



Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

13 June 2019*

(Request for a preliminary ruling — Value added tax (VAT) — Directive 2006/112/EC — Articles 9 and 10 — Taxable person — Economic activity carried out ‘independently’ — Definition — Activity as a member of the Supervisory Board of a foundation)

In Case C-420/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Gerechtshof 's-Hertogenbosch (Court of Appeal, 's-Hertogenbosch, Netherlands), made by decision of 21 June 2018, received at the Court on 26 June 2018, in the proceedings

IO

v

Inspecteur van de rijksbelastingdienst,

THE COURT (Second Chamber),

composed of A. Arabadjiev, President of the Chamber, T. von Danwitz, C. Vajda, P.G. Xuereb and A. Kumin (Rapporteur), Judges,

Advocate General: M. Szpunar,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- IO, by J.L. Delleman,
- the Netherlands Government, by M. Bulterman and J.M. Hoogveld, acting as Agents,
- the Swedish Government, by A. Falk, C. Meyer-Seitz, H. Shev, J. Lundberg and H. Eklinder, acting as Agents,
- the European Commission, by J. Jokubauskaitė and P. Vanden Heede, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

* Language of the case: Dutch.

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Articles 9 and 10 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 This request was made in the course of proceedings between IO and the Inspecteur van de rijksbelastingdienst (Inspector at the National Tax Office, Netherlands) concerning the liability to value added tax (VAT) of the person concerned in his capacity as a member of the Supervisory Board of a foundation.

Legal context

EU law

- 3 Under Article 9(1) of the VAT Directive:

“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 Article 10 of that directive provides:

‘The condition in Article 9(1) that the economic activity be conducted “independently” shall exclude employed and other persons from VAT in so far as they are bound to an employer by a contract of employment or by any other legal ties creating the relationship of employer and employee as regards working conditions, remuneration and the employer’s liability.’

Netherlands law

- 5 Article 7 of the Wet op de omzetbelasting 1968 (Law of 1968 on Turnover Tax) provides:

‘1. Entrepreneur shall mean any person who, independently, operates a business.

2. For the purposes of this Law, business shall also mean:

(a) professional activity;

...’

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

- 6 IO is a member of the Supervisory Board of a foundation whose main activity is to offer accommodation on a long-term basis to persons in need.

- 7 The articles of association of that foundation stipulate that that Supervisory Board is composed of a minimum of 5 and a maximum of 10 members who are appointed for a term of office of four years. A person who has concluded an employment contract with the foundation cannot be a member of the Supervisory Board. The members of that Supervisory Board may be suspended or removed only on account of negligence in the performance of their duties or on other serious grounds, by decision of the Supervisory Board itself, adopted by a three-quarters majority of the votes cast consisting of at least three quarters of its members, excluding the member or members challenged.
- 8 The powers of the Supervisory Board of that foundation include, in particular, the appointment, suspension and removal of members of the governing body, determining their working conditions, the suspension of enforcement of that body's decisions, offering advice to that body, approving the annual accounts, the appointment, suspension and removal of members of the Supervisory Board and determining the fixed remuneration of those members.
- 9 Although the foundation concerned is represented judicially and extra judicially by its governing body, it is represented jointly, in the event of a conflict of interest between the governing body or a member thereof and that foundation, by the President and one or more members of the Supervisory Board. Moreover, if there is a failure of all of the members of the governing body, the Supervisory Board of the foundation will manage it until a new governing body is appointed.
- 10 With regard to the tasks of the Supervisory Board, Article 18 of the articles of association of the foundation concerned provide:
 - '1. The Supervisory Board has the task of monitoring the governing body's strategy and the general course of business within the foundation and the undertaking related to it. The members of the Supervisory Board shall perform their duties without being given a mandate from the person who proposed them and independently of the special interests involved in the undertaking. It shall provide advice to the governing body. In the performance of their duties, the members of the Supervisory Board shall focus on the interests of the foundation and the undertaking related to it.
 2. The Supervisory Board is not obliged to justify its actions before the governing body.
 3. The Supervisory Board shall be held accountable for its external actions by reporting on its activities in the annual report.
 4. The Supervisory Board shall determine its working arrangements in a regulation which cannot contain provisions which are unlawful or contrary to these articles of association.'
- 11 For his activities as a member of the Supervisory Board of the foundation concerned, IO receives a gross remuneration of EUR 14 912 per year which is subject to a wage-based levy. That remuneration was determined by that Supervisory Board on the basis of the rules laid down in the *Wet Normering Bezoldiging topfunctionarissen publieke en semipublieke sector* (Law on the standardisation of the remuneration of senior officials in the public and semi-public sector) and is not dependent on the participation of the person concerned in meetings or the hours actually worked.
- 12 IO is also employed as a local civil servant. However, his role as a member of that Supervisory Board in no way concerns the municipality which employs him and therefore there is no question of the existence of possible conflicts of interest.
- 13 Until 1 January 2013, IO was considered not to be liable for VAT in respect of his activity as a member of the Supervisory Board of that foundation by an approval decision of the *Staatssecretaris van Financiën* (Secretary of State for Finance, Netherlands) of 5 October 2006. However, that decision has been withdrawn.

- 14 On 8 July 2014, in connection with the performance of his role as a member of that Supervisory Board, IO submitted a VAT return declaring that he owed EUR 782 for the period from 1 April to 30 June 2014, which he paid. By a letter dated 9 July 2014, however, he lodged a complaint against that tax, which was rejected by a decision of the tax authority. The action brought by IO against that decision was dismissed as unfounded by a judgment of the Rechtbank Zeeland-West-Brabant (Zeeland-West-Brabant District Court, Netherlands).
- 15 IO appealed against that judgment before the Gerechtshof 's-Hertogenbosch (Court of Appeal, 's-Hertogenbosch, Netherlands). That court states that the parties to the proceedings brought before it are in dispute as to whether IO must, on account of his activity as a member of the Supervisory Board concerned, be classified as an 'entrepreneur' within the meaning of Article 7 of Law of 1968 on Turnover Tax and a 'taxable person' in accordance with Articles 9 and 10 of the VAT Directive. In that regard, it is not in dispute that the person concerned, as a member of that Supervisory Board, participates continually in the economy and, consequently, carries out an economic activity. Those parties disagree, however, as to whether that activity is carried out independently.
- 16 According to the Gerechtshof 's-Hertogenbosch (Court of Appeal, 's-Hertogenbosch), the following factors, inter alia, support the view that IO does not independently carry out an economic activity:
- the members of the Supervisory Board of the foundation concerned are appointed, suspended and removed by the Supervisory Board;
 - that Supervisory Board determines the fixed remuneration of its members and that remuneration is not dependent on their participation in meetings or hours actually worked; and
 - a member of that Supervisory Board cannot exercise individually the powers conferred on that board and therefore that member does not act in his own name, on his own behalf and under his own responsibility, but on behalf of and under the responsibility of that Supervisory Board.
- 17 By contrast, according to that Court, the following factors, inter alia, support the view that the economic activity is carried out independently:
- a person who has concluded an employment contract with the foundation concerned cannot be a member of the Supervisory Board;
 - although that Supervisory Board appoints its members, the appointment leads to a contract for the provision of services being concluded between the member concerned and that foundation, since only that foundation, as a legal person, may conclude a contract of that kind;
 - upon the conclusion of that contract, that foundation cannot freely deviate from the terms of employment and remuneration laid down by its Supervisory Board, nor does it bear the responsibilities of an ordinary employer; and
 - the members of the Supervisory Board of the foundation concerned are independent in that board and must act critically in relation to other members of that board and the governing body of that foundation.
- 18 That court concludes that a member of the Supervisory Board of that foundation is in a subordinate position in relation to that Supervisory Board with regard to his employment and remuneration conditions even if, otherwise, there is no relationship of employer and employee between that member and that Supervisory Board or between that member and the foundation concerned. The referring court is therefore inclined to take the view that, in the present case, the economic activity at issue in the main proceedings is not carried out independently and that, consequently, IO cannot be regarded as a 'taxable person'.

- 19 However, since it has doubts as to the interpretation of the VAT Directive, the *Gerechtshof 's-Hertogenbosch* (Court of Appeal, 's-Hertogenbosch) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Does a member of the Supervisory Board of a foundation, who is in a subordinate position in regard to that board for his employment and remuneration conditions, but who is otherwise not in a subordinate position in regard to the Supervisory Board or the foundation, carry out his economic activities independently within the meaning of Article 9 and Article 10 of [the VAT] Directive?'

The question referred for a preliminary ruling

- 20 By its question, the referring court asks, in essence, whether Articles 9 and 10 of the VAT Directive must be interpreted as meaning that a member of a Supervisory Board of a foundation, such as the applicant in the main proceedings, carries out an economic activity independently, within the meaning of those provisions and must, consequently, be regarded as a taxable person for VAT purposes.
- 21 In order to answer that question, it should be recalled that taxable person is to mean any person who, independently, carries out one of the economic activities referred to in the second subparagraph of Article 9(1) of the VAT Directive, and in particular any activity supplying a service. The terms used in that provision give to the notion of 'taxable person' a broad definition focused on independence in the pursuit of an economic activity to the effect that all persons who, in an objective manner, satisfy the criteria set out in that provision, must be regarded as being taxable persons for the purposes of VAT (judgment of 12 October 2016, *Nigl and Others*, C-340/15, EU:C:2016:764, paragraph 27 and the case-law cited).
- 22 In that regard, Article 10 of the VAT Directive stipulates that the condition that the economic activity must be carried out independently excludes employed and other persons from the tax in so far as they are bound to an employer by a contract of employment or by any other legal ties creating the relationship of employer and employee as regards working conditions, remuneration and the employer's liability.
- 23 Therefore it is necessary to examine whether an activity as a member of the Supervisory Board of a foundation, as carried out by the applicant in the main proceedings, must be classified as 'economic' and then, if necessary, whether that activity is carried out 'independently'.

Whether the activity is 'economic' in nature

- 24 In the present case, the parties to the main proceedings have not disputed that an activity such as that at issue must be classified as 'economic' since it is permanent and is carried out in return for remuneration which is received by the person carrying out the activity (judgment of 13 June 2018, *Polfarmex*, C-421/17, EU:C:2018:432, paragraph 38 and the case-law cited).
- 25 To carry out his activities as a member of the Supervisory Board of the foundation concerned, the applicant in the main proceedings receives a gross remuneration of EUR 14 912 per year. In that regard, the fact that that remuneration is determined not on the basis of individualised services but at a flat rate and annually is irrelevant (see, to that effect, judgment of 22 February 2018, *Nagyszénás Településszolgáltatási Nonprofit Kft.*, C-182/17, EU:C:2018:91, paragraph 37 and the case-law cited).
- 26 Moreover, since that remuneration has been determined in the light of the rules laid down in the Law on the standardisation of the remuneration of senior officials in the public and semi-public sector, the circumstances in which the applicant in the main proceedings performs the service in question

correspond to those in which that type of service is usually performed (see, to that effect, judgment of 12 May 2016, *Geemente Borsele and Staatssecretaris van Financiën*, C-520/14, EU:C:2016:334, paragraphs 29 and 30).

- 27 Furthermore, as is clear from the articles of association of the foundation concerned, the members of the Supervisory Board of that foundation are appointed for a term of office of four years and, in view of that duration, it must be considered that that remuneration is received on a continuing basis (see, to that effect, judgment of 2 June 2016, *Lajvér*, C-263/15, EU:C:2016:392, paragraph 33).
- 28 However, the position taken by the Swedish Government cannot be upheld. According to that government, the fact that a member of the Supervisory Board performs only one or a few terms of office is not sufficient, in itself, to conclude that an activity has been carried out for the purpose of obtaining income therefrom on a continuing basis. The Swedish Government considers, in that regard, that the person concerned must take active steps in order to generate revenue in the form of remuneration for services supplied and, therefore, that the activity must be carried out commercially.
- 29 Although it is true that the Court has held, with regard to the tax treatment of the sale of land included in private assets, that the mere exercise of the right of ownership by its holder cannot, in itself, be regarded as constituting an economic activity, but that is not the case where the party concerned takes active steps to market property (see, to that effect, judgments of 15 September 2011, *Ślaby and Others*, C-180/10 and C-181/10, EU:C:2011:589, paragraphs 36 to 39, and of 9 July 2015, *Trgovina Prizma*, C-331/14, EU:C:2015:456, paragraphs 23 and 24, and, with regard to active steps in forestry management, judgment of 19 July 2012, *Rēdlihs*, C-263/11, EU:C:2012:497, paragraph 36), it should be noted that not only is that case-law specific to the tax treatment of the sale of land included in private assets, but that, in any event, it cannot be inferred from it that the fact that such steps are taken is a condition for an activity to be able to be regarded as being carried out for the purpose of obtaining income therefrom on a continuing basis and may therefore be able to be classified as ‘economic’.
- 30 Accordingly, the economic nature of an activity as a member of the Supervisory Board of a foundation, such as that at issue in the main proceedings, cannot be called into question by the fact that that member performs only one term of office since that activity is permanent and is carried out in return for remuneration.
- 31 Moreover, in so far as the Swedish Government also submits, in that context, that the aim of the activity consisting in the performance of one or a few terms of office as a member of a Supervisory Board is not to sell the provision of services on a permanent basis, it should be recalled that, according to the settled case-law of the Court, the term ‘economic activity’ is objective in character, in the sense that the activity is considered per se and without regard to its purpose or results (judgment of 5 July 2018, *Marle Participations*, C-320/17, EU:C:2018:537, paragraph 22 and the case-law cited).

Whether the activity is carried out independently

- 32 As to the question whether an activity such as that at issue in the main proceedings must be regarded as being carried out independently, it must be assessed, first, whether a person such as the applicant in the main proceedings is excluded from taxation, under Article 10 of the VAT Directive, as he is an employee or any other person who is bound to his employer by a contract of employment or by any other legal ties creating the relationship of employer and employee as regards working conditions, remuneration and the employer’s liability.
- 33 In that regard, it should be pointed out, in the first place, that, in the present case, the applicant in the main proceedings cannot be regarded as an employee. While it is true that his remuneration is, according to the referring court, subject to a ‘wage-based’ levy, that court states that, in the context of

the case in the main proceedings, a legal fiction has resulted in the relationship between a member of the Supervisory Board of a legal person and that legal person being classified as an ‘employment’ relationship since, as he is a member of that board, the criteria for an employment relationship have not been met.

- 34 In the second place, according to the referring court, the applicant in the main proceedings carries out his activity not on the basis of a contract of employment but on the basis of a contract for the provision of services.
- 35 As regards, in the third place, the examination of any other legal ties creating the relationship of employer and employee as regards working conditions, remuneration and the employer’s liability, it must be concluded that there is no relationship of employer and employee as regards working conditions, since the members of a Supervisory Board of that kind are not bound by instructions from the governing body of the foundation concerned, in particular where they stipulate how they should perform their role. Thus, the members of that Supervisory Board are expected to monitor independently the governing body’s strategy and the general course of business of that foundation, since that supervisory function is incompatible with an employer-employee relationship.
- 36 Moreover, as noted in the request for a preliminary ruling, although the Supervisory Board establishes its working arrangements in a regulation, that board does not seem to be able to impose on its members rules on how they exercise their mandate individually. According to the request for a preliminary ruling, the members of that Supervisory Board are independent within that board and must act critically in relation to its other members.
- 37 In the absence of a relationship of employer and employee as regards working conditions, the members of a Supervisory Board of that kind are not bound by any other legal ties creating the relationship of employer and employee, within the meaning of Article 10 of the VAT Directive. Consequently, secondly, the question whether an activity such as that at issue in the main proceedings must be regarded as being carried out independently must be assessed in the light of Article 9 of that directive.
- 38 In that regard, it is apparent from the case-law of the Court on Article 9 of the VAT Directive that, in order to establish whether a person independently carries out an economic activity, it is necessary to ascertain whether there is an employer-employee relationship in the pursuit of that activity (see, to that effect, judgment of 29 September 2015, *Gmina Wrocław*, C-276/14, EU:C:2015:635, paragraphs 33 and 36 and the case-law cited).
- 39 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, as well as the fact that person concerned acts on his own account and under his own responsibility, is free to arrange how he performs his work and himself receives the emoluments which make up his income (judgment of 29 September 2015, *Gmina Wrocław*, C-276/14, EU:C:2015:635, paragraph 34 and the case-law cited).
- 40 As noted in paragraphs 35 and 36 of this judgment, the position of a member of the Supervisory Board of a foundation, such as the applicant in the main proceedings, is characterised by the absence of any employer-employee relationship between the governing body of that foundation and that Supervisory Board with regard to how the member of that Supervisory Board performs the role.
- 41 That said, according to the referring court, in the performance of his duties as a member of the Supervisory Board of the foundation concerned, the applicant in the main proceedings does not act in his own name, on his own behalf or under his own responsibility. As is clear from the articles of

association of that foundation, the activity as a member of the Supervisory Board includes, in some cases, representing the foundation legally, which entails the power to bind that foundation legally. Moreover, the referring court states that the members of that Supervisory Board cannot exercise individually the powers conferred on that board and that they act on behalf of and under the responsibility of that board. It therefore appears that the members of the Supervisory Board of the foundation concerned do not individually bear the liability arising from actions taken by that board in connection with the legal representation of that foundation, or the liability for any damage caused to third parties in the performance of their duties and that, accordingly, they do not act under their own responsibility (see, by analogy, judgment of 25 July 1991, *Ayuntamiento de Sevilla*, C-202/90, EU:C:1991:332, paragraph 15).

- 42 Furthermore, the position of a member of a Supervisory Board, such as the applicant in the main proceedings, unlike that of an entrepreneur, is characterised by the absence of any economic risk arising from the activity carried out. According to the referring court, that member receives a fixed remuneration which is not dependent on his participation in meetings or hours actually worked. Thus, unlike an entrepreneur, he does not have a significant influence over his revenue or his expenditure (see, *a contrario*, judgment of 12 November 2009, *Commission v Spain*, C-154/08, not published, EU:C:2009:695, paragraph 107 and the case-law cited). In addition, it appears that negligence on the part of the member of that Supervisory Board, in the performance of his duties, is not likely to have a direct effect on that member's remuneration, since, in accordance with the articles of association of the foundation concerned, such negligence may lead to the removal of that member only after a specific procedure has been followed.
- 43 A person who does not bear an economic risk of that kind cannot be considered to carry out an economic activity independently, within the meaning of Article 9 of the VAT Directive (see, in that regard, judgments of 23 March 2006, *FCE Bank*, C-210/04, EU:C:2006:196, paragraphs 35 to 37; of 18 October 2007, *van der Steen*, C-355/06, EU:C:2007:615, paragraphs 24 to 26; and of 24 January 2019, *Morgan Stanley & Co International*, C-165/17, EU:C:2019:58, paragraph 35 and the case-law cited).
- 44 In the light of all the foregoing consideration, the answer to the question referred must be that Articles 9 and 10 of the VAT Directive must be interpreted as meaning that a member of the Supervisory Board of a foundation, such as the applicant in the main proceedings, who, although he is not bound to the governing body of that foundation by any employer-employee relationship or to the Supervisory Board of that foundation by such a relationship in respect of the performance of his role as a member of that board, does not act in his own name, on his own behalf or under his own responsibility, but on behalf of and under the responsibility of that Supervisory Board and does not bear the economic risk arising from his activities, since he receives a fixed remuneration which is not dependent on his participation in meetings or hours actually worked, does not carry out an economic activity independently.

Costs

- 45 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 (Second Chamber) hereby rules:

Articles 9 and 10 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning that a member of the Supervisory Board of a foundation, such as the applicant in the main proceedings, who, although he is not bound to the governing body of that foundation by any employer-employee relationship or to the Supervisory

Board of that foundation by such a relationship in respect of the performance of his role as a member of that board, does not act in his own name, on his own behalf or under his own responsibility, but on behalf of and under the responsibility of that Supervisory Board and does not bear the economic risk arising from his activities, since he receives a fixed remuneration which is not dependent on his participation in meetings or hours actually worked, does not carry out an economic activity independently.

[Signatures]