

JUDGMENT OF THE COURT (Grand Chamber)

29 September 2015 (*)

(Reference for a preliminary ruling — Value added tax — Directive 2006/112/EC — Article 9(1) — Article 13(1) — Taxable persons — Interpretation of the word ‘independently’ — Municipal body — Economic activities carried out by an organisational entity of a municipality other than as a public authority — Whether such an entity may be regarded as a ‘taxable person’ within the meaning of the provisions of Directive 2006/112 — Articles 4(2) and 5(3) TEU)

In Case C-276/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Naczelny Sąd Administracyjny (Poland), made by decision of 10 December 2013, received at the Court on 5 June 2014, in the proceedings

Gmina Wrocław

v

Minister Finansów,

THE COURT (Grand Chamber),

composed of V. Skouris, President, K. Lenaerts, Vice-President, A. Tizzano, R. Silva de Lapuerta, T. von Danwitz, A. Ó Caoimh, J.-C. Bonichot, C. Vajda, Presidents of Chambers, E. Levits, A. Arabadjiev, M. Safjan, A. Prechal, E. Jaraši nas, C.G. Fernlund (Rapporteur) and J.L. da Cruz Vilaça, Judges,

Advocate General: N. Jääskinen,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 5 May 2015,

after considering the observations submitted on behalf of:

- the Gmina Wrocław, by L. Mazur, K. Sachs, A. Bładowski and A. Januszkiewicz, acting as tax advisors,
- the Minister Finansów, by J. Kaute and T. Tratkiewicz, acting as Agents,
- the Polish Government, by B. Majczyna and A. Kramarczyk-Szaładzi ska, acting as Agents,
- the Greek Government, by K. Paraskevopoulou and I. Kotsoni, acting as Agents,
- the European Commission, by M. Owsiany-Hornung and L. Lozano Palacios, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 30 June 2015,

gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 9(1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1) ('the VAT Directive').
- 2 The request has been made in proceedings between the Gmina Wrocław (Municipality of Wrocław, Poland) and the Minister Finansów (Minister of Finance; 'the Minister') concerning whether a municipal budgetary entity may be regarded as a taxable person for the purposes of value added tax ('VAT').

Legal context

EU law

- 3 The VAT Directive repealed and replaced, as from 1 January 2007, Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to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 (OJ 1977 L 145, p. 1) ('the Sixth Directive'). According to the first and third recitals in the preamble to the VAT Directive, the recasting of the Sixth Directive was necessary in order to present all the applicable provisions in a clear and rational manner and in an improved structure and drafting which would not, in principle, bring about material change.
- 4 Recital 65 in the preamble to the VAT Directive states as follows:

'Since, for those reasons, the objectives of this Directive cannot be sufficiently achieved by the Member States and can therefore be better achieved by at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.'
- 5 Article 9(1) of that directive, which essentially reproduces the wording of Article 4(1) to (3) of the Sixth Directive, provides:

"Taxable person" shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity.

Any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions, shall be regarded as "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.'
- 6 Article 13(1) of that directive, which corresponds, in essence, to Article 4(5) of the Sixth Directive, provides:

'States, regional and local government authorities and other bodies governed by public law shall not be regarded as taxable persons in respect of the activities or transactions in which they engage as public authorities, even where they collect dues, fees, contributions or payments in connection with those activities or transactions.

However, when they engage in such activities or transactions, they shall be regarded as taxable persons in respect of those activities or transactions where their treatment as non-taxable persons would lead to significant distortions of competition.'

In any event, bodies governed by public law shall be regarded as taxable persons in respect of the activities listed in Annex I, provided that those activities are not carried out on such a small scale as to be negligible.'

Polish law

- 7 Article 15(1) and (6) of the Law of 11 March 2004 on goods and services tax (Dz. U. nr 54, poz. 535 ze zm.), as amended ('the Law on VAT'), provides:

'1. "Taxable persons" shall mean legal persons, organisational entities without legal personality and natural persons who carry out, independently, one of the economic activities referred to in paragraph 2, whatever the purpose or results of that activity.

...

6. "Taxable persons" shall not include public authorities and the offices of such authorities as regards tasks established by specific provisions for the accomplishment of which they have been appointed, with the exception of activities carried out under private law contracts.'

The dispute in the main proceedings and the question referred for a preliminary ruling

- 8 The dispute between the Municipality of Wrocław and the Minister concerns the tax status in relation to VAT of municipal budgetary entities which are linked to that municipality.
- 9 It is apparent from the file submitted to the Court that the Municipality of Wrocław carries out the tasks entrusted to it in accordance with the Law of 8 March 1990 on municipalities (Dz. U. z 2001 r. nr 142, poz. 1591 ze zm.) via 284 budgetary entities and local and regional budgetary establishments, including, inter alia, schools, cultural centres, district inspectorates and police services.
- 10 Wishing to obtain a statement by the Minister of his position on the question as to whether it is the municipality or the budgetary entity which must be regarded as a taxable person for the purposes of VAT where such an entity carries out activities coming within the scope of VAT, the Municipality of Wrocław requested that the Minister give an individual written interpretation of the Law on VAT. According to that municipality, the fact that only the municipality satisfies the criteria laid down in Article 15(1) and (2) of the Law on VAT as regards independent engagement in economic activities must lead the tax administration to take the view that only the municipality may be subject to VAT for the economic activities carried out by such an entity.
- 11 In his individual written interpretations, the Minister considered however that, since budgetary entities which are separate from the organisational structure of the Municipality of Wrocław engaged independently in economic activities, as determined by objective criteria, and in doing so carried out activities subject to VAT, they had to be regarded as being themselves taxable persons for the purposes of VAT.
- 12 The Municipality of Wrocław then brought before the Regional Administrative Court of Wrocław (Wojewódzki Sąd Administracyjny we Wrocławiu) actions for the annulment of those individual written interpretations, which were dismissed. That municipality then brought an appeal on a point of law against those judgments before the Supreme Administrative Court (Naczelny Sąd Administracyjny).
- 13 Taking the view that the appeal raised serious questions, the Supreme Administrative Court (ordinary composition) decided to refer that case to the chamber in extended

composition in order for it to rule on the issue of the treatment of a municipal budgetary entity as a taxable person for the purposes of VAT.

- 14 That chamber in extended composition took the view that, in order to determine whether a municipal budgetary entity carries out an economic activity independently, first, it is necessary to consider both the national rules on VAT and the VAT Directive. As regards Article 9(1) of that directive, that chamber noted that there is a certain difference in the various language versions of that provision, some using the expression 'independently' and others using the expression 'autonomously'. In connection with those differences in wording, academic writing emphasises the importance of a teleological interpretation of that provision, taking the view, in accordance with the case-law of the Court of Justice, that an entity independently engaging in economic activities should be regarded as a taxable person for purposes of VAT. Secondly, that chamber found that it is necessary to analyse the legal status of such an entity in the light of the Polish Constitution.
- 15 As regards the analysis of that legal status, the chamber in extended composition observed, in essence, that a municipality, as a basic unit of local government, has legal personality and has rights of ownership and other property rights, whereas a municipal budgetary entity is an organisational structure without legal personality. According to that chamber, it is for the municipality to take decisions regarding the establishment, field of activity, affiliation and dissolution of such an entity.
- 16 That chamber in extended composition noted that a municipal budgetary entity does not own its own property but manages certain assets of the property owned by the municipality, which the latter has entrusted to it. Any activities which may be subject to VAT are carried out in the name and on behalf of the municipality, within the limits of the resources which the latter allocates to them in a given year in the budgetary decision.
- 17 In addition, that chamber observed that such an entity's expenditure is covered directly by the municipal budget and that its revenue is assigned to the accounts of that same municipality. Accordingly, in financial terms, there is no link between the financial results generated by the economic activities carried out by a municipal budgetary entity and the expenditure incurred by them and therefore there are no financial risks connected with activities subject to tax. The scale of a municipal budgetary entity's expenditure is thus not dependent upon the amount of that entity's earnings; moreover, it cannot dispose of any income which it has earned. Likewise, a budgetary entity does not bear liability for damage caused by its activities; that liability is borne solely by the municipality.
- 18 In the light of those considerations, the Supreme Administrative Court (extended composition) decided, in response to the question raised by the ordinary chamber of that court, that, under national law, a municipal budgetary authority was not a taxable person for the purposes of VAT because of its lack of autonomy when carrying out economic activities.
- 19 However, the Supreme Administrative Court (ordinary composition) harbours doubts as to whether, under EU law, the same inferences concerning VAT liability may be drawn from the lack of autonomy of bodies governed by public law which carry out activities subject to VAT.
- 20 In that regard, the Supreme Administrative Court states that the case-law of the Court of Justice on the criterion of independence concerns natural persons and that the Court of Justice has not yet ruled on the relationship between the criterion of independence forming part of the general definition of a taxable person in Article 9(1) of the VAT Directive and the specific rules laid down in Article 13 of that directive in relation to bodies governed by public law, and more specifically on whether that criterion must be fulfilled for such a body to be regarded as a taxable person for the purposes of VAT in respect of its activities which do not fall within the exercise of public authority.

21 Furthermore, that court also raises the question as to how those two provisions should be interpreted in the light of the principle of institutional autonomy and the principle of subsidiarity, as set out in Articles 4(2) and 5(3) TEU.

22 In those circumstances the Supreme Administrative Court decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘In the light of Article 4(2), in conjunction with Article 5(3) [TEU], may an organisational entity of a municipality (a local government body in Poland) be regarded as a taxable person for purposes of VAT when it engages in activities other than as a public authority within the meaning of Article 13 of [the VAT] Directive ..., notwithstanding the fact that it does not satisfy the criterion of autonomy (independence) set out in Article 9(1) of that directive?’

23 Pursuant to the third paragraph of Article 16 of the Statute of the Court of Justice of the European Union, the Polish Government requested the Court to sit as a Grand Chamber.

Consideration of the question referred

24 By its question, the referring court asks, in essence, whether Article 9(1) of the VAT Directive must be interpreted as meaning that bodies governed by public law, such as the municipal budgetary entities at issue in the main proceedings, may be regarded as taxable persons for the purposes of VAT when they do not satisfy the criterion of independence set out in that provision.

25 In determining the scope of a provision of EU law, its wording, context and objectives must all be taken into account. Furthermore, it follows from the need for uniform application of EU law and from the principle of equality that the terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Union (judgment in *Commission v Sweden*, C-480/10, EU:C:2013:263, paragraph 33 and the case-law cited).

26 The VAT Directive, which seeks to establish a common system of VAT, confers a very wide scope on VAT. In order to ensure the uniform application of that directive, it is important that the terms which define that scope, such as the terms ‘taxable transactions’, ‘taxable persons’ and ‘economic activities’, are interpreted in an autonomous and uniform manner, regardless of the purpose and results of the transactions concerned (see, to that effect, judgment in *Halifax and Others*, C-255/02, EU:C:2006:121, paragraphs 48 to 56).

27 The VAT Directive contains a Title III dealing with the notion of ‘taxable person’. As set out in the first provision under that title, namely Article 9(1), “[t]axable person” shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity’.

28 The terms used in that provision, in particular the term ‘any person who’, give the notion of ‘taxable person’ a broad definition focused on independence in the pursuit of an economic activity to the effect that, as the Advocate General has observed in points 28 to 29 of his Opinion, all persons — natural or legal, both public and private, even entities devoid of legal personality — which, in an objective manner, satisfy the criteria set out in that provision are regarded as being taxable persons for the purposes of VAT.

29 However, in derogation from that general rule on treatment as taxable persons laid down in Article 9(1) of the VAT Directive, Article 13(1) of that directive excludes bodies governed by public law from the capacity as a taxable person in respect of activities or economic transactions in which they engage as a public authority, unless their treatment as non-

taxable persons leads to significant distortions of competition (judgment in *Commission v Netherlands*, C-79/09, EU:C:2010:171, paragraph 77).

- 30 Thus, for a body governed by public law to be regarded as a taxable person within the meaning of the VAT Directive, it must, in accordance with Article 9(1) of that directive, independently carry out any economic activity.
- 31 As regards the case in the main proceedings, it should be noted that the economic nature of the activities concerned is not disputed. It is also common ground that the economic activities at issue do not fall within the exception laid down in Article 13(1) of the VAT Directive.
- 32 The question which arises is therefore whether municipal budgetary entities, such as those at issue in the main proceedings, independently carry out the economic activities concerned and must as a result be made subject to VAT.
- 33 In order to establish whether such an entity independently carries out economic activities, it is necessary to ascertain, as is apparent from the case-law of the Court, whether, in the pursuit of those activities, it is in an employer-employee relationship vis-à-vis the municipality to which it is linked (see, to that effect, judgments in *Commission v Netherlands*, 235/85, EU:C:1987:161, paragraph 14; *Ayuntamiento de Sevilla*, C-202/90, EU:C:1991:332, paragraph 10; *FCE Bank*, C-210/04, EU:C:2006:196, paragraphs 35 to 37; and *Commission v Spain*, C-154/08, EU:C:2009:695, paragraphs 103 to 107).
- 34 In that regard, as the Advocate General has observed in points 40 and 41 of his Opinion, in order to assess whether that employer-employee relationship exists, it is necessary to check whether the person concerned performs his activities in his own name, on his own behalf and under his own responsibility, and whether he 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 between public authorities and operators who were not integrated into the public administration, as well as the fact that such operators acted on their own account and under their own responsibility, were free to arrange how they performed their work and themselves received the emoluments which made up their income (see, to that effect, judgments in *Commission v Netherlands*, 235/85, EU:C:1987:161, paragraph 14; *Heerma*, C-23/98, EU:C:2000:46, paragraph 18; and *van der Steen*, C-355/06, EU:C:2007:615, paragraphs 21 to 25).
- 35 In that context, it should be clarified, as stated in point 44 of the Advocate General's Opinion, that the same criteria for assessing the condition of independence in the pursuit of economic activities may apply to public and private persons.
- 36 The use of expressions which are not exactly the same in all the language versions of Article 9(1) of the VAT Directive does not call that finding into question. Both the expression 'independently' and the expression 'autonomously' express the need to assess the employer-employee relationship in the pursuit of an economic activity.
- 37 In the present case, it is apparent from the order for reference that the budgetary entities at issue in the main proceedings carry out the economic activities which are entrusted to them in the name and on behalf of the Municipality of Wrocław and that they do not bear liability for damage caused by those activities; that liability is borne solely by that municipality.
- 38 It is also apparent from the order for reference that those entities do not bear the economic risk associated with carrying out those activities since they do not own their own property, do not generate their own earnings and do not bear the costs of those activities; any earnings generated are assigned to the budget of the Municipality of Wrocław and expenses are directly attributed to the budget of that municipality.

- 39 Therefore, as the Supreme Administrative Court (extended composition) also found, a municipality, such as the Municipality of Wrocław, and its budgetary entities must be regarded, in a situation such as that at issue in the main proceedings, as one and the same taxable person within the meaning of Article 9(1) of the VAT Directive.
- 40 Lastly, in order to answer the questions from the referring court, it should be explained, first, that, since that finding relating to Article 9(1) of the VAT Directive concerns only the issue of the treatment of public or private persons as taxable persons for the purposes of VAT, it does not affect the guarantees provided for in Article 4(2) TEU.
- 41 Secondly, such a finding is also consistent with the principle of subsidiarity enshrined in Article 5(3) TEU. As is apparent from recital 65 in the preamble to the VAT Directive, the objective of that directive, namely to harmonise the laws of the Member States in order to establish a common system of VAT, can be better achieved at EU level.
- 42 In the light of all the foregoing considerations, the answer to the question referred for a preliminary ruling is that Article 9(1) of the VAT Directive must be interpreted as meaning that bodies governed by public law, such as the municipal budgetary entities at issue in the main proceedings, cannot be regarded as taxable persons for the purposes of VAT in so far as they do not satisfy the criterion of independence set out in that provision.

The limitation of the temporal effects of the present judgment

- 43 In the event that the Court should find that the municipal budgetary entities cannot be regarded as taxable persons for the purposes of VAT, the Polish Government, in its written observations, asked the Court to limit the temporal effects of its judgment.
- 44 It should be recalled in this regard that, according to settled case-law, the interpretation which, in the exercise of the jurisdiction conferred on it by Article 267 TFEU, the Court gives to a rule of EU law clarifies and defines the meaning and scope of that rule as it must be or ought to have been understood and applied from the date of its entry into force. It follows that the rule as thus interpreted may, and must, be applied by the courts to legal relationships which arose and were established before the judgment ruling on the request for interpretation, provided that in other respects the conditions for bringing a dispute relating to the application of that rule before the courts having jurisdiction are satisfied (judgment in *Balazs*, C-401/13 and C-432/13, EU:C:2015:26, paragraph 49 and the case-law cited).
- 45 It is only quite exceptionally that the Court may, in application of the general principle of legal certainty inherent in the EU legal order, be moved to restrict for any person concerned the opportunity of relying on a provision which it has interpreted with a view to calling into question legal relationships established in good faith. Two essential criteria must be fulfilled before such a limitation can be imposed, namely that those concerned should have acted in good faith and that there should be a risk of serious difficulties (judgment in *Balazs*, C-401/13 and C-432/13, EU:C:2015:26, paragraph 50 and the case-law cited).
- 46 In that regard, it is sufficient to note that the Polish Government has not established that there is a risk of serious difficulties. At the hearing, that government admitted that it was unable to assess the economic repercussions in question.
- 47 In the light of the foregoing, there is no need to limit the temporal effects of the present judgment.

Costs

- 48 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs

incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

Article 9(1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning that bodies governed by public law, such as the municipal budgetary entities at issue in the main proceedings, cannot be regarded as taxable persons for the purposes of value added tax in so far as they do not satisfy the criterion of independence set out in that provision.

[Signatures]

* Language of the case: Polish.