Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

9 July 2020*

(Reference for a preliminary ruling – Taxation – Common system of value added tax (VAT) – Directive 2006/112/EC – Point 4 of the first paragraph of Article 288 – Special scheme for small enterprises – Method of calculating annual turnover which serves as a reference for the application of the special scheme for small enterprises – Concept of 'incidental real estate transaction' – Letting of immovable property by a natural person who exercises several liberal professions)

In Case C-716/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Curtea de Apel Timişoara (Court of Appeal, Timişoara, Romania), made by decision of 1 November 2018, received at the Court on 14 November 2018, in the proceedings

CT

v

Administrația Județeană a Finanțelor Publice Caraş-Severin – Serviciul Inspecție Persoane Fizice,

Direcția Generală Regională a Finanțelor Publice Timişoara – Serviciul Soluționare Contestații 1,

THE COURT (Fifth Chamber),

composed of E. Regan, President of the Chamber, I. Jarukaitis, E. Juhász (Rapporteur), M. Ilešič and C. Lycourgos, Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– CT, by N. Şvidchi, lawyer,

* Language of the case: Romanian.

– the Romanian Government, initially by E. Gane, L. Lițu and O.-C. Ichim and by C.-R. Canțăr, acting as Agents, and subsequently by E. Gane, L. Lițu and O.-C. Ichim, acting as Agents,

– the European Commission, by A. Armenia and J. Jokubauskaitė, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 6 February 2020,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of point 4 of the first paragraph of Article 288 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 by Council Directive 2009/162/EU of 22 December 2009 (OJ 2010 L 10, p. 14) ('the VAT Directive').

2 The request has been made in proceedings between CT and the Administrația Județeană a Finanțelor Publice Caraș-Severin – Serviciul Inspecție Persoane Fizice (Provincial Authority for Public Finances, Caraș-Severin – Tax Inspection Department for Natural Persons, 'the AJFP Caraș-Severin') and the Direcția Generală Regională a Finanțelor Publice Timișoara – Serviciul Soluționare Contestații 1 (Regional Directorate-General of Public Finances, Timișoara – Department for the Settlement of Complaints 1) concerning the method of calculating his annual turnover for the purposes of applying, to him, the special scheme for small enterprises provided for in the VAT Directive.

Legal framework

EU law

3 Article 9 of the VAT Directive states:

'1. "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.

…'

4 Under Article 135(1)(l) and (2) of that directive:

'1. Member States shall exempt the following transactions:

…

(l) the leasing or letting of immovable property.

2. The following shall be excluded from the exemption provided for in point (l) of paragraph 1:

(a) the provision of accommodation, as defined in the laws of the Member States, in the hotel sector or in sectors with a similar function, including the provision of accommodation in holiday camps or on sites developed for use as camping sites;

(b) the letting of premises and sites for the parking of vehicles;

(c) the letting of permanently installed equipment and machinery;

(d) the hire of safes.

Member States may apply further exclusions to the scope of the exemption referred to in point (l) of paragraph 1.'

5 Article 174(2) of that directive provides as follows:

'By way of derogation from paragraph 1, the following amounts shall be excluded from the calculation of the deductible proportion:

(a) the amount of turnover attributable to supplies of capital goods used by the taxable person for the purposes of his business;

(b) the amount of turnover attributable to incidental real estate and financial transactions;

(c) the amount of turnover attributable to the transactions specified in points (b) to (g) of Article 135(1) in so far as those transactions are incidental.'

6 Under Title XII, 'Special Schemes', the VAT Directive contains Chapter 1, entitled 'Special scheme for small enterprises'. Section 2 of that chapter, entitled 'Exemptions or graduated relief', contains Articles 282 to 292 of that directive.

7 In accordance with Article 282 of that directive, the exemptions and graduated tax relief provided for in that section are to apply to the supply of goods and services by small enterprises.

8 Article 287 of the directive is worded as follows:

'Member States which acceded after 1 January 1978 may exempt taxable persons whose annual turnover is no higher than the equivalent in national currency of the following amounts at the conversion rate on the day of their accession:

…

(18) Romania: EUR 35 000;

…'

9 Article 288 of the VAT Directive provides:

'The turnover serving as a reference for the purposes of applying the arrangements provided for in this Section shall consist of the following amounts, exclusive of [value added tax (VAT)]:

(1) the value of supplies of goods and services, in so far as they are taxed;

(2) the value of transactions which are exempt, with deductibility of the VAT paid at the preceding stage, pursuant to Articles 110 or 111, Article 125(1), Article 127 or Article 128(1);

(3) the value of transactions which are exempt pursuant to Articles 146 to 149 and Articles 151, 152 or 153;

(4) the value of real estate transactions, financial transactions as referred to in points (b) to (g) of Article 135(1), and insurance services, unless those transactions are ancillary transactions.

However, disposals of the tangible or intangible capital assets of an enterprise shall not be taken into account for the purposes of calculating turnover.'

10 Under Article 1 of Council Implementing Decision 2012/181/EU of 26 March 2012 authorising Romania to introduce a special measure derogating from Article 287 of Directive 2006/112 (OJ 2012 L 92, p. 26), 'by way of derogation from point 18 of Article 287 of [the VAT] Directive …, Romania is authorised to exempt from VAT taxable persons whose annual turnover is no higher than the equivalent in national currency of EUR 65 000 at the conversion rate on the day of its accession to the European Union'.

Romanian law

11 Article 127 of Lege nr. 571 privind Codul fiscal (Law No 571 on the Tax Code) of 22 December 2003 (*Monitorul Oficial al României*, Part 1, No 927 of 23 December 2003), as amended by lege nr. 343 pentru modificarea şi completarea Legii nr. 571 privind Codul fiscal (Law No 343 amending and supplementing Law No 571 on the Tax Code) of 17 July 2006 (*Monitorul Oficial al României*, Part I, No 662 of 1 August 2006) ('the Tax Code'), entitled 'Taxable persons and economic activities', provides:

'1. "Taxable person" shall mean any person who, independently, carries out in any place an economic activity as referred to in paragraph 2, whatever the purpose or results of that activity.

2. For the purposes of this title, 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.'

12 Article 141 of that code, entitled 'Exemptions for domestic transactions', provides, in paragraph 2:

'The following transactions shall also be exempt from VAT:

…

(e) land leases, concessions, the letting and leasing of immovable property …'

13 Article 152(1) of that code, entitled 'Special exemption scheme for small enterprises', is worded as follows:

'A taxable person established in Romania, in accordance with Article 125a(2)(a), whose annual turnover, declared or achieved, is less than the upper limit of EUR 65 000, in the equivalent [Romanian lei (RON)] set in accordance with the exchange rate communicated by the Banca Națională a României [(National Bank of Romania)] on the date of accession and rounded to the nearest thousand, namely RON 220 000, may apply the tax exemption … in respect of the transactions referred to in Article 126(1), with the exception of intra-Community supplies of new means of transport, which are exempt under Article 143(2)(b).'

14 Article 152(2) of the code specifies the transactions the total amount of which, net of tax, serves as a reference for the purposes of applying the special scheme for small enterprises and lays down the condition that those transactions cannot be ancillary to the taxable person's principal activity.

15 Article 153 of the Tax Code, entitled 'Identification for VAT purposes', provides:

'1. A taxable person whose economic activity is carried out in Romania and who engages or intends to engage in an economic activity involving taxable transactions and/or VAT-exempt transactions with a right of deduction, shall be required to request registration for VAT purposes with the competent tax authority …, as follows: …

(b) if, during a calendar year, he reaches or exceeds the exemption threshold provided for in Article 152(1) within 10 days of the end of the month in which he reached or exceeded that threshold;

…'

16 The normele metodologice de aplicare a Legii nr. 571/2003 privind Codul fiscal (detailed rules for the application of Law No 571/2003 on the Tax Code), approved by hotărâre nr. 44 pentru aprobarea Normelor metodologice de aplicare a Legii nr. 571/2003 privind Codul fiscal (Government decision No 44 approving the rules for implementing Law No 571/2003 on the Tax Code) of 22 January 2004 (*Monitorul Oficial al României*, Part I, No 112 of 6 February 2004), as amended by hotărâre nr. 670 pentru modificarea şi completarea Normelor metodologice de aplicare a Legii nr. 571/2003 privind Codul fiscal, aprobate prin Hotărârea Guvernului nr. 44/2004 (Government decision No 670 amending and supplementing the rules for implementing Law No 571/2003 on the Tax Code, approved by Government decision No 44/2004) of 4 July 2012 (*Monitorul Oficial al României*, Part I, No 481 of 13 July 2012), provided, in point 47, paragraph 3:

'A transaction is ancillary to the taxable person's principal activity if the following cumulative conditions are met:

(a) performing the transaction requires limited technical resources in terms of equipment and staff;

(b) the transaction is not directly connected with the principal activity of the taxable person; and

(c) the value of the purchases made for the purposes of the transaction and the amount of the deductible tax relating to the transaction are insignificant.'

17 Point 61, paragraph 1 of those rules provided as follows in respect of Article 152 of the Tax Code:

'In accordance with Article 152(2) of the Tax Code, a transaction is ancillary to the taxable person's principal activity if the cumulative conditions laid down in point 47, paragraph 3 are met.'

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

18 The appellant in the main proceedings, a university lecturer, practices a number of professions independently, namely he is an accountant, a tax consultant, a practitioner in collective proceedings and a lawyer and, in addition, he receives an income as an author of articles and publications. In 2008, as a natural person, he obtained a tax registration number for 'accounting activities' which include accounting and tax consultancy.

19 The appellant in the main proceedings, who used his home address as the registered address for the majority of his activities, declared that he performed his profession as a practitioner in collective proceedings at the address of a building that he co-owns with another person, part of which is let to a commercial company of which he is a shareholder and director. That company, which is identified for VAT purposes, has its registered office in that building, where it carries out, inter alia, business consultancy and other management consultancy activities, accountancy and financial auditing, as well as tax consultancy. That company has declared its principal area of activity as: 'Business and other management consultancy activities'.

20 In 2016, the appellant in the main proceedings was the subject of a VAT tax inspection with regard to his economic activity as a natural person, following which the AJFP Caraș-Severin found that, during 2012, his turnover had exceeded RON 220 000 (approximately EUR 65 000), which at that time was the reference threshold for applying the special scheme for small enterprises in Romania. Accordingly, by a tax assessment notice, that tax authority charged to the appellant in the main proceedings the amount that he should have paid from the date on which he was required to identify himself for VAT purposes, namely 1 September 2012.

21 In order to determine whether the appellant in the main proceedings' annual turnover had exceeded that reference threshold in 2012, the AJFP Caraș-Severin took into account his income not only from the performance of his various liberal professions and his copyrights, but also from the letting of that property. That authority's calculation did not include the salary that the person concerned received in his capacity as a university lecturer or the income from his activity as a lawyer since this had already been subject to VAT in connection with the professional partnership of lawyers of which he was a partner.

22 In particular, after having found that, in 2012, of the total amount of the appellant in the main proceedings' income that was relevant for the purposes of applying the special scheme for small enterprises, 69% came from his activity as a practitioner in collective proceedings, 17% from the letting of the property which he co-owned and 14% from his activity as an accountant and tax consultant, the AJFP Caraș-Severin took the view that the main activity of the person concerned, during that year, was the activity as a practitioner in collective proceedings. That authority stated that the letting of the building could not be classified as an 'ancillary transaction' to that main

activity, for the purposes of Article 152(2) of the Tax Code, and therefore the income from that letting could not be excluded from the calculation of the turnover which serves as a reference for determining the application of the special scheme for small enterprises.

23 The appellant in the main proceedings lodged a complaint against that tax assessment notice and the tax inspection report by the AJFP Caraș-Severin. By decision of 22 August 2017, the Regional Directorate-General of Public Finances, Timișoara – Department for the Settlement of Complaints 1 rejected that complaint.

24 The appellant in the main proceedings lodged an administrative appeal against that decision. By judgment of 26 March 2018, the Tribunalul Timiș (Regional Court, Timiș, Romania) dismissed that administrative appeal.

25 The appellant in the main proceedings therefore lodged an appeal before the referring court, by which he claims that the letting of the immovable property which he co-owns is an ancillary transaction for the purposes of Article 152(2) of the Tax Code and the income deriving from it does not need to be included in calculation of turnover for the purposes of applying the special scheme for small enterprises. Taking the view that the resolution of the dispute before it required an interpretation of provisions of the VAT Directive, the Curtea de Apel Timișoara (Court of Appeal, Timișoara, Romania) decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

‘(1) In circumstances such as those here at issue, in which a natural person carries on an economic activity by practising several liberal professions and by letting out immovable property and thereby obtaining income of a continuous nature, do the provisions of Article 288 [first paragraph] point 4 of [the VAT] Directive … require the identification of a particular professional activity as being the principal activity in order to verify whether the letting can be classified as an ancillary transaction thereto and, if so, on the basis of what criteria is that principal activity to be identified, or must those provisions be interpreted as meaning that all of the professional activities by which the economic activity of that natural person is carried on constitute the “principal activity”?

(2) In the event that the immovable property let by a natural person to a third party is not intended and used for the performance of the remainder of his economic activity, so that it is not possible to establish any connection between that letting and the practice of the various professions of that person, do the provisions of Article 288 [first paragraph] point (4) of [the VAT] Directive … permit the classification of the letting as an “ancillary transaction”, with the consequence that it is excluded from the calculation of the turnover which serves as a reference for the purpose of applying the special exemption scheme for small undertakings?

(3) In the situation described in the second question, is it relevant to the classification of the letting transaction as “ancillary” that it is for the benefit of a third party – a legal person of which the natural person is a shareholder and director – established in the property let and carrying on professional activities of the same kind as those of the natural person in question?’

The questions referred for a preliminary ruling

26 By its questions, which should be examined together, the referring court asks, in essence, whether point 4 of the first paragraph of Article 288 of the VAT Directive must be interpreted as meaning that, with respect to a taxable person who is a natural person and whose economic activity consists of the exercise of several liberal professions and the letting of immovable property, that letting constitutes an 'ancillary transaction' under that provision for the purposes of applying the special scheme for small enterprises.

27 As a preliminary point, first, it should be pointed that, as an exception to the common system applicable under the VAT Directive, the special scheme for small enterprises laid down in Articles 281 to 294 of that directive must be interpreted strictly and be applied only to the extent necessary to achieve its objective (see, to that effect, judgment of 2 May 2019, *Jarmuškienė*, C-265/18, EU:C:2019:348, paragraph 27 and the case-law cited).

28 Secondly, in respect of the letting of immovable property, the Court has held that this is an economic activity that falls within the scope of the VAT Directive in so far as the letting transaction is done for the purpose of obtaining income therefrom on a continuing basis, in accordance with the second subparagraph of Article 9(1) of that directive (see, to that effect, judgment of 27 January 2000, *Heerma*, C-23/98, EU:C:2000:46, paragraph 19 and the case-law cited).

29 Thirdly, as the Advocate General noted in points 30 and 31 of her Opinion, the letting of immovable property may constitute a 'real estate transaction' under point 4 of the first paragraph of Article 288 of the VAT Directive only in so far as it is an exempt transaction, which it is for the referring court to ascertain having regard to Article 135(1)(l) and the final subparagraph of Article 135(2) of that directive.

30 In the light of those preliminary observations, it should be noted that, since point 4 of the first paragraph of Article 288 of the VAT Directive does not contain any reference to the law of the Member States, the concept of 'ancillary transactions' within the meaning of that provision is an autonomous concept of EU law which must be interpreted uniformly in the territory of the European Union, taking into account not only the wording of that provision, but also the context in which that provision is found and the objective it pursues (see, to that effect, judgment of 5 February 2020, *Staatssecretaris van Justitie en Veiligheid (Signing-on of seamen in the Port of Rotterdam)*, C-341/18, EU:C:2020:76, paragraph 40 and the case-law cited).

31 As regards the wording of point 4 of the first paragraph of Article 288 of the VAT Directive, it must be noted that it does not specify what is meant by 'ancillary transaction', and that concept is also not defined in any other provision of that directive.

32 With regard to the context of point 4 of the first paragraph of Article 288 of the VAT Directive, reference should be had to Article 174(2)(b) of that directive, contained in Chapter 2, entitled 'Proportional deduction', of Title X, entitled 'Deductions', of that directive, which states that the amount of turnover attributable to 'incidental real estate and financial transactions' is to be excluded from the calculation of the deductible proportion.

33 The latter provision corresponds, in essence, to Article 19(2) of 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), by which the EU legislature intended to exclude from the calculation of the proportion the turnover attributable to transactions of an unusual nature in relation to the normal activities of the taxable person concerned (see, to that effect, judgment of 6 March 2008, *Nordania Finans and BG Factoring*, C-98/07, EU:C:2008:144, paragraph 24).

34 In particular, for the purposes of interpreting the concept of 'incidental transactions' within the meaning of that provision, the Court has referred to the Explanatory Memorandum to the Proposal for a Sixth Council Directive on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment, presented by the Commission to the Council of the European Communities on 29 June 1973 (COM(73) 950 final) (*Bulletin of the European Communities*, Supplement 11/73, p. 20) ('the proposal for the Sixth Directive'). In the words of that memorandum 'the factors mentioned in [Article 19(2) of this proposal] must be excluded from the calculation of the proportion lest, being unrepresentative of the taxable person's business activity, they should deprive the amount of any real significance'. According to that memorandum, 'such is the case with sales of capital items and real estate and financial transactions which are only ancillary operations, that is to say are only of secondary importance in relation to the total turnover of the business'. The memorandum stipulates that 'these factors are only excluded if they are not part of the usual business activity of the taxable person' (judgment of 29 October 2009, *NCC Construction Danmark*, C-174/08, EU:C:2009:669, paragraph 30).

35 It should be observed that point 4 of the first paragraph of Article 288 of the VAT Directive responds to the same considerations. The provision corresponds to Article 25(2) of the proposal for a Sixth Directive, which became Article 24(4) of the Sixth Directive 77/388. According to the explanatory memorandum to the proposal for a Sixth Directive, '[that provision] lays down the method of determining turnover for the purposes of applying exemptions and graduated tax relief'. In accordance with that memorandum, 'it excludes unusual transactions which may make drastic changes in the turnover within one year' and 'it also disregards operations which, as in the case of the transfer of debts, do not indicate the actual size of the undertaking'.

36 Admittedly, it should be noted that some language versions of the VAT Directive, inter alia the Bulgarian, German, English, Croatian, Dutch and Slovenian versions, do not use identical terminology in Article 174(2) and point 4 of the first paragraph of Article 288 of that directive, the English version using 'incidental … transactions' and 'ancillary transactions'.

37 However, in the light of the considerations set out in paragraphs 34 and 35 of this judgment, it must be concluded that the concepts contained in those provisions, although used in different contexts, have the same subject matter.

38 Therefore, the concept of 'ancillary transactions' refers to certain transactions which are not part of the taxable person's usual business activity.

39 In the context of the special scheme at issue, the classification of a transaction as an 'ancillary transaction' of the taxable person does not require an element of that taxable person's economic activity to be identified as being the main activity, nor does is need to be connected to any other economic activity that that taxable person carries out. That expression must be regarded as an autonomous concept.

40 That interpretation of point 4 of the first paragraph of Article 288 of the VAT Directive is supported by the objective pursued by the special scheme for small enterprises. In that regard, the Court held that that scheme provides for administrative simplifications intended to support the creation, activities and competitiveness of small undertakings, and to retain a reasonable relationship between the administrative charges connected with fiscal supervision and the small amounts of tax to be reckoned with. Thus, that scheme is aimed at sparing small undertakings and the tax authorities from such an administrative burden (judgments of 26 October 2010, *Schmelz*, C-97/09, EU:C:2010:632, paragraphs 63 and 68, and of 2 May 2019, *Jarmuškienė*, C-265/18, EU:C:2019:348, paragraph 37).

41 It follows that, in order to ensure the attainment of the objective pursued by the special scheme for small enterprises, there is no need to impose such administrative burdens on account of transactions which are not part of the taxable person's usual business activity.

42 It should be noted that, in respect of the current provisions of Article 174(2) of the VAT Directive, the Court has held that an economic activity cannot be classified as 'incidental' if it constitutes the direct, permanent and necessary extension of the usual business activity of the enterprise concerned (see, to that effect, judgment of 29 October 2009, *NCC Construction Danmark*, C-174/08, EU:C:2009:669, paragraph 31).

43 In situations other than the one set out in the preceding paragraph, the decisive factor is whether or not the real estate transaction was carried out in the context of the taxable person's usual business activity, a factor which must be assessed by the tax authorities and, where appropriate, by the national courts.

44 Therefore, the tax authorities and the national courts must take into account the evidence submitted to them, in particular the kind of immovable property concerned, the origin of the finances used to purchase that property and its use.

45 As regards the situation at issue in the main proceedings, it is clear from the order for reference that, as the Advocate General noted in points 51 and 52 of her Opinion, first, the registered office for the appellant in the main proceedings' activity as a practitioner in collective proceedings is established at the address of the let property which he co-owns. Secondly, that property, which includes premises for office use, is let by the appellant in the main proceedings to a legal person of which he is a shareholder and director. Moreover, that legal person has its registered office in that building and carries out the same kind of activities as those carried out by the appellant in the main proceedings. It is for the referring court to assess whether those factors demonstrate that the letting in question is part of the taxable person's usual business activity.

46 It follows from all of the foregoing considerations that the answer to the questions referred is that point 4 of the first paragraph of Article 288 of the VAT Directive must be interpreted as meaning that, with respect to a taxable person who is a natural person and whose economic activity consists of the exercise of several liberal professions and the letting of immovable property, that letting does not constitute an 'ancillary transaction' under that provision where that transaction is carried out in the context of a usual business activity of the taxable person.

Costs

47 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 (Fifth Chamber) hereby rules:

Point 4 of the first paragraph of Article 288 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, as amended by Council Directive 2009/162/EU of 22 December 2009, must be interpreted as meaning that, with respect to a taxable person who is a natural person and whose economic activity consists of the exercise of several liberal professions and the letting of immovable property, that letting does not constitute an 'ancillary transaction' under that provision where that transaction is carried out in the context of a usual business activity of the taxable person.

[Signatures]