JUDGMENT OF THE COURT (Eighth Chamber)

26 September 2013 (*)

(VAT – Directive 2006/112/EC – Articles 2(1)(c), 26, 62 and 63 – Chargeable event – Reciprocal supplies of services – Transactions for consideration – Basis of assessment for a transaction in the event of consideration in the form of goods or services – Assignment by a natural person to a company of the right to use and to let to third parties immoveable property in exchange for that company's services to improve and furnish the property)

In Case C?283/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Administrativen sad Varna (Bulgaria), made by decision of 29 May 2012, received at the Court on 6 June 2012, in the proceedings

Serebryannay vek EOOD

v

Direktor na Direktsia 'Obzhalvane i upravlenie na izpalnenieto' – Varna pri Tsentralno upravlenie na Natsionalna agentsia za prihodite,

THE COURT (Eighth Chamber),

composed of E. Jaraši?nas (Rapporteur), President of the Chamber, C. Toader and C.G. Fernlund, Judges,

Advocate General: Y. Bot,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Bulgarian Government, by E. Petranova and Y. Atanasov, acting as Agents,

– the European Commission, by C. Soulay and R. Lyal, acting as Agents,

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

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 2(1)(c), 26, 62 and 63 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1) ('the VAT Directive').

2 The request has been made in proceedings between Serebryannay vek EOOD ('Serebryannay vek') and the Direktor na Direktsia 'Obzhalvane i upravlenie na izpalnenieto' –

Varna pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite (Director of the Varna ‘Appeals and Administration of Enforcement’ Directorate at the Central Administration of the National Revenue Agency) (‘the Direktor’) concerning a tax adjustment notice requiring Serebryannay vek to pay value added tax (‘VAT’) in respect of the month of July 2010.

Legal context

European Union law

3 Article 2(1) of the VAT Directive provides:

‘The following transactions shall be subject to VAT:

…

(c) the supply of services for consideration within the territory of a Member State by a taxable person acting as such;

…’.

4 Article 26(1) of the VAT Directive provides:

‘Each of the following transactions shall be treated as a supply of services for consideration:

(a) the use of goods forming part of the assets of a business for the private use of a taxable person or of his staff or, more generally, for purposes other than those of his business, where the VAT on such goods was wholly or partly deductible;

(b) the supply of services carried out free of charge by a taxable person for his private use or for that of his staff or, more generally, for purposes other than those of his business.’

5 Article 62 of the VAT Directive provides:

‘For the purposes of this Directive:

(1) “chargeable event” shall mean the occurrence by virtue of which the legal conditions necessary for VAT to become chargeable are fulfilled;

(2) VAT shall become “chargeable” when the tax authority becomes entitled under the law, at a given moment, to claim the tax from the person liable to pay, even though the time of payment may be deferred.’

6 Article 63 of the VAT Directive provides that ‘[t]he chargeable event shall occur and VAT shall become chargeable when the goods or the services are supplied.’

7 Under Article 65 of the VAT Directive, ‘[w]here a payment is to be made on account before the goods or services are supplied, VAT shall become chargeable on receipt of the payment and on the amount received.’

8 Article 73 of the VAT Directive provides:

‘In respect of the supply of goods or services, other than as referred to in Articles 74 to 77, the taxable amount shall include everything which constitutes consideration obtained or to be obtained by the supplier, in return for the supply, from the customer or a third party, including subsidies directly linked to the price of the supply.’

9 Article 75 of the VAT Directive provides:

‘In respect of the supply of services, as referred to in Article 26, where goods forming part of the assets of a business are used for private purposes or services are carried out free of charge, the taxable amount shall be the full cost to the taxable person of providing the services.’

10 Article 80(1) of the VAT Directive provides that, in order to prevent tax evasion or avoidance, Member States may, in the cases listed therein, take measures to ensure that, in respect of the supply of goods or services involving family or other close personal ties, management, ownership, membership, financial or legal ties as defined by the Member State, the taxable amount is to be the open market value of the transaction.

Bulgarian law

11 Article 2(1) of the Law on value added tax (Zakon za danak varhu dobavenata stoynost, DV No 63 of 4 August 2006), in the version applicable to the case in the main proceedings (‘the ZDDS’), provides that any supply of services for consideration is to be subject to VAT.

12 Article 9 of the ZDDS provides:

‘(1) A supply of services shall be any performance of a service.

(2) The following shall also be regarded as a supply of services:

…

4. the supply of services by a holder/user for the repair and/or improvement of a leased asset or an asset the use of which has been assigned in some other way.

(3) The following shall also be deemed to be supplies of services for consideration:

1. the supply services for the personal needs of a taxable natural person, owner, employees or third parties provided that, in the course of performance, use is made of an item in the manufacture, importation or acquisition of which input tax has been wholly or partially deducted;

2. the supply of a service free of charge, for the personal needs of a taxable natural person, owner, employees or third parties.

(4) Paragraph 3 shall not apply to:

…

2. the supply of a service free of charge by a holder/user for repair of a leased asset or an asset the use of which has been assigned in some other way in cases where the asset has been leased or use thereof assigned to the holder/user and has actually been in continuous use for a period of no less than three years;

3. the supply of a service free of charge by a licensee for improvement of an asset the use of which has been assigned where this is a condition and/or obligation of the licensing agreement;

…’

13 Article 25 of the ZDDS provides:

‘(1) “Chargeable event” within the meaning of this law shall be the supply of goods or services carried out by persons taxable under this law…

(2) The chargeable event shall occur on the date on which ownership of the goods is transferred or the service supplied.

(3) Except for the cases under paragraph 2, the chargeable event shall occur on:

…

6. the date of the actual return of the asset in a repaired and/or improved condition on the expiry of the contract or on its use coming to an end in cases where a service has been supplied by a holder/user free of charge for repair and/or improvement of a leased asset or an asset the use of which has been assigned in some other way where the conditions under Article 9(4)(2) and (3) are not fulfilled.

…

(6) At the time when the chargeable event occurs in accordance with paragraphs 2, 3 and 4:

1. the tax on taxable transactions under this law shall fall due and the registered person shall be obliged to charge it.

…’

14 Article 26 of the ZDDS provides:

‘…

(2) The taxable amount, in leva and stotinki and exclusive of the tax provided for under this Law, shall be determined on the basis of everything that forms part of the consideration received by the supplier of the goods or services from the recipient of the goods or services or from another person in connection with the transaction or which is owed to him by the recipient of the goods or services or by another person. Payments of interest and penalty clauses of a compensatory nature shall not be regarded as consideration for a transaction.

…

(7) If the consideration consists wholly or partially of goods or services (payment is made wholly or partially in goods or services), the taxable amount shall be the open market value of the goods or services supplied, calculated at the time when the VAT became payable.’

15 Article 27(3) of the ZDDS provides:

‘…

(3) The taxable amount for the following supplies shall be the open market value:

1. supplies between associated persons;

…

3. supplies free of charge for the purposes of Article 9(2)(4).’

16 Article 130 of the ZDDS provides:

‘(1) Where there is a supply the consideration for which is (wholly or partially) expressed as goods or services, it shall be assumed that there are two supplies in a relationship of reciprocity, each supplier being regarded as the seller of what he provides and as the purchaser of what he receives.

(2) The chargeable event for VAT purposes in respect of the supplies referred to in paragraph 1 shall occur pursuant to the general provisions of the law.

(3) The supply referred to in paragraph 1, the chargeable event for which occurs at an earlier date, shall be deemed to constitute payment in advance (in whole or in part) for the second supply.’

17 Paragraph 1(8) of the Additional Provisions of the ZDDS provides that a supply is ‘free of charge’ if no consideration is given for it or if the value of the supply manifoldly exceeds that of the consideration given.

18 Article 51 of the Law on corporate income tax (Zakon za korporativnoto i podohodno oblagane) provides:

‘(1) Intangible fixed assets for tax purposes shall be:

1. those acquired non-monetary resources which:

(?) have no physical substance;

(b) are used for a period longer than 12 months;

(c) have a limited useful life;

(d) have a value that either equals or exceeds the lower of the following:

(??) the minimum value of the fixed assets, as established according to the accounting policy of the taxable person;

(bb) BGN 700;

…

3. amounts charged as a result of business transactions leading to an increase in the economic benefit from leased assets or assets the use of which has been assigned in some other way; these amounts do not constitute tangible fixed assets for tax purposes.

…’

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

19 Serebryannay vek is a one-person limited liability undertaking governed by Bulgarian law belonging to Mr Bodzuliak, who is also the director thereof. According to the register of companies, the purpose of that undertaking is, inter alia, the letting of property, tourism and the hotel business.

20 In June 2009, Mr Bodzuliak bought, in a personal capacity, an apartment in an apartment hotel in Varna. He also purchased a second apartment in the same city. Those apartments are declared to be co-owned by Mr Bodzuliak and his wife ('the owners').

21 On 8 April 2009, Mr Bodzuliak, in his own name, concluded two contracts of identical content with Serebryannay vek, under which he granted that undertaking a 'right *in rem* to use' the shells of his immovable property, and in particular the two apartments in question, for a period of five years, with the possibility of extension. It was envisaged that Serebryannay vek would let those apartments to third parties.

22 Under those contracts, Serebryannay vek does not have to pay rent to the owners during the term of the contracts. By contrast, it undertook to carry out in its own name, at its expense and according to its own assessment, fitting-out and assembly work in order to complete the apartments and put them into service for the purposes of use, inter alia the purchase and provision of floors, furniture, decoration and bathroom installations. It is envisaged that, at the end of those contracts, the owners will recover the apartments concerned with the fixtures to be found there.

23 The tax revenue authorities carried out an inspection on 21 October 2010 and issued a tax adjustment notice in respect of the month of July 2010. They took the view that Serebryannay vek had supplied services to the owners free of charge and that the taxable amount of that supply corresponded to the value of the expenditure incurred by that company for the purposes of that supply.

24 Serebryannay vek lodged an administrative objection to that notice with the Direktor. By decision of 10 June 2011, the Direktor annulled that notice and referred the matter back to the tax revenue authorities for reassessment. He took the view, in essence, that there had been an exchange of services because the apartments concerned had been let to Serebryannay vek as remuneration for its services of fitting them out and furnishing them. Having regard to that interpretation, the Direktor found, on the basis of Article 26(7) of the ZDDS, that the taxable amount of the services of fitting out and furnishing those apartments was the open market value of those services and had to be determined in the course of a reassessment.

25 The tax revenue authorities therefore carried out a second inspection and found that there had been an exchange of services, namely fitting?out and furnishing services on the part of Serebryannay vek and a letting service on the part of the owners, for the purposes of Article 130 of the ZDDS, on the grounds that Mr Bodzuliak co-owns the apartments in question with his wife, that he is the sole owner of the capital in Serebryannay vek and that no rent was agreed on.

26 The tax revenue authorities took the view that the date of the approval for use of the hotel in which the first apartment referred to in paragraph 20 of the present judgment is situated, namely 29 June 2010, was the date on which the fitting-out and furnishing services were rendered. As regards the second apartment referred to in that paragraph, the date of the final acceptance certificate, namely 30 June 2010, was found to be the date on which those services were supplied.

27 Having regard to those dates, the tax revenue authorities found that Serebryannay vek should have issued, by 5 July 2010 at the latest, an invoice relating to the fitting-out and furnishing

services which it had rendered.

28 As the transactions were carried out between associated persons, it was found that the taxable amount of the services provided by Serebryannay vek should be the open market value of those goods and services. The overall value of the two apartments in question was, at the time of an expert's report, determined to be 558 000 Bulgarian leva (BGN). On that basis, the tax revenue authorities, on 14 December 2011, issued a new tax adjustment notice stating that Serebryannay vek was, in respect of the month of July 2010, liable for a VAT debt of BGN 111 600 together with default interest in the amount of BGN 6 341.55.

29 Serebryannay vek lodged an administrative objection to that notice with the Direktor who, by decision of 12 March 2012, dismissed that objection. It brought an action against that decision before the national court. In support of that action, that company submits that there was no exchange of services, but that it provided a supply of services free of charge for the purposes of Article 9(2)(4) of the ZDDS. It takes the view that the chargeable event in respect of the VAT on that supply will occur on the date of the actual return of the asset in an improved condition on the expiry of the contract or on its use coming to an end, in accordance with Article 25(3)(6) of the ZDDS.

30 In the alternative, Serebryannay vek submits that the VAT should have been levied in respect of the month of June 2010, that is to say for the period during which the services in question are deemed to have been rendered, and not in respect of the month of July 2010. That company also takes the view that the taxable amount should have been the value of the service received and not that of the services rendered.

31 Furthermore, according to Serebryannay vek, the Bulgarian legislation is incompatible with Articles 2(1)(c) and 26 of the VAT Directive on the ground that only transactions for consideration may be subject to tax.

32 The national court takes the view that, in order to dispose of the case before it, it is for it to ascertain whether there has been an exchange of supplies of services and, if so, which are the applicable rules for the purpose of determining the taxable amount of the two supplies. By contrast, if what is involved is not an exchange, the national court wonders whether the services provided by Serebryannay vek constitute a taxable supply and, in that case, at what time the chargeable event in respect of the VAT on those services occurred and how to determine the taxable amount of that supply.

33 The national court is of the opinion that the tax revenue authorities erred in categorising the making available of the apartments in question by the owners to Serebryannay vek as a let. A let is a transaction for consideration, which, according to that court, is not the case in the main proceedings because the contracts at issue expressly provide that no rent is payable. Consequently, what is involved is a transaction free of charge which is a loan for use. To regard the services provided by Serebryannay vek as equivalent to the payment of rent would, for that court, be contrary to the intention of the parties.

34 The national court, taking the view that Serebryannay vek acquired an intangible fixed asset as consideration for the expenditure which it incurred in improving the apartments in question, wonders whether the acquisition of such an asset may be regarded as payment for the services of improvement. If that is so, what is in issue is, according to that court, a transaction for consideration in respect of which the determination of the date of the chargeable event and the taxable amount for VAT purposes does not present any difficulty. If that is not so, what is in issue is a supply of services free of charge which, in the circumstances of the present case, may not be treated in the same way as a supply for consideration because that supply has been carried out for

the purposes of Serebryannay vek's business activities. However, the national court has doubts as regards the compatibility with Articles 2(1)(c), 26, 62 and 63 of the VAT Directive of the national provisions relating inter alia to whether such supplies carried out free of charge are taxable, the taxable amount in respect of those supplies and the time at which the chargeable event in respect of those supplies occurs.

35 In those circumstances, the Administrativen sad Varna (Bulgaria) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Can Article 2(1)(c) of [the VAT] be interpreted as meaning that the acquisition of a fixed intangible asset in exchange for assumption of the costs involved in improving a leased asset or an asset the use of which has been assigned in some other way constitutes payment for the service of making the improvement, regardless of the fact that, under the contract, the owner of the asset is not required to pay any remuneration?

(2) Do Article 2(1)(c) and Article 26 of [the VAT] Directive preclude a national provision under which the supply of a service carried out free of charge and consisting in the improvement of a leased asset or of an asset the use of which has been assigned in some other way is in all circumstances to be regarded as taxable? Is it of significance for the purpose of answering this question, in circumstances such as those in the main proceedings, that:

– the party supplying the service carried out free of charge has exercised the right to deduct VAT on the goods and services used in making the improvements, a right which had not yet been refused him by a tax adjustment notice which had entered into force;

– at the time of the inspection, the company had not yet begun to use the building for taxable supplies, but the contracts had not yet expired?

(3) Do Articles 62 and 63 of [the VAT] Directive preclude a national provision according to which the chargeable event for the purposes of the tax on the supply does not occur at the time when the service is supplied (in this particular case, when improvements are made) but at the time when the asset which has been improved is actually returned, on the expiry of the contract or on the termination of its use?

(4) If the first and second questions are answered in the negative: under which provision of Title VII of Directive 2006/112 is the taxable amount for purposes of value added tax to be determined in the case where a transaction carried out free of charge does not come within the scope of Article 26 of the directive?'

Consideration of the questions referred

The first question

36 By its first question, the national court asks, in essence, whether Article 2(1)(c) of the VAT Directive is to be interpreted as meaning that a supply of services to fit out and furnish an apartment must be regarded as having been carried out for consideration if, under a contract concluded with the owner of that apartment, the supplier of those services, first, undertakes to carry out that supply of services at its own expense and, secondly, obtains the right to have that apartment at its disposal in order to use it for its business activities during the term of that contract, without being required to pay rent, whereas the owner recovers the improved apartment at the end of that contract.

37 In that regard, it should be borne in mind, first, that the possibility of classifying a transaction

as a transaction for consideration requires only that there be a direct link between the supply of goods or the provision of services and the consideration actually received by the taxable person (see Case C?412/03 *Hotel Scandic Gåsabäck* [2005] ECR I?743, paragraph 22, and Case C?285/10 *Campsa Estaciones de Servicio* [2011] ECR I?5059, paragraph 25). Such a direct link is established if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient (see, inter alia, Case C?37/08 *RCI Europe* [2009] ECR I?7533, paragraph 24, and Case C?520/10 *Lebara* [2012] ECR, paragraph 27).

38 Secondly, the consideration for a supply of goods may consist of a supply of services, and so constitute the taxable amount within the meaning of Article 73 of the VAT Directive, provided, however, that there is a direct link between the supply of goods and the supply of services and that the value of those services can be expressed in monetary terms (Case C?380/99 *Bertelsmann* [2001] ECR I?5163, paragraph 17 and the case-law cited). The same is true if a supply of services is performed in exchange for another supply of services, as long as the same conditions are satisfied.

39 Thirdly, barter contracts, under which the consideration is by definition in kind, and transactions for which the consideration is in money are, economically and commercially speaking, two identical situations (see, to that effect, Case C?330/95 *Goldsmiths* [1997] ECR I?3801, paragraphs 23 to 25, and Case C?549/11 *Orfey* [2012] ECR, paragraph 35).

40 It follows that if, under a contract concluded with the owner of an apartment, a supplier of services to fit out and furnish that apartment, first, undertakes to carry out that supply of services at its own expense and, secondly, obtains the right to have that apartment at its disposal in order to use it for its business activities during the term of that contract, without being required to pay rent, whereas the owner recovers the improved apartment at the end of that contract, that supply of fitting-out and furnishing services falls within the category of a supply of services for consideration within the meaning of Article 2(1)(c) of the VAT Directive. There is thus a direct link between that supply and the consideration actually received in exchange by the supplier thereof, namely the right to use the apartment in question for its business activities during the term of the contract.

41 The fact that the supply of services in question will benefit the owner of the apartment at issue only after the contract has expired does not alter anything in that regard, seeing that, as from the conclusion of that contract, the parties to such a bilateral contract undertake to perform reciprocal services for each other (see, by analogy, Case C?174/00 *Kennemer Golf* [2002] ECR I?3293, paragraph 40, and *RCI Europe*, paragraphs 31 and 33).

42 In the light of the foregoing, the answer to the first question is that Article 2(1)(c) of the VAT Directive must be interpreted as meaning that a supply of services to fit out and furnish an apartment must be regarded as having been carried out for consideration if, under a contract concluded with the owner of that apartment, the supplier of those services, first, undertakes to carry out that supply of services at its own expense and, secondly, obtains the right to have that apartment at its disposal in order to use it for its business activities during the term of that contract, without being required to pay rent, whereas the owner recovers the improved apartment at the end of that contract.

The other questions

43 It is apparent from the wording of the second to fourth questions that they require a reply only if it is apparent from the answer given to the first question that a supply of services such as

that described in that first question does not fall within the category of a supply of services for consideration within the meaning of Article 2(1)(c) of the VAT Directive.

44 In view of the foregoing, there is no need to reply to the second to fourth questions.

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 (Eighth Chamber) hereby rules:

Article 2(1)(c) 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 supply of services to fit out and furnish an apartment must be regarded as having been carried out for consideration if, under a contract concluded with the owner of that apartment, the supplier of those services, first, undertakes to carry out that supply of services at its own expense and, secondly, obtains the right to have that apartment at its disposal in order to use it for its business activities during the term of that contract, without being required to pay rent, whereas the owner recovers the improved apartment at the end of that contract.

[Signatures]

* Language of the case: Bulgarian.