demand the division of joint property. Nor may a spouse dispose of or undertake to dispose of the share that will accrue to him or her in the joint property or in the individual items included in that property in the event that the joint property ownership ceases’.

Succinct presentation of the facts and procedure in the main proceedings

- 1 On 21 April 1989, E.T. (‘the applicant’), together with her husband W.T., acquired the plots of land at issue in the main proceedings under an agreement transferring the ownership of a farm to a successor. During the examined period, the applicant and her husband sold 19 undeveloped plots of land located in the village of Ł. No VAT was charged on any of those transactions.
- 2 On 11 January 2011, the applicant and her husband (‘the principals’) entered into a contract of mandate with the B.A.Z. company (‘the contractor’) concerning cooperation in the development and sale of land located in Ł., municipality of Z., which was intended for residential housing or residential housing and service development. The agreement covered specific plots of land. The plots were to be sold by the end of 2017. Under the contract, the contractor was granted a power of attorney to take all necessary actions. In order to implement the project, the principal commissioned the contractor’s company to perform a number of activities, including:
 - planning the division of the aforementioned land property into smaller plots, and carrying out the necessary actions in that regard resulting in formal entries being made in the land registry and in the land and mortgage register;
 - connecting the property to utilities, cleaning up the site, and removing trees and shrubs;
 - obtaining the relevant permits and decisions from the competent authorities and institutions to carry out the aforementioned works;
 - advertising the plots to potential buyers;
 - preparing the necessary documents relating to the property in order for the principal to enter into notarised agreements with persons interested in acquiring the plots in question.
- 3 The contract also stipulated that the contractor would bear the costs of performing the mandate. In addition, the contractor was to be granted a notarised power of attorney to appear before institutions and administrative bodies in connection with

the subject matter of the contract. The contractor's remuneration was determined as an amount representing the excess of the sale prices established in the contract – either the total amount of that excess or a certain percentage according to the rules established for each individual plot – and was to be paid on the basis of a VAT invoice issued by the contractor for the gross amount of remuneration.

- 4 By Annex 1 to the aforementioned contract, concluded on 25 May 2015, the deadline for the sale of the plots was extended until the end of 2021.
- 5 In the view of the tax authorities, the sale of the immovable property by the applicant constituted an economic activity, and not the management of personal assets, and was therefore subject to VAT. Accordingly, the first-instance authority determined the applicant's VAT liability for the sale of the plots in an amount corresponding to the applicant's share [in those plots] for individual months from December 2017 to July 2021. An analogous decision was issued with respect to the applicant's husband. By its decision of 19 December 2022, the DIAS, as the second-instance tax authority, upheld the decision of the first-instance authority.

Essential arguments of the parties to the main proceedings

- 6 In her action before the referring court, the applicant alleges misinterpretation and infringement of, in particular, Article 15(1) and (2) of the Law on VAT, Article 4(1) and (2) of the Sixth Directive, and Article 9(1) of Directive 2006/112. She claims that the facts of the case do not indicate that she carried out an economic activity that was subject to VAT. In the case at issue, she sold private property. That property had been acquired for her personal use and not for commercial purposes, and therefore its sale cannot be considered a commercial activity resulting in the seller being recognised as a taxable person for the purpose of VAT. According to the applicant, she cannot be considered a taxable person since she merely exercised her property rights and had no intention of carrying out an economic activity or of using the property she owned for such activity, and the funds obtained were intended to satisfy her private needs. Moreover, she had acquired ownership of the property in question not in order to resell it, but as a result of taking over the farm.
- 7 In response, the DIAS filed a motion to dismiss the action, reiterating its previous position in full. In the view of the tax authorities, the sales were made from at least 2017 to 2021, which shows that they were cyclical and repetitive, and the applicant implemented several measures to maximise the profit from those sales. Between the acquisition of the plots (by way of donation) and their sale, they were converted from agricultural land into building plots (via changes to the local use-land plan) as requested by the contractor on behalf of the applicant and her husband. An additional plot was also purchased in order to create internal roads and access roads to the subdivided plots. The tax authorities considered that the following circumstances, in particular, demonstrated the professional, continuous,

planned and organised nature of the sale of the immovable property in question, which attests to the carrying out of an economic activity:

- entering into a contract of mandate with a building contractor, under which the contractor agreed to carry out activities aimed at making the plots in question more attractive and preparing them for sale, for which it was to receive the remuneration specified in the contract;
- paying remuneration to the contractor for the performance of the activities commissioned under the aforementioned contract, based on the VAT invoices it issued to W.T.;
- granting the contractor a power of attorney to carry out the above actions and also to represent the principals before institutions and administrative bodies in matters relating to the plots of land in question.

Succinct presentation of the reasoning in the request for a preliminary ruling

- 8 Under Directive 2006/112, the scope of VAT is very wide in that Article 2, which concerns taxable transactions, refers not only to the importation of goods but also to the supply of goods or services for consideration within the territory of the country by a taxable person acting as such (see the judgment of 10 June 2010, C-86/09, *Future Health Technologies*, EU:C:2010:334, paragraph 25 and the case-law cited therein).
- 9 In the main proceedings, the supplies in question were made on behalf of, and on the account of, the applicant.
- 10 As regards the concept of ‘economic activity’ within the meaning of Article 9(1) of Directive 2006/112, it is settled case-law that that term is objective in character, in the sense that the activity is considered per se and without regard to its purpose or results (see, to that effect, the judgment of 21 February 2006, C-223/03, *University of Huddersfield*, EU:C:2006:124, paragraphs 47 and 48 and the case-law cited therein).
- 11 Among other things, the exploitation of tangible property for the purposes of obtaining income therefrom on a continuing basis is to be regarded as an economic activity.
- 12 The applicant claims that she is selling her personal property. In that regard, the referring court has doubts as to whether using the assistance of a suitably qualified person in that type of transaction in order to prepare the property for sale so as to maximise the price achieved can be considered tantamount to having a permanent establishment, and whether the fact that the contractor is acting within the framework of its business and its remuneration is the excess of the price it achieves over the price expected by the seller is relevant.

- 13 According to the case-law of the Court of Justice, where a taxable person sells property, part of which he or she had chosen to reserve for his or her private use, he or she does not act with respect to the sale of that part as a taxable person within the meaning of Article 2(1) of the Sixth Directive (see the judgment in C-291/92, *Armbrecht*, EU:C:1995:304).
- 14 Directive 2006/112/EC provides that 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 the supply of building land (Article 12(1)(b)), may also be regarded as a taxable person.
- 15 Polish law does not lay down particular rules on taxing the supply of building land. Under Article 43(1)(9) of the Law on VAT, only the supply of building land and land designated for development is excluded from the exemption from tax. In principle, this means that under Polish law any supply of land designated for development is subject to tax. However, it must be carried out by a taxable person for the purpose of VAT, that is to say, in the course of an economic activity of a commercial nature.
- 16 However, a doubt arises as to whether the second subparagraph of Article 9(1) of Directive 2006/112 allows transactions concerning the supply of land designated for development to be taxed in instances where that land was not previously used for economic activity.
- 17 It is clear from the case-law of the Court of Justice that the actual intention, confirmed by objective evidence, to carry out an economic activity determines that it is necessary to treat the person concerned as a taxable person for the purpose of VAT, even where the tax authority is aware that the economic activity envisaged, which was to give rise to taxable transactions, will not be taken up (see the judgment of 8 June 2000 in C-400/98, *Breitsohl*, EU:C:2000:304). In turn, the absence of such intention makes it impossible to regard the person concerned as a taxable person for the purpose of VAT.
- 18 At the same time, the fact that the applicant in the main proceedings acquired the tangible property at issue to meet her own personal needs does not preclude that property from being subsequently used for the purpose of carrying out an ‘economic activity’. The question as to whether an individual, in a given case, has acquired property for the needs of his or her economic activities or for his or her own needs arises when that individual requests the right to deduct the input VAT paid in respect of the acquisition of that property (judgment of 19 July 2012 in C-263/11, ECLI:EU:C:2012:497, paragraph 39).
- 19 Since the applicant acquired the land for the purpose of carrying out agricultural activities, it cannot be considered that she had intended to engage in commercial activity. The land, which was acquired as agricultural land without VAT, was not used by the applicant in any way. However, it remains an open question whether the intent revealed when she repeatedly sold plots of land ‘from her private

assets', after they had been converted to building plots and taken out of agricultural production, allows those activities to be qualified as economic (commercial) activity. It must be considered whether it is relevant in that case that the change of land use occurred on the initiative of the applicant, represented by a professional contractor.

- 20 If such sales are regarded as commercial sales, the question arises as to the number of transactions which determine that nature, since the land in question can – depending on the price and on demand – be disposed of in its entirety in a single transaction or be disposed of in several or several dozen such transactions, depending on the number of plots into which the land has been divided.
- 21 The issue of whether the sale of immovable property should be classified as economic activity has been the subject of a number of decisions by the national courts. In its judgment of 31 January 2013, the Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland) expressed the view that assets originally acquired for personal purposes and used as such may also be the subject of professional trading. It is important that at the time the land is sold, the taxable person actually undertakes active, planned activities related to trading in immovable property, involving resources similar to those used by traders (see the judgment of the Supreme Administrative Court of 15 January 2019). The Supreme Administrative Court also assumed that the intention behind the original acquisition of property does not preclude its subsequent different treatment. Similarly, it is irrelevant whether the owner's intention at the time of acquiring the property was to sell it at a profit; what is significant is that the taxable person undertook activities of a continuous and organised nature, aimed at making a profit on the sale of the property.
- 22 It is also apparent from the case-law of the Court regarding Article 9 of Directive 2006/112 that, in order to establish whether a person independently carries out an economic activity, it is necessary to ascertain whether there is an employer-employee relationship in the pursuit of that activity (judgment of 13 June 2019, *IO*, C-420/18, EU:C:2019:490, paragraph 38 and the case-law cited therein). In order to assess whether that employer-employee relationship exists, it is necessary to check whether the person concerned performs his or her activities in his or her own name, on his or her own behalf and under his or her own responsibility, and whether he or she bears the economic risk associated with carrying out those activities. In order to find that the activities at issue are independent, the Court has thus taken into account the complete absence of any employer-employee relationship, as well as the fact that the person concerned acts on his or her own account and under his or her own responsibility, is free to arrange how he or she performs his or her work and himself or herself receives the emoluments which make up his or her income. According to the Court, economic risk relates always to the economic risk incurred directly by the person for whom the independent nature of the economic activity must be assessed (judgment of 21 December 2023, C-288/22, *Administration de l'Enregistrement, des Domaines [et] de la TVA*, EU:C:2023:1024). In the present case, the economic risk borne by

the applicant was minimised by the contract of mandate, and the contractor bore the entire risk of failing to achieve a price higher than the minimum price indicated in the contract.

- 23 If the first question is answered in the affirmative, another question arises: who is the entity carrying out such economic activity in a situation where the sale involves property under joint ownership?
- 24 To date, the national tax authorities have adopted the practice of considering each spouse as a separate taxable person, attributing half of the sales value to him or her. That practice has been accepted by the national courts. However, in the present case the court has concluded that the practice infringes the provisions of the Polish Family and Guardianship Code indicated above. Indeed, it undoubtedly follows from those provisions that during the course of the marriage, the spouses' joint property ownership may only be abolished by an agreement concluded between them. Since that joint ownership cannot be forcibly abolished by a court, it cannot be questioned by the tax authorities either. Therefore, it should be recognised that the spouses' transactions involving assets subject to joint ownership are always conducted jointly.
- 25 Since Article 9(1) of Directive 2006/112 indicates that the taxable person is a 'person', a doubt arises as to whether, with respect to natural persons, each person taking part in a transaction is always taxed separately or, in light of national regulations on matrimonial property regimes, the term 'person' can also be understood as 'a group of natural persons acting together'.
- 26 It follows from the case-law of the Court that Article 9(1) and Article 193 of Directive 2006/112 must be interpreted as meaning that a natural person who has concluded with another natural person a joint activity agreement setting up a partnership, which lacks legal personality and is characterised by the fact that the first person is empowered to act in the name of the partners as a whole, but participates alone and in his or her own name in relations with third parties when performing acts that form the economic activity pursued by that partnership, must be regarded as a 'taxable person' within the meaning of Article 9(1) of Directive 2006/112 and as having sole liability for the VAT payable under Article 193 of that directive, since he or she acts on his or her own behalf or on behalf of another person as a commission agent as provided for in Article 14(2)(c) and Article 28 of that directive (judgment of 16 September 2020, C-312/19, *Valstybinė mokesčių inspekcija*, EU:C:2020:711). By converse inference, it should be considered that if two persons carry out an activity jointly and act jointly vis-à-vis their counterparties, both are liable for the payment of VAT, and since their shares in the item sold cannot be separated, their share in the VAT liability should be joint as well.
- 27 The above doubts justify referring the questions presented above to the Court of Justice for a preliminary ruling.