Up-1056/11-15
21 November 2013

DECISION

At a session held on 21 November 2013, in proceedings to decide upon the constitutional complaint of sole proprietor Peter Kezić, s. p., Ilirska Bistrica, represented by Bojana Ozimek, attorney in Ljubljana, the Constitutional Court

decided as follows:

Judgment of the Supreme Court No. X Ips 154/2009, dated 25 May 2011, is abrogated. The case is remanded to the Supreme Court for new adjudication.

REASONING

A.

1. The Administrative Court dismissed the applicant's claim against point II of the operative provisions of the decision of the Tax Administration Office Kranj, by which the administrative authority of first instance imposed on the complainant, for the accounting period from June 2003 until June 2004, the payment of a 20% value added tax, amounting to SIT 40,738,939.81, calculated from the tax basis in the amount of SIT 203,694,699.05. The tax administration of second instance dismissed his appeal. In the opinion of the Court, the construction of and the selling of a shopping mall on multiple plots of land, two of which remained in the property of the complainant as a natural person, constituted a taxable transaction of goods and services that the complainant carried out in the framework of his business operations and not a transaction that a natural person carried out in his private sphere. In the opinion of the Court, there cannot exist two separate tax regimes for the entire

complex of the shopping mall complex, even though the natural person did not transfer the two plots of land into the sphere of operations of the sole proprietor. The Supreme Court, which dismissed the complainant's revision, concurred with such positions.

2. The complainant alleges the violation of Articles 14, 22, 23, 25, 33, 67, 69, 74, and 147 of the Constitution. He claims that in the case at issue there was unequal treatment regarding the selling of the property of natural persons, as the selling of the complainant's property was taxed in its entirety, whereas other natural persons would not pay tax for such a sale. There was also unequal treatment in the determination of the value of the plots of land sold, as the tax authority determined the value by revaluing the purchase price and by comparing it to the value of other plots of land that the complainant had bought as a sole proprietor and invested in his company, whereby the investments in the two plots of land that he made as a natural person were not taken into consideration. With regard to other taxable persons, the value of assets is allegedly determined by the market price if they are invested in a company (Articles 475 through 478 of the Companies Act, Official Gazette RS Nos. 65/09 – official consolidated text, 33/11, 91/11, 32/12, 57/12, and 82/13 – CA-1). The applicant draws attention to Judgment of the Administrative Court No. U 2199/2000, dated 3 July 2003, from which it allegedly proceeds that it must be assessed whether the taxable person acquired equipment as a natural person or as a sole proprietor, whereby only what the taxable person determines as an asset of the company and enters into the register of fixed assets is deemed as one, whereby the use [of the asset] to carry out business is allegedly not the decisive circumstance. Also from Judgments of the Supreme Court No. I Up 538/2002, dated 15 March 2005, and I Up 369/2001, dated 23 May 2002, in which the Supreme Court allegedly adopted the position that the mere ownership of fixed assets serves as the basis for the write-off of the amortisation as an expenditure in the procedure for the assessment of income tax from business operations, it allegedly follows that there is no legal basis for the two plots of land to be deemed assets of the company. The complainant alleges that he referred to all three judgments in the revision, however the Supreme Court allegedly did not explain why in these cases the factual and legal situations are different than in his case. Consequently, the reasoning of the challenged judgment is inadequate and allegedly entails a departure by the Supreme Court from the established and uniform case law without substantiation. The complainant makes a similar allegation also with regard to the Judgment of the Court of Justice of the European Union in *Finanzamt Uelzen v. Dieter Armbrecht*, C-291/92, dated 4 October 1995, in which the Supreme Court also allegedly only stated that the

state of the facts was different. By deeming that the complainant's plots of land were the property of the company, the courts interfered with his right to private property protected by Article 33 of the Constitution. The complainant also refers to the Sixth Council Directive of 17 May 1977 on the harmonisation of the laws of the Member States relating to sales taxes – Common system of value added tax: uniform basis of assessment (77/388/EEC) (OJ L 145, 13 June 1977 – hereinafter referred to as the Sixth Directive), from which it allegedly clearly follows when a natural person is a taxable person with regard to occasional transactions. The complainant also alleges that it proposed that the Supreme Court stay proceedings and submit the case to the Court of Justice of the European Union on the basis of Article 234 of the Treaty establishing the European Community (consolidated text, UL C 325, 24 December 2002, and Official Gazette RS No. 27/04, MP, No. 7/04 – hereinafter referred to as the TEC), together with three questions on the interpretation of the Sixth Directive, however the Supreme Court did not grant the motion. Moreover, it failed to take a position at all on his motion, even though in conformity with the third paragraph of Article 234 of the TEC and Article 113a of the Courts Act (Official Gazette RS Nos. 94/07 – official consolidated text, 45/08, 96/09, 33/11, and 63/13 – CtA) it should have submitted the case to the Court of Justice of the European Union. Allegedly, Article 147 of the Constitution is violated, because there is allegedly no legal basis for determining that private assets are deemed to be assets of the company if the latter makes permanent or temporary use of them for its operations. Consequently, there is allegedly no legal basis for including the purchase money among the income from carrying out a business activity. Allegedly, not even point 4 of the second paragraph of Article 4 of the Value Added Tax Act (Official Gazette RS Nos. 25/05 – official consolidated text and 108/05 – hereinafter referred to as the VATA), to which the Supreme Court refers, is the legal basis, because also Articles 3 and 13 of that Act must be taken into consideration, from which it follows that the complainant as a natural person cannot have the status of a taxable person.

3. By Order No. Up-1056/11, dated 4 December 2012, the Constitutional Court accepted the constitutional complaint for consideration. In conformity with the first paragraph of Article 56 of the Constitutional Court Act (Official Gazette RS No. 64/07 – official consolidated text – hereinafter referred to as the CCA), the Constitutional Court notified the Supreme Court and the Ministry of Finance thereof.

B.

4. In the case at issue involving the calculation of value added tax, during the entire proceedings the applicant referred to the case law of the Court of Justice of the European Union, from which it follows, in his opinion, that in the case at issue he should not have been taxed for selling two plots of land that he had bought as a natural person. Moreover, in the revision he subordinately proposed that the Supreme Court stay the proceedings and submit the case to the Court of Justice of the European Union for a decision on the basis of the then valid Article 234 of the TEC (now Article 267 of the Treaty on the Functioning of the European Union, consolidated version, UL C 326, 26 October 2012 – hereinafter referred to as the TFEU). The Supreme Court dismissed the applicant's reference to the case law of the Court of Justice of the European Union as unfounded, as allegedly the factual circumstances were different, and did not expressly take a position on his motion to submit the case to the Court of Justice of the European Union. Consequently, the Constitutional Court assessed whether the alleged violations of human rights and fundamental freedoms in fact occurred.

5. Firstly, it is necessary to assess whether the case at issue concerning the calculation of value added tax is actually a case in which questions regarding the interpretation and application of European Union law arise, including the case law of the Court of Justice of the European Union and the obligation to submit the case to this Court for a preliminary ruling. As the Constitutional Court has already more extensively explained in its Order No. U-I-113/04, dated 27 February 2007 (Official Gazette RS No. 16/07 and OdlUS XVI, 16), the Republic of Slovenia transferred the exercise of part of its sovereign rights to the European Union, which means that it also transferred thereto the normative regulation of certain fields. The field of joint regulation also includes the field of so-called indirect taxation. Article 113 of the TFEU (previously Article 93 of the TEC) namely determines that the Council adopts provisions for harmonising the legislation with regard to sales taxes, excise duties, and other forms of indirect taxation in the scope necessary for establishing the internal market and its functioning and for preventing the distortion of competition. The Sixth Directive[1] was adopted on that legal basis, which the Republic of Slovenia transposed, in conformity with the requirements determined by the third paragraph of Article 288 of the TFEU (previously Article 249 of the TEC), into its legal order by the VATA,[2] which explicitly determines such in the first paragraph of Article 1. The fact that the regulation of the value added tax has been at least partially[3] transferred to the European Union has certain important consequences. Even though it is a field in which the conduct of Member States is not entirely determined by European

Union law, Member States cannot regulate this field by national regulations when the European Union regulates this field by its own legal act;[4] however, if European Union law does not regulate a certain question, Member States must, in conformity with the established case law of the Court of Justice of the European Union,[5] take into consideration the regulations of European Union law when exercising their competences.[6] Since what is at issue is a field of joint regulation, Member States must, in the framework of the common value added tax system, ensure that taxable persons respect their obligations and they have in this regard a certain freedom, especially with regard to the manner available [financial] resources are to be used.[7] However, this freedom of Member States is limited by the obligation to ensure sufficient levying of the Union's own funds and by the obligation to ensure that taxable persons are not treated differently either inside certain Member States or in all Member States.[8] The fact that the case at issue refers to a field that also belongs within the sphere of regulation of the European Union also entails that courts must interpret national regulations in light of European Union law and in conformity with its purpose (the principle of consistent interpretation).[9]

6. By joining the European Union, on the basis of the first paragraph of Article 3a of the Constitution the Republic of Slovenia transferred the exercise of part of its sovereign rights to the institutions of the European Union and exercises such, in the framework of the European Union and for the length of time of its existence, jointly in cooperation with other Member States. The third paragraph of Article 3a of the Constitution determines that legal acts and decisions adopted within international organisations to which Slovenia has transferred the exercise of part of its sovereign rights shall be applied in the Republic of Slovenia in accordance with the legal regulation of these organisations. This provision binds all authorities of the state, including national courts, to take into consideration European Union law when exercising their competences in accordance with the legal regulation of the European Union.[10] The Court of Justice of the European Union has exclusive jurisdiction to give preliminary rulings on questions concerning the interpretation of the Treaties and the validity and interpretation of acts of the institutions, bodies, offices, or agencies of the European Union (Article 267 of the TFEU). Its task is therefore to ensure uniform interpretation and application of (primary and secondary) European Union law and its decisions are binding on all national courts and all other authorities and [legal] subjects in Member States.[11] When in proceedings it is conducting a national court is faced with a question whose resolution falls within the exclusive jurisdiction of the Court of Justice of the European Union, it must not decide thereon unless the Court of Justice of the European Union has already answered it or other conditions

that allow the national court to adopt a decision are fulfilled.[12] If the national court adopts a position inconsistent with the above, such entails a violation of the right to judicial protection determined by the first paragraph of Article 23 of the Constitution.

7. The case at issue refers to the field of indirect taxes (value added tax), which is subject to joint regulation by Member States and the European Union. The complainant proposed that a preliminary question be submitted to the Court of Justice of the European Union with regard to the implementation of the Sixth Directive. The Supreme Court did not take a position with regard to the motion. Consequently, the question arises whether the complainant's right to judicial protection (the first paragraph of Article 23 of the Constitution) was thereby violated.

8. Respect for the first paragraph of Article 23 of the Constitution in relation to the third paragraph of Article 3a of the Constitution and the third paragraph of Article 267 of the TFEU presupposes that the Court of Justice of the European Union is a court in the sense of the first paragraph of Article 23 of the Constitution and that the Supreme Court was obliged, as a court in the sense of the third paragraph of Article 267 of the TFEU, to submit the case to the Court of Justice of the European Union, under the presumption that the question regarding the interpretation of European Union law is essential for the decision, with regard to which the case law of the Court of Justice of the European Union has not yet delivered an answer thereon. Consequently, the Constitutional Court first had to assess whether the mentioned conditions are fulfilled.

9. The Court of Justice of the European Union is a court in the sense of an independent, impartial court constituted by law as referred to in the first paragraph of Article 23 of the Constitution. With regard to extensive institutional provisions (especially Articles 13 and 19 of the Treaty on European Union, consolidated version, OJ C 326, 26 October 2012 – hereinafter referred to as the TEU; Articles 251 through 256 of the TFEU and Protocol (No. 3) on the Statute of the Court of Justice of the European Union), there cannot be any doubt that in terms of its characteristics, the Court of Justice of the European Union is a court in the sense of the first paragraph of Article 23 of the Constitution. Not even the fact that the procedure under Article 267 of the TFEU is an intermediary procedure[13] that the parties to original proceedings before the court of a Member State cannot initiate by themselves, nor the fact that the main purpose of such procedure is to (merely) interpret of European Union law and/or assess the validity of

secondary European Union law, can influence such characterisation. The answer to a question regarding the interpretation of the Treaties and/or the validity and interpretation of legal acts adopted on their basis is of essential importance for the adoption of the final decision in a single judicial dispute, a part of which is also a motion for a preliminary ruling. The right of an individual who is party to original proceedings [before the court of a Member State] to judicial protection under the first paragraph of Article 23 of the Constitution refers also to the duty of a court to submit the case to the Court of Justice of the European Union on the basis of Article 267 of the TFEU, regardless of the type of original judicial proceedings.

10. The third paragraph of Article 267 of the TFEU imposes on those courts or tribunals of a Member State against whose decision there is no judicial remedy under national law the duty to submit such question [to the Court of Justice of the European Union]. Both the terms “court or tribunal” and “judicial remedy” are terms of European Union law.[14] With regard to the terms “court or tribunal”, it has to be taken into consideration that before it qualifies an authority as a “court or tribunal” in the sense of Article 267 of the TFEU, the Court of Justice of the European Union considers all its elements, such as the lawful origin of the authority, its permanence, the obligatory nature of its judicial power, the adversarial nature of proceedings, its application of legal rules, and its independence.[15] By taking into consideration the mentioned criteria, there cannot be any doubt that the Supreme Court is a court in the sense of Article 267 of the TFEU, because it fulfils all criteria that the case law of the Court of Justice of the European Union determines as decisive. Furthermore, Article 127 of the Constitution determines that the Supreme Court is the highest court in the state and that it decides on ordinary and extraordinary legal remedies and performs other functions provided by law. European Union law must be taken into consideration also with regard to the interpretation of the term “legal remedy”. When defining a legal remedy in the sense of European Union law, it is not relevant whether the legal remedy is such that it must first be granted by the national court[16] and also whether the reasons due to which the legal remedy can be filed are limited (i.e. only due to legal questions).[17] Theory has provided two answers to the question of how “decisions against which there is no judicial remedy under national law” should be interpreted in national law. The first one is an abstract or institutional method, whereas the second one is a functional or concrete method.[18] Also the case law of the Court of Justice of the European Union approaches the latter.[19] The choice of the method is not decisive in the case at issue, as the result is the same whichever method is applied: The Supreme Court of the Republic of Slovenia is a Member State court against the decisions of which

there is no legal remedy under national law. The constitutional complaint as a special legal remedy for the protection of human rights is namely not a legal remedy in the sense of the third paragraph of Article 267 of the TFEU.[20] One consequence of a different position would namely be that the duty to submit the case [to the Court of Justice of the European Union] determined in the third paragraph of Article 267 of the TFEU would apply only to the constitutional courts of those states in which such constitutional complaints exist.

11. Since the Court of Justice of the European Union is a court in the sense of the first paragraph of Article 23 of the Constitution, this human right also guarantees that in the event a question of interpretation of European Union law and/or the validity of secondary European Union law arises in a dispute, it is the court that is competent under Article 267 of the TFEU to reply thereto that will reply thereto. However, such a constitutional guarantee does not entail that it is the task of the Constitutional Court to assess each mistake committed by courts with regard to questions related to jurisdiction. In proceedings to decide upon a constitutional complaint, the Constitutional Court only assesses whether the individual was ensured judicial protection before a court constituted by law, namely in such a manner that with regard to the transfer of the exercise of part of the sovereign rights of the Republic of Slovenia to the European Union (the third paragraph of Article 3a of the Constitution), also the separation of jurisdiction between the courts of the Republic of Slovenia as a Member State of the European Union and the Court of Justice of the European Union is taken into consideration (Article 267 of the TFEU).

12. The conditions under which Member State courts must submit a case to the Court of Justice of the European Union are determined by the third paragraph of Article 267 of the TFEU. The failure to comply with the duty to submit the case to the Court of Justice of the European Union must be consistent with the case law of the Court of Justice of the European Union established with regard to the third paragraph of Article 267 of the TFEU ([in accordance with] the third paragraph of Article 3a of the Constitution). In accordance with this case law, whenever the question of the *interpretation* of European Union law arises, courts must fulfil their duty to submit such question to the Court of Justice of the European Union, except if it is established 1) that the question is not relevant, whereby it is the national court that decides whether the question is relevant,[21] 2) that the point of European Union law in question has already been a subject of interpretation by the Court of Justice of the European Union[22], or 3) that the correct application of

European Union law is so obvious as to leave no space for any reasonable doubt.[23] Before the national court decides that the case at issue is such, it must be convinced that this is evident to the same degree also for the courts of other Member States and the Court of Justice of the European Union. Only if these conditions are fulfilled can national courts not submit the question to the Court of Justice of the European Union and decide thereon on their own responsibility.[24] Thereby, they must take into consideration the characteristics of European Union law and special problems that the interpretation thereof brings, including a comparison of all language versions of the text, respect for the special terminology of European Union law, and the positioning of the interpretation into the context of that law.[25] When what is at issue is a question of *the validity* of a legal act of the European Union, national courts cannot avoid submitting the case to the Court of Justice of the European Union because national courts do not have jurisdiction to establish that the legal acts of the European Union are invalid.[26]

13. In order for the Constitutional Court to be able to assess whether the individual was ensured judicial protection before a court constituted by law and whether the separation of jurisdiction determined by Article 267 of the TFEU was taken into consideration, there is the necessary precondition that the court [at issue] has adopted a sufficiently clear position with regard to the questions related to European Union law. This also includes reasoning explaining why, despite the party's motion to stay proceedings and to submit the case [to the Court of Justice of the European Union] in conformity with Article 267 of the TFEU, the court [at issue] decided, by taking into consideration the criteria stemming from the case law of the Court of Justice of the European Union, not to proceed in such manner. Already from the established constitutional case law it follows that a substantiated judicial decision constitutes an essential part of a fair trial, as protected by the right to the equal protection of rights determined by Article 22 of the Constitution, and that courts must, by a judicial decision, in a concrete manner, and with sufficient clarity determine the reasons on the basis of which they adopted their decision (Decision of the Constitutional Court No. Up-147/09, dated 23 September 2010, Official Gazette RS No. 83/10).[27] Even though it follows from the case law of the European Court of Human Rights that, [firstly], the Convention for the Protection of Human Rights and Fundamental Freedoms (Official Gazette RS No. 33/94, MP, No. 7/94 – hereinafter referred to as the ECHR) does not confer an absolute right to address questions of European Union law before the Court of Justice of the European Union,[28] because it is primarily national authorities, especially the courts, who must apply and interpret national law, even if the latter refers to or makes a reference to international law or

agreements, and [secondly], that it is more suitable that the judicial authorities of the European Union interpret and apply European Union law,[29] such does not entail that the right to address a question of European Union law before the Court of Justice of the European Union is not protected indirectly by the right to a fair trial determined by the first paragraph of Article 6 of the ECHR. There may be a violation [of that Article], if the case is not submitted to the Court of Justice of the European Union.[30] However, only when a national court adopts an arbitrary decision to not submit a case to the Court of Justice of the European Union does such entail a violation of Article 6 of the ECHR.[31] The arbitrariness of not submitting the case to the Court of Justice of the European Union, in conformity with the case law of the European Court of Human Rights, entails an omission of the duty to substantiate the decision[32] guaranteed by the first paragraph of Article 6 of the ECHR. With regard to the above, the task of the European Court of Human Rights is not to correct mistakes in the interpretation or application of the relevant provision of European Union law, but to ensure that the decision is appropriately substantiated.[33]

14. In proceedings in which a question of the application of European Union law arises, sufficient reasoning is essential not only due to the constitutional procedural guarantees ensured by the right to the equal protection of rights determined by Article 22 of the Constitution, but also because by omitting the reasoning or if the reasoning is inadequate, the conditions determined in European Union law under which a case must be submitted to the Court of Justice of the European Union for a preliminary ruling are disregarded. A consequence of the fact that the case is not submitted to the Court of Justice of the European Union is that a court not competent to answer questions pertaining to European Union law decides thereon. Whenever there exists a duty to submit a case [to the Court of Justice of the European Union], a consequence of its omission may be that the Member State is liable for damages due to the violation of European Union law,[34] whereby, on the other hand, not even proceedings against a Member State for a violation of European Union law under Article 258 of the TFEU are excluded.[35] If the reasoning is omitted or it is inadequate, also the Constitutional Court is unable to conduct an assessment of the decision from the viewpoint of the first paragraph of Article 23 of the Constitution. A court’s reasoning that refers to aspects of European Union law, including the dismissal of the party’s motion to submit the case to the Court of Justice of the European Union, must therefore be such as to enable an assessment of whether the conditions establishing the duty to submit [the case] determined by the third paragraph of Article 267 of the TFEU had been respected in a manner consistent with these

conditions.[36] These conditions are namely decisive for an assessment of which court is competent to interpret European Union law.

15. As follows from the reasoning of the judgment, especially from the fifteenth paragraph thereof, the Supreme Court obviously deemed that also European Union law is relevant for deciding on the matter, more concretely, the Sixth Directive. It thereby adopted the positions that the case law of the Court of Justice of the European Union to which the complainant had referred is not relevant in his case, because “the factual circumstances and conclusions of the Court of Justice of the European Union in these cases cannot be equated with the state of the facts in the case at issue” and that “the mentioned judgments must be interpreted with regard to the manner and type of use of ‘joint property’, which must be clearly separated between the private and business sphere”, and also that “the two disputed plots of land had been directly involved in carrying out a business activity of the applicant in revision proceedings and directly connected with the achieved profit and loss, regardless of the fact that the applicant in revision proceedings tried to achieve, by civil contracts, different business results and to lower his tax obligation.”

16. Therefore, if the case law of the Court of Justice of the European Union to which the complainant referred is not relevant, because in the opinion of the Supreme Court the state of the facts in the case at issue cannot be equated with the state of the facts in the cases decided by the Court of Justice of the European Union, such could entail for the case at issue that the Court of Justice of the European Union has not (yet) decided on the questions raised therein. Such would entail at the same time that by adopting the position that the disputed plots of land had been involved in carrying out a business activity, the Supreme Court formed a position regarding which it is not clear whether it is based on the positions adopted in the case law of the Court of Justice of the European Union (*acte éclairé*). If it is not, the Supreme Court should have submitted the case to the Court of Justice of the European Union for a preliminary ruling, because the relevant provision of European Union law, with regard to the questions raised in the case at issue and by taking into consideration the circumstances of this case, has not (yet) been a subject of interpretation by the Court of Justice of the European Union.[37] In such case, the failure to submit the question to the Court of Justice of the European Union entails that the Supreme Court decided on a question which, due to the transfer of the exercise of part of the sovereign rights [of the Republic of Slovenia] to the European Union, it cannot decide on by itself (the third paragraph of Article 3a of the Constitution and Article 267 of the TFEU). In the

absence of reasons of the Supreme Court that would substantiate a different decision, such position in itself entails a violation of the complainant's right to a court constituted by law determined by the first paragraph of Article 23 of the Constitution. However, the Supreme Court did not take a position with regard to the question of whether the correct application of European Union law is so obvious that there is no reasonable doubt about it (*acte clair*)[38] and that the case thus does not have to be submitted to the Court of Justice of the European Union to be decided on preliminarily. Consequently, in this part, the Constitutional Court is unable to carry out an assessment from the viewpoint of the first paragraph of Article 23 of the Constitution.

17. With regard to the established violation of the right determined by the first paragraph of Article 23 of the Constitution, the Constitutional Court abrogated the challenged judgment and remanded the case to the Supreme Court for new adjudication. In the new proceedings, the [Supreme] Court shall take into consideration the positions of the Constitutional Court in the present Decision. As the Constitutional Court abrogated the challenged judgment due to a violation of the right determined by the first paragraph of Article 23 of the Constitution, it did not assess the other alleged violations.

C.

18. The Constitutional Court adopted this Decision on the basis of the first paragraph of Article 59 of the CCA, composed of: Mag. Miroslav Mozetič, President, and Judges Dr. Mitja Deisinger, Dr. Dunja Jadek Pensa, Mag. Marta Klampfer, Dr. Etelka Korpič – Horvat, Dr. Ernest Petrič, Jasna Pogačar, Dr. Jadranka Sovdat, and Jan Zobec. The Decision was adopted unanimously.

Mag. Miroslav Mozetič
President

Notes:
[1] This field is now regulated by Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ L 347, 11 December 2006, with amendments).

[2] This Act was later replaced by the Value Added Tax Act (Official Gazette RS Nos. 13/11 – official consolidated text, 18/11, 78/11, 38/12, and 83/12 – VATA-1).
[3] According to the predominant standpoint, the field of the harmonisation of indirect taxes falls within the shared competence of the European Union and Member States. See, e.g., R. de la Feria, The EU VAT System and the Internal Market, IBFD, Amsterdam 2009, pp. 21–22.
[4] Judgment of the Court of Justice of the European Union in *The Queen v. Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd*, C-491/01, dated 10 December 2002.
[5] Its case law is extensive in this field; attention must be drawn to certain positions from this case law regarding the question of the application of different tax regimes with regard to the ownership that appears in the case at issue. It clearly follows therefrom that regardless of the fact whether under national law the principle *superficies solo cedit* is applicable, a distinction must be made between the taxation of plots of land that are the property of the taxable person as a natural person and the taxation of buildings that the taxable person built on these plots of land in the framework of carrying out its business operations (*cf.* in particular the Judgment in *Pieter de Jong v. Staatssecretaris van Financiën*, C-20/91, dated 6 May 1992, para. 19), and also that the taxable person has the right to choose whether they will include a particular item or asset in their business activity or not (see, e.g., the Judgments in *Finanzamt Uelzen*, para. 20; *Finanzamt Bergisch Gladbach v. HE*, C-25/03, dated 21 April 2005, para. 46; *Laszlo Bakcsi v. Finanzamt Fürstenfeldbruck*, C-415/98, dated 8 March 2001, paras. 24–34; and *Wolfgang Seeling v. Finanzamt Starnberg*, C-269/00, dated 8 May 2003, paras. 40 and 41). Furthermore, the question regarding the use of the item for business or private purposes can only be raised as a factual question that must be answered by a national court, if upon the acquisition of the item the taxable person was entitled to deduct the input value added tax (Judgment in *Bakcsi,* para. 31). Only if the answer is positive must the national court assess, by taking into consideration all the circumstances of the case, especially the nature of the matter and the time between the acquisition of the item and its use for the taxable person's business activity, whether the item was acquired with the intention to be used for business purposes (*ibidem*, para. 29, and the Judgment in *Hansgeorg Lennartz v. Finanzamt München III*, C-97/90, dated 11 July 1991, para. 21).
[6] See, e.g., the Judgments of the Court of Justice of the European Union in *Commission of the European Communities v. United Kingdom*, C-246/89, dated 4 October 1991; in *Petri Manninen*, C-319/02, dated 7 September 2004;

and in *Centro di Musicologia Walter Stauffer v. Finanzamt München für Körperschaften,* C-386/04, dated 14 September 2006.
[7] The Judgment of the Court of Justice of the European Union in the case *Commission of the European Communities v. Italian Republic*, C-132/06, dated 17 July 2008, para. 38.
[8] *Ibidem*.
[9] Such was the position of the Constitutional Court already in Decision No. Up-2012/08, dated 5 March 2009 (Official Gazette RS No. 22/09 and OdlUS XVIII, 65).
[10] *Cf.* Order of the Constitutional Court No. U-I-65/13, dated 26 September 2013.
[11] See, e.g., M. Ilešič, Vloga sodišča EU pri enotnosti razlage pravil o (trgovinskih, tržnih) znamkah, Pravna praksa, No. 12 (2010), p. 12.
[12] See the Judgment in *C.I.L.F.I.T.*, 283/81, dated 6 October 1982.
[13] A. Middeke in: H. - W. Rengeling, A. Middeke, and M. Gellermann, Handbuch des Rechtsschutzes in der Europäischen Union, 2nd edition, Verlag C. H. Beck, München 2003, p. 213; M. Pechstein, EU-Prozessrecht, 4th edition, Mohr Siebeck, Tübingen 2011, p. 369.
[14] This is also stated, e.g., in the Judgment of the Court of Justice of the European Union in *Cartesio Oktató és Szolgáltató bt*, C-210/06, dated 16 December 2008, para. 55.
[15] See, in particular, the Judgment of the Court of Justice of the European Union in *Standesamt Stadt Niebüll*, C-96/04, dated 27 April 2006, para. 12, and the case law mentioned therein.
[16] The Judgment of the Court of Justice of the European Union in *Criminal proceedings against Kenny Roland Lyckeskog*, C-99/00, dated 4 June 2002, para. 16.
[17] The Judgment in *Cartesio Oktató és Szolgáltató bt*, paras. 75–78.
[18] A. Middeke in: H. - W. Rengeling, A. Middeke, and M. Gellermann, *op. cit.*, pp. 237–239; U. Ehrricke in: R. Streinz (Ed.), EUV/AEUV, Vertrag über die Europäische Union und Vertrag über die Arbeitsweise der Europäischen Union, Verlag C. H. Beck, München 2012, pp. 2324–2325; M. Holoubek, Vorlageberechtigung und Vorlageverpflichtung, in: M. Holoubek and M. Lang, Das EuGH-Verfahren in Steuersachen, Linde Verlag, Vienna 2000, p. 56.
[19] See, e.g., The Judgment in *Criminal Proceedings against Kenny Roland Lyckeskog,* paras. 15 and 16.
[20] As stated also by U. Ehrricke in: R. Streinz (Ed.), *op. cit.*, p. 2325; C. Gaitanides in: H. von den Groeben and J. Schwarze (Ed.), Kommentar zum Vertrag über die Europäische Union und zur Gründung der Europäischen Gemeinschaft (Volume 4), 6th edition, Nomos Verlagsgesellschaft, Baden-Baden 2004, p. 543; J. Schwarze in: J. Schwarze (Ed.), EU-Kommentar, 2nd

edition, Nomos Verlagsgesellschaft, Baden-Baden 2009, p. 1820; M. Holoubek, *op. cit.*, p. 57; A. Middeke in: H. - W. Rengeling, A. Middeke, and M. Gellermann, *op. cit.*, p. 238; M. Pechstein, *op. cit.*, p. 412.

[21] See, in particular, the Judgments of the Court of Justice of the European Union in *C.I.L.F.I.T.*, para. 10; and in *Mecanarte – Metalúrgica da Lagoa Ld.ª v. Chefe do Serviço da Conferência Final da Alfândega do Porto*, C-348/89, dated 27 June 1991, para. 47.

[22] Judgments of the Court of Justice of the European Union in the joined cases *Da Costa en Shaake NV and others v. Netherlands Inland Revenue Administration*, 28–30/62, dated 27 March 1963; and in *C.I.L.F.I.T.*, para. 14.

[23] See the Judgments in *C.I.L.F.I.T.*, para. 21, in *Intermodal Transports BV v. Staatssecretaris van Financiën*, C-495/03, dated 15 September 2005, para. 33, and *Gaston Schul Douane-expediteur BV v. Minister van Landbouw, Natuur en Voedselkwaliteit*, C-461/03, dated 6 December 2005, para. 16.

[24] The Judgment of the Court of Justice of the European Union in *C.I.L.F.I.T.*, para. 16.

[25] *Ibidem*, paras. 18–20.

[26] The Judgments in *Foto-Frost v. Hauptzollamt Lübeck-Ost*, 314/85, dated 22 October 1987 and in the case *Gaston Schul Douane-expediteur BV*, paras. 17–19.

[27] The Constitutional Court has already adopted the position that the fact that the Supreme Court failed to take a position on the allegations of an inconsistency of a statutory regulation with a European Union directive and on the motion that a preliminary question be submitted to the Court of Justice of the European Union entailed a violation of Article 22 of the Constitution (Decision of the Constitutional Court No. Up-958/09, U-I-199/09, dated 15 April 2010, Official Gazette RS No. 37/10).

[28] The Judgments of the European Court of Human Rights in *Société Divagsa v. Spain*, dated 12 May 1993*; André Desmots v. France,* dated 23 March 1999; *Schweighofer and others v. Austria,* dated 24 August 1999; *Peter Moosbrugger v. Austria*, dated 25 January 2000; *mutatis mutandis Coëme and others v. Belgium,* dated 22 June 2000; *Canela Santiago v. Spain,* dated 4 October 2001; *Bakker v. Austria,* dated 13 June 2002; *Pedersen and Pedersen v. Denmark,* dated 12 June 2003; *John v. Germany,* dated 13 February 2007; *Herma v. Germany,* dated 8 December 2009; and *Wallihauser v. Austria,* dated 20 June 2013.

[29] The Judgments of the European Court of Human Rights in *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland,* dated 30 June 2005, and *Herma v. Germany.*

[30] See, in particular, the Judgment of the European Court of Human Rights in *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland,* para.

147. See also M. Schröder, Die Vorlagepflicht zum EuGH aus europarechtlicher und nationaler Perspective, Europarecht, No. 6 (2011), p. 824.

[31] The Judgments of the European Court of Human Rights in *Société Divagsa v. Spain*; *Peter Moosbrugger v. Austria*; *Coëme and others v. Belgium*; *Canela Santiago v. Spain*; *Pedersen and Pedersen v. Denmark*; *John v. Germany*; *Herma v. Germany*.

[32] The Judgments of the European Court of Human Rights in *Higgins and others v. France,* dated 19 February 1998, and *Predil Anstalt S. A. v. Italy,* dated 8 June 1999.

[33] The Judgment of the European Court of Human Rights in *Ullens de Schooten and Rezabek v. Belgium,* dated 20 September 2011.

[34] The Judgments in *Gerhard Köbler v. Republic of Austria*, C-224/01, dated 30 September 2003, and in *Traghetti del Mediterraneo SpA v. Italian Republic*, C-173/03, dated 13 June 2006. See also J. Kokott, C. Sobotta, Die Pflicht zur Vorlage an den Europäischen Gerichtshof und die Folgen ihrer Verletzung, Neue Juristische Wochenschrift, No. 13 (2006), pp. 637–639; C. Calliess, Der EuGH als gesetzlicher Richter im Sinne des Grundgesetzes, Auf dem Weg zu einer kohärenten Kontrolle der unionrechtlichen Vorlagepflicht?, Neue Juristische Wochenschrift, No. 27 (2013), p. 1909.

[35] The Judgment in *Commission v. Kingdom of Spain*, C-154/08, dated 12 November 2009, paras. 124–126. See also M. López Escudero, Case Note on Case C-154/08, Commission v. Spain, Common Market Law Review, No. 2 (2011), pp. 227–242. *Cf*. also the Judgments in *Commission v. Italian Republic*, C-129/00, dated 9 December 2003, paras. 29 and 32; in *Commission v. Greece*, C-156/04, dated 7 June 2007, para. 52; and in *Commission v. Federal Republic of Germany*, C-441/02, dated 27 April 2006, paras. 49, 50, and 99; as well as J. Kokott, C. Sobotta, *op. cit.*, pp. 640–641; and M. Pechstein, *op. cit.*, pp. 416–418.

[36] *Cf*. also Decisions of the Federal Constitutional Court of Germany No. 1 BvR 1036/99, dated 9 January 2001; No. 2 BvR 264/06, dated 14 July 2006; No. 1 BvR 2722/06, dated 20 February 2008; and No. 1 BvR 230/09, dated 25 February 2010.

[37] *Cf*. the Judgment in *C.I.L.F.I.T.*, para. 14.

[38] See, in particular, the Judgments in *C.I.L.F.I.T.*, para. 21; *Intermodal Transports BV*, para. 33; and *Gaston Schul Douane-expediteur BV*, para. 16.