

Case C-697/20**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:**

21 December 2020

Referring court:

Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland)

Date of the decision to refer:

22 July 2020

Appellant:

W.G.

Respondent:

Dyrektor Izby Skarbowej in L.

Subject matter of the case in the main proceedings

Exclusion of the option to treat as separate VAT taxable persons spouses who engage in agricultural activity within an agricultural holding using their marital joint property; the status of flat-rate farmers and of farmers taxed in accordance with general rules.

Subject matter and legal basis of the reference

Interpretation of EU law; Article 267 TFEU

Questions referred

1. Must the provisions of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1, as amended), in particular Articles 9, 295 and 296, be interpreted as precluding a national practice laid down in Article 15(4) and (5) of the 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) (*Journal of Laws* [Dz. U.] of 2011, No 177, item 1054, as amended), which excludes the option of treating as separate VAT taxable persons spouses who engage in agricultural activity within an agricultural holding using their marital joint property?

2. Is it relevant to the answer to the first question that, according to national practice, if one spouse opts to tax his or her business on the basis of general VAT rules, the other spouse ceases to be a flat-rate farmer?

3. Is it relevant to the answer to the first question that it is possible to clearly distinguish between the assets used independently and autonomously by each spouse for the purposes of the business activity concerned?

Provisions of EU law cited

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax ('Directive 2006/112'): Articles 9, 295 and 296

Provisions of national law cited

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) (*Journal of Laws* [Dz. U.] of 2011, No 177, item 1054, as amended; 'the Law on VAT'):

Article 2

For the purposes of the following provisions:

...

15) agricultural activity means plant and animal production, also including ... industrial or farm animal production ..., farm breeding and rearing of slaughter and laying poultry, poultry hatcheries, ... as well as the supply of agricultural services;

16) an agricultural holding means an agricultural holding as defined in the provisions on agricultural tax;

...

21) agricultural services means:

a) services relating to agriculture and animal breeding and rearing ...;

Article 15

1. Taxable persons are legal persons, unincorporated organisational units and natural persons which, independently, carry out economic activity as referred to in paragraph 2, regardless of the purpose or result of such activity.

...

4. In the case of natural persons exclusively running an agricultural holding or forestry or fisheries undertaking, a taxable person means any person who has submitted an application for registration as referred to in Article 96(1).

5. Paragraph 4 shall apply *mutatis mutandis* to natural persons carrying out exclusively an agricultural activity in circumstances other than those mentioned in that paragraph.

Article 43

1. The following shall be exempt from tax:

...

3) the supply by a flat-rate farmer of agricultural products resulting from his or her agricultural activity and the supply of agricultural services by a flat-rate farmer;

Article 96

1. The operators referred to in Article 15 shall be obliged, before the date of performing the first activity referred to in Article 5, to submit an application for registration to the head of the tax office, subject to paragraph 3.

2. In the case of natural persons referred to in Article 15(4) and (5), an application for registration may only be submitted by one of the persons to whom invoices will be issued in respect of purchases of goods and services and who will issue invoices in respect of sales of agricultural products.

Brief outline of the facts and procedure

- 1 In 2011, the appellant in the main proceedings ('the appellant') was engaged in a special sector of agricultural production, rearing chickens for slaughter with the use of two out of the six sheds purchased together with her husband who was engaged in a special sector of agricultural production within the same scope using the remaining four sheds. On 31 December 2010, the appellant submitted a VAT registration application, opting out of the tax exemption as of 1 January 2011 and opting for a monthly tax period, while her husband continued to benefit from the exemption as a flat-rate farmer.
- 2 The appellant submitted corrections to her VAT-7 returns for the period from January to December 2011, which were deemed correct by the first-tier authority

because they accounted for the income and expenses of the entire agricultural holding.

- 3 On 29 August 2016, the appellant submitted further corrections to her VAT returns for the months from January to December 2011, together with a VAT overpayment claim for the tax periods of February, April, June, August, October and November 2011.
- 4 By decision of 26 October 2016, the first-tier tax authority held that the corrections to the VAT returns previously submitted by the appellant for the months from January to December 2011 were correct, but refused to recognise the VAT overpayments claimed by the appellant for the individual months of 2011.
- 5 After reviewing the appellant's appeal, the second-tier authority found that the liabilities relating to the January-November 2011 tax periods were time-barred but held that the authority's right to verify the overpayment was not time-barred. Therefore, by decision of 28 February 2017, the second-tier authority set aside the decision of the first-tier authority of 26 October 2016 with respect to determining the amount of excess input tax over output tax to be deducted in the subsequent tax periods (January, March, May, July, September and December 2011) and the amount of VAT liability (February, April, June, August, October and November 2011) and discontinued the proceedings in this regard, while with respect to the rest of the case – the refusal to recognise overpayments for the individual months of 2011 – it upheld the decision of the first-tier authority.
- 6 In the view of the second-tier authority, it is undisputed that on the land which is the statutory joint property of the spouses, there are six buildings (sheds) in which both spouses engaged in a special sector of agricultural production consisting in the rearing of chickens for slaughter (in two of the sheds this activity was carried out independently by the appellant, and in the remaining four sheds it was carried out by her husband).
- 7 The second-tier authority stated that the appellant had submitted an application for registration and was, by virtue of her agricultural activity, an active VAT taxable person who was taxed in accordance with general rules. Therefore, it was she who had the status of a VAT taxable person by virtue of engaging in agricultural activity in the agricultural holding which was the spouses' joint property. Consequently, the authority took the view that the submission by the appellant of the application for registration referred to in Article 96(1) of the Law on VAT also had an effect with regard to the appellant's husband, who thereby lost his status as a flat-rate farmer.
- 8 After the appellant had brought an action before the court of first instance, that court dismissed the action, holding that where an agricultural holding is owned jointly by several persons, only one person may become an active VAT taxable person. The situation is similar where spouses who own marital joint property engage exclusively in agricultural activity of the same type in a joint agricultural

holding, which is the case here, since the six sheds constitute their joint marital property. That court noted that since the appellant had submitted the application for registration from 1 January 2011, she was an active VAT taxable person by virtue of her agricultural activity and was taxed in accordance with general rules.

- 9 The appellant disagreed with the court's position and lodged an appeal on a point of law.

Brief statement of and reasons for the reference

- 10 The key issue is to answer the question whether, for VAT purposes, in a situation where each spouse declares that they engage in separate activity relating to a special sector of agricultural production (rearing of chickens for slaughter) in an agricultural holding which is statutory marital joint property, the fact that only one of the spouses is registered for VAT purposes as an active taxable person has an effect on the other spouse who declared that he was a flat-rate taxpayer.
- 11 The appellant takes the view that the registration only concerned her personally and cannot be regarded as the registration of a taxable person as referred to in Article 15(4) of the Law on VAT. As a consequence, her husband could not have lost his status as a flat-rate farmer and, as a person independently running a commercial agricultural holding, he enjoys the tax exemption provided for in Article 43(1)(3) of the Law on VAT.
- 12 In the light of Article 15(1) and (2) of the Law on VAT and Article 9 of Directive 2006/112, in order for an operator to be regarded as a VAT taxable person, it must be established that that person engages in economic activity in an independent manner. These provisions, analysed in complete isolation from Article 15(4) and (5) of the Law on VAT, do not preclude the functioning of two separate taxable persons within a single agricultural holding – provided that, despite engaging in activity within that holding, they engage in their activity independently.
- 13 However, the prevailing view in national case-law is that in the case of natural persons as referred to in Article 15(4) and (5) of the Law on VAT, an application for registration may only be submitted by one of the persons to whom invoices will be issued in respect of purchases of goods and services and who will issue invoices in respect of sales of agricultural products or the supply of services. It is assumed that this legislation establishes a special rule concerning the formal status of a taxable person in the case of family run agricultural holdings, or, more precisely, agricultural holdings run by multiple persons. In order to simplify the taxation rules applicable to this group of persons, the legislature introduced the rule that the taxable person is exclusively the natural person who has submitted the required application for registration.
- 14 As a result, the provisions of Article 15(4) and (5) of the Law on VAT in practice result in treating an agricultural holding in a special manner, namely as assets which may be assigned to a single VAT taxable person.

- 15 The second question concerns the national practice of the referring court, according to which it is not possible to combine within a single agricultural holding two statuses, namely that of a taxable person exempt for VAT purposes owing to that person's status as a flat-rate farmer (who is not required to submit VAT returns, maintain VAT registers or issue invoices) and that of an active VAT taxable person with respect to the remainder of the agricultural activity, that is to say, the supply of agricultural services. The opt-out from the exemption under Article 43(1)(3) of the Law on VAT may apply only in its entirety, since either all or none of the agricultural activity of a flat-rate farmer can be exempt from tax. A flat-rate farmer may be an active VAT taxable person with respect to the remaining part of his business activity, but only if that remaining part is activity other than the supply of agricultural products resulting from his own agricultural activity and the supply of agricultural services.
- 16 The third question relates to the fact that in the course of the proceedings, the appellant referred to the criteria of independence and autonomy. She argued, *inter alia*, that she and her husband had separate bank accounts for their respective chicken farms and managed the funds used for rearing activities independently. The spouses are subject to separate income taxation according to the rules applicable to special sectors of agricultural production. Under these circumstances, it is clear that each of the chicken farms was financially, economically and organisationally independent.
- 17 According to the referring court, a doubt arises as to whether, in the case of spouses who engage in separate agricultural activities within a joint agricultural holding, the opting out by one spouse from flat-rate tax has consequences for the other spouse.
- 18 The referring court takes the view that there is no provision in Directive 2006/112 which would make it possible to explicitly introduce a rule, such as that laid down in Article 15(4) and (5) of the Polish Law on VAT, which results in the special treatment of an agricultural holding.
- 19 In itself, Article 9 of Directive 2006/112 does not provide a basis for a Member State to lay down rules which preclude individual members of an agricultural holding from becoming VAT taxable persons in respect of their agricultural activities.
- 20 In the opinion of the referring court, Article 15(4) and (5) of the Law on VAT cannot be regarded as part of the implementation of Article 11 of Directive 2006/112. The latter provision provides for the possibility for a Member State to regard persons who, while legally independent, are closely bound to one another by financial, economic and organisational links, as a single taxable person. However, the VAT Committee must be consulted beforehand as a condition for introducing such a regulation, and Poland has never carried out such consultations.

- 21 It appears that the provisions of Directive 2006/112 do not allow the independent character of a person's business activity to be ruled out simply because it is of an agricultural nature. Obviously, if it is determined that a member of the agricultural holding in question does not engage in business activity himself, but is merely an 'associate' of the person engaging in this activity, the sales falsely declared by him should be imputed to the 'real' taxable person. However, this is an issue of legal evidence which should not be subject to the provisions of substantive law, and this evidence must additionally be assessed taking into account the circumstances of the particular case.
- 22 On the other hand, the recognition that in the case of family-run agricultural holdings, or more precisely agricultural holdings run by multiple persons, the taxable person is only the natural person who has submitted the required application for registration, has a practical justification. The consequences for the taxation of such holdings will be aimed at correcting the previously existing irregularity and restoring the situation which would have existed had the abuse not taken place.
- 23 Potential abuses may occur, inter alia, upon the division of an agricultural holding between several operators with the intention of benefiting from the special taxation scheme, with one spouse using the flat-rate taxation scheme and the other one being entitled to deduct input tax.
- 24 It appears that the purpose of the rules contained in the Law on VAT is precisely to counteract such abuse. According to that law, a VAT taxable farmer engages in a special type of business activity, namely agricultural activity within an agricultural holding, and within the scope of that activity he or she is a producer as well as a supplier of services to third parties. Thus, he or she intends to engage in such business activity owing to the desire to produce and sell agricultural products or to supply agricultural services to third parties. A farmer's activity is therefore different from that of a producer, trader or service provider listed in Article 15(2) of the Law on VAT; it also differs from the use of goods or intangible assets on a continuing basis for the purpose of obtaining income.
- 25 A taxable person engaging in agricultural activity (Article 2(15) of the Law on VAT) or supplying agricultural services (Article 2(21) of the Law on VAT) cannot combine two statuses at the same time – that of a VAT taxable person exempt as a flat-rate farmer by virtue of selling agricultural products resulting from his own activity and that of an active VAT taxable person. A flat-rate farmer is entitled to flat-rate compensation for the purchase of certain means of agricultural production that are subject to VAT under Article 115 et seq. of the Law on VAT. This rule means that a flat-rate farmer who is exempt from tax under Article 43(1)(3) of the Law on VAT is not entitled to reduce the amount of output tax by the amount of input tax under the general rules provided for in Article 86(1) of the Law on VAT. This principle is expressed in Article 302 of Directive 2006/112. It should be added that where a flat-rate farmer opts out of the tax exemption and switches to general rules, he may 'recover' the input tax paid

on the purchase of means of agricultural production by submitting a correction pursuant to Article 91(7) and (7a) read in conjunction with Article 91(2) of the Law on VAT.

- 26 The above prohibition on combining, within a single agricultural holding, the status of a flat-rate farmer and that of a taxable person subject to general rules has a limited scope. The supply of agricultural products resulting from the farmer's own agricultural activity by a flat-rate farmer and the supply of agricultural services by a flat-rate farmer are exempt from taxation and thus covered by the flat-rate taxation scheme, while the supply of other services is subject to general VAT rules. The fact that a person is a flat-rate farmer does not in itself result in solely the flat-rate taxation scheme for agriculture being applicable to that person, irrespective of the type of activity he or she engages in, since this scheme only covers activities consisting in 'the supply of agricultural products resulting from the farmer's agricultural activity and the supply of agricultural services'. The services referred to are ones which a flat-rate farmer is in a position to provide using the labour and equipment with which he or she normally farms his or her own agricultural property.
- 27 It appears that the taxation scheme set out above is consistent and not only safeguards against the abuse of tax law, but also achieves the objectives of the introduction of the flat-rate scheme for farmers provided for in Directive 2006/112, namely simplifying administrative procedures for the farmers concerned, which must be reconciled with offsetting the input VAT borne by farmers when purchasing goods used for the purposes of their activity (see, to that effect, judgments of the Court of 8 March 2012, *Commission v Portugal*, C-524/10, EU:C:2012:129, paragraph 50, and of 12 October 2016, *Nigl and Others*, C-340/15, EU:C:2016:764, paragraph 38).
- 28 In the Court's case-law, it has been repeatedly emphasised that the flat-rate scheme constitutes an exception to the general scheme provided for in Directive 2006/112 and must therefore be applied only to the extent necessary to achieve its objective (judgments of 15 July 2004, *Finanzamt Rendsburg*, C-321/02, EU:C:2004:447, paragraph 27; of 8 March 2012, *Commission v Portugal*, C-524/10, EU:C:2012:129, paragraph 49; and of 12 October 2016, *Nigl and Others*, C-340/15, EU:C:2016:764, paragraph 37).
- 29 According to the referring court, it appears possible to consider that the introduction of a national practice which excludes the option of treating as separate VAT taxable persons spouses who engage in agricultural activity within an agricultural holding using their marital joint property is intended to prevent VAT fraud. In this context, the contested national provisions constitute a means of countering possible VAT fraud by introducing a single tax status with respect to a specific agricultural holding irrespective of the number of operators – VAT taxable persons – who engage in agricultural activities within that undertaking.