

JUDGMENT OF THE COURT (Seventh Chamber)

5 October 2016 (*)

(Reference for a preliminary ruling — Taxation — Value added tax — Directive 2006/112/EC — Article 2(1)(a) — Article 9(1) — Article 14(1) — Articles 73, 80 and 273 — Principles of fiscal neutrality and proportionality — Tax evasion — Anomalies in accounting — Concealment of supplies and revenue — Determination of the taxable amount)

In Case C-576/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Administrativen sad Veliko Tarnovo (Administrative Court, Veliko Tarnovo, Bulgaria), made by decision of 28 October 2015, received at the Court on 9 November 2015, in the proceedings

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Direktor na Direksia ‘Obzhalvane i danachno-osiguritelna praktika’ Veliko Tarnovo pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite,

THE COURT (Seventh Chamber),

composed of C. Toader, President of the Chamber, A. Rosas and E. Jarašiūnas (Rapporteur), Judges,

Advocate General: N. Wahl,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- the Direktor na Direksia ‘Obzhalvane i danachno-osiguritelna praktika’ Veliko Tarnovo pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite, by A. Manov, acting as Agent,
- the Bulgarian Government, by D. Drambozova and E. Petranova, acting as Agents,
- the European Commission, by L. Lozano Palacios and S. Petrova, 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 Article 2(1)(a), Article 9(1), Article 14(1) and Articles 73, 80 and 273 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 Maya Marinova ET ('MM') and the Direktor na Direktsia 'Obzhalvane i danachno-osiguritelna praktika' Veliko Tarnovo pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite (Director of the 'Appeals and Tax and Social Security Office' Directorate for Veliko Tarnovo, attached to the central office of the National Revenue Agency, Bulgaria, 'the Director') concerning a tax adjustment notice in respect of an additional assessment to value added tax (VAT) and late payment interest.

Legal context

EU law

3 Recital 59 of the VAT directive is worded as follows:

'Member States should be able, within certain limits and subject to certain conditions, to introduce, or to continue to apply, special measures derogating from this Directive in order to simplify the levying of tax or to prevent certain forms of tax evasion or avoidance.'

4 Article 2(1) of that directive provides:

'The following transactions shall be subject to VAT:

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

...'

5 Under Article 9(1) of the 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.'

6 Article 14(1) of the directive provides:

"Supply of goods" shall mean the transfer of the right to dispose of tangible property as owner.'

7 Article 73 of the VAT directive is worded as follows:

'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.'

8 Under Article 80(1) of that directive:

'In order to prevent tax evasion or avoidance, Member States may in any of the ... cases [listed hereunder] 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.'

9 Article 242 of the directive provides that 'every taxable person shall keep accounts in sufficient detail for VAT to be applied and its application checked by the tax authorities'.

10 Under Article 244 of the directive, 'every taxable person shall ensure that copies of the invoices issued by himself, or by his customer or, in his name and on his behalf, by a third party, and all the invoices which he has received, are stored.'

11 Article 250(1) of the VAT directive provides:

'Every taxable person shall submit a VAT return setting out all the information needed to calculate the tax that has become chargeable and the deductions to be made including, in so far as is necessary for the establishment of the basis of assessment, the total value of the transactions relating to such tax and deductions and the value of any exempt transactions.'

12 The first paragraph of Article 273 of that directive provides:

'Member States may impose other obligations which they deem necessary to ensure the correct collection of VAT and to prevent evasion, subject to the requirement of equal treatment as between domestic transactions and transactions carried out between Member States by taxable persons and provided that such obligations do not, in trade between Member States, give rise to formalities connected with the crossing of frontiers.'

Bulgarian law

13 In the version applicable to the facts in the main proceedings, Article 3(1) of the *Zakon za danak varhu dobavenata stoynost* (Law on value added tax, DV No 63 of 4 August 2006, 'the ZDDS') provides that any person who, independently, carries out any economic activity, whatever the purpose or results of that activity, is a taxable person.

14 Under Article 6(1) of the ZDDS, a transfer of the right of ownership or any other real right is, for the purposes of that law, a 'supply of goods'.

15 Under Article 25(1) of the ZDDS, a supply of goods or services by a taxable person within the meaning of the ZDDS, intra-Community acquisition or import of goods within the meaning of Article 16 of the ZDDS is, for the purposes of that law, a 'chargeable event'.

16 Under Article 26(1) of the ZDDS, the taxable amount, for the purposes of that law, is the amount on which VAT is charged or is not charged, according to whether the supply is taxable or exempt. Article 26(2) provides that the taxable amount is to be determined on the basis of any consideration fixed in Bulgarian leva (BGN) or cents, less tax due under the ZDDS, which has been paid or is payable to the supplier by the transferee or a third party as payment for the supply. Interest or penalties of a compensatory nature do not form part of the consideration for a supply.

17 In accordance with Article 96(1) of the ZDDS, any taxable person with a taxable turnover of BGN 50 000 (approximately EUR 25 000) or more in a period not exceeding 12 consecutive months preceding the current month is required to lodge an application for registration for the purposes of that law within 14 days from the end of the financial year in which that turnover was achieved.

18 Article 102(3)(1) of the ZDDS provided, in the version in force until 1 January 2012, that, in determining the charge to tax of a person required to lodge an application for registration but who did not do so within the prescribed time limit, that person is regarded as liable to tax on its taxable supplies and intra-Community acquisitions made during the period from the expiration of the

period in which the application for registration was required to be lodged until the actual date of registration entered by the revenue agency.

19 Under Article 122(1) of the Danachno-osiguriteln protsesualen kodeks (Code of tax and social security procedures) of 1 January 2006 (DV No 105 of 29 December 2005, 'the DOPK'), the revenue agency may apply the rate of tax provided for in the relevant legislation to the taxable amount that it has determined in accordance with Article 122(2), inter alia where there are factors pointing to the existence of concealed goods or revenue, in the absence of accounts kept in accordance with the zakon za schetovodstvo (Law on accounting), where accounts are not submitted or where the taxable amount cannot be determined from the accounts submitted and where the necessary documentation for determining the taxable amount or calculating outstanding social security contributions have been irregularly destroyed.

20 Article 122(2)(1), (4), (6), (8) and (16) of the DOPK provides that, in determining the taxable amount, the revenue agency is to take account of all the following individual circumstances: the type and nature of the activity actually carried out; official documents and documents containing credible data; the commercial importance of the place where the activity is carried out; the gross income/revenue (turnover); any other evidence from which the taxable amount can be determined.

21 Under Article 124(2) of the DOPK, in the course of a complaint procedure against a tax adjustment notice made following an investigation pursuant to Article 122 of the DOPK, the findings of fact made in that notice are to be presumed correct until the contrary is proven where it is established that the conditions referred to in Article 122(1) of the DOPK are satisfied.

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

22 MM is a sole-trader business owned by Ms Maya Vasileva Marinova, a Bulgarian national registered as a sole trader within the meaning of Bulgarian law. The business sells by retail food and non-food products to end consumers in a shop in the municipality of Troyan (Bulgaria).

23 MM was the subject of a tax inspection following which the Territorial Directorate of the Natsionalna agentsia po prihodite (National Revenue Agency, 'the Bulgarian tax authorities') issued an additional assessment to VAT on 5 June 2014 in the amount of BGN 30 545.73 (approximately EUR 15 618) increased by BGN 16 442.85 (approximately EUR 8 407) in interest.

24 During that inspection, in taking investigative action in relation to MM's commercial partners, who were registered for the purposes of VAT, the Bulgarian tax authorities found that several of them had issued invoices to MM with regard to tobacco products and food products which had been supplied to MM. Those invoices were recorded in the accounts of their issuers but not in those of MM, which had not deducted the VAT referred to in those invoices.

25 The Bulgarian tax authorities took the view that MM had in fact received those goods and they presumed, on the basis of the absence of those goods from the warehouse of that business and their nature, that MM had sold them at retail level to unknown third parties during the tax years in which those invoices had been drawn up. Finding that MM had accounted neither for the supplies of the goods by the suppliers nor their subsequent sale, the Bulgarian tax authorities concluded that that business had concealed those supplies and the revenue from their resale.

26 In addition, the Bulgarian tax authorities found that, from 1 May 2008 to 26 April 2010, MM did not appear on the register of persons liable to VAT on the ground that its turnover had not exceeded the threshold of BGN 50 000 (approximately EUR 25 000) laid down in the national legislation from which such registration is mandatory. However, the tax authorities took the view, on the basis also of the invoices issued by that business's suppliers, that, from 1 May 2007 to 30

April 2008, the actual turnover of MM was above that threshold and that, accordingly, MM was required to request entry onto the register of persons liable to VAT from 1 May 2008, although it did so only on 26 April 2010.

27 Consequently, the Bulgarian tax authorities calculated an additional assessment to VAT and issued the tax adjustment notice at issue in the main proceedings. It determined the taxable amount of the presumed retail sales of the products indicated in the invoices drawn up by the commercial partners of MM and the taxable amount of the sales effected by MM in the period from 1 May 2008 to 26 April 2010. In order to determine that taxable amount, pursuant to the national legislation, the Bulgarian tax authorities added a profit margin to the price of the goods appearing on those invoices, determined according to the prices ordinarily applied by MM to the corresponding products.

28 MM lodged an administrative objection to that notice with the Director. As that objection was dismissed by decision of 15 August 2014, MM brought judicial proceedings against that notice before the Administrativen sad Veliko Tarnovo (Administrative Court, Veliko Tarnovo, Bulgaria).

29 MM claims that there is no basis for the determination ‘by analogy’ of a taxable amount under the procedure provided for by the national law at issue in the main proceedings. In that regard, it submits that the fact that invoices for the sale of goods are recorded in the accounts of suppliers does not mean that the goods referred to in those invoices have actually been supplied and that it concealed the supply of those goods. There is evidence neither of the receipt of those goods by MM nor of their subsequent resale by MM.

30 According to the Director, in accordance with the national legislation, it can be presumed from the failure of a taxable person to keep proper accounts that there is a subsequent unaccounted for supply of the goods to third parties for consideration and that the date of the taxable event and taxable amount can be determined.

31 The referring court considers it to have been proved that, in acting as a taxable person within the meaning of the VAT directive and, independently, carrying out an economic activity, MM actually received the goods listed on the invoices issued by the suppliers during the tax years in which those invoices were issued and that it had those invoices in its possession, but neither recorded them in the accounts nor produced them to the Bulgarian tax authorities at the time of the tax inspection.

32 However, the referring court considers that the receipt of those goods and anomalies in the accounting of MM do not necessarily mean, in the absence of other objective evidence, that those goods were subsequently sold by MM. Noting that the provisions of the DOPK do not require the existence of concealed revenue relating to each of those subsequent presumed sales to be proved and that the taxable amount calculated under that legislation does not necessarily reflect the consideration actually received by the taxable person, the referring court finds that Article 122(2) of the DOPK lays down rules for determining the taxable amount of supplies of goods that are different from those provided for in Articles 73 to 80 of the directive.

33 The referring court therefore wishes to know whether the national legislation at issue in the main proceedings is, within the context of the procedural autonomy enjoyed by the Member States, compatible with the principles of fiscal neutrality and proportionality and with Article 9(1), Article 14(1) and Articles 73, 80 and 273 of the directive.

34 In those circumstances, the Administrativen sad Veliko Tarnovo (Administrative Court, Veliko Tarnovo) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Must Article 273, Article 2(1)(a), Article 9(1) and Article 14(1) of the VAT directive, taken together, having regard to the principles of fiscal neutrality and proportionality, be interpreted as meaning that a Member State is to be entitled to treat the de facto absence of goods which were transferred to a taxable person by way of taxable supplies as subsequent taxable supplies of those goods for consideration by that taxable person, without the recipient of those goods being identified, where the aim is to prevent VAT evasion?’

(2) Must the provisions referred to in Question 1, having regard to the principles of fiscal neutrality and proportionality, be interpreted as meaning that a Member State is to be entitled to treat the failure by a taxable person to record tax-relevant documents relating to taxable supplies received in the manner described above, where this serves the same aim?

(3) Must Articles 273, 73 and 80 of the VAT directive, taken together, having regard to the principles of equal treatment and proportionality, be interpreted as meaning that Member States are to be entitled, on the basis of national provisions which do not serve to transpose the VAT directive, to determine the taxable amount for supplies of goods by a taxable person in a way which diverges from the general rule provided for in Article 73 of the VAT directive and the exceptions expressly provided for in Article 80 of that directive, where the aim is, first, to prevent VAT evasion and, secondly, to determine a taxable amount for the transactions concerned that is as reliable as possible?’

The questions referred for a preliminary ruling

35 As a preliminary matter, it should be noted that Article 80 of the VAT directive to which the referring court refers in one of its questions is not relevant in the present case, since that article concerns the determination of the taxable amount of transactions between tied parties, which may be distinguished from the transactions at issue in the main proceedings.

36 Accordingly, it must be understood that, by its questions, which it is appropriate to consider together, the referring court is asking, in essence, whether Article 2(1)(a), Article 9(1), Article 14(1) and Articles 73 and 273 of the VAT directive and the principles of fiscal neutrality and proportionality must be interpreted as precluding national legislation, such as that at issue in the main proceedings, under which, where goods are not in the warehouse of a taxable person to whom they have been supplied and the tax documents of relevance to those goods have not been recorded in the accounts of that taxable person, tax authorities may presume that the taxable person subsequently sold those goods to third parties and determine the taxable amount of the sale of those goods according to the factual information at hand pursuant to rules not provided for in that directive.

37 According to the order for reference, the referring court considers it to have been established that MM had actually received the goods indicated on the invoices issued by its suppliers, that it had had those invoices in its possession but neither recorded them in its accounts nor showed them to the Bulgarian tax authorities, that those goods were no longer in the warehouse of that business at the time of the tax inspection and that MM did not record any subsequent transactions concerning those goods in its accounts.

38 In the light of those circumstances, it should be noted that Article 242 of the VAT directive requires persons liable to VAT to keep proper accounts, that Article 244 thereof imposes an

obligation on those persons to store all invoices and that Article 250(1) of the directive requires all taxable persons to submit a tax return setting out all the information needed to calculate the amount of chargeable tax.

39 A failure to keep accounting records which would allow VAT to be applied and monitored by the tax authorities, and the failure to record the invoices issued and paid are liable to prevent the correct collection of that tax and, therefore, to compromise the proper functioning of the common system of VAT. Therefore, EU law does not prevent Member States from treating such infringements as amounting to tax evasion (see, to that effect, judgments of 7 December 2010, *R.*, C?285/09, EU:C:2010:742, paragraphs 48 and 49, and of 28 July 2016, *Astone*, C?332/15, EU:C:2016:614, paragraph 56).

40 To ensure the correct collection of VAT and to prevent evasion, the first paragraph of Article 273 of the VAT directive provides that Member States may impose obligations other than those provided for in that directive which they deem necessary for such purposes, subject to the requirement of equal treatment as between domestic transactions and transactions carried out between Member States by taxable persons and provided that such obligations do not, in trade between Member States, give rise to formalities connected with the crossing of frontiers.

41 The Court has established that it follows from that provision, from Article 2 and Article 250(1) of the VAT directive and from Article 4(3) TEU that every Member State is under an obligation to take all legislative and administrative measures appropriate for ensuring collection of all the VAT due on its territory and for preventing evasion (judgment of 9 July 2015, *Cabinet Medical Veterinar Dr. Tomoiag? Andrei*, C?144/14, EU:C:2015:452, paragraph 25 and the case-law cited).

42 In that regard, the Court notes that fraudulent acts of a taxable person, such as concealing supplies and revenue, must not hinder the collection of VAT. In the light of Article 273 of the directive and the case-law cited in the previous paragraph, it is for the national competent authorities to re-establish the situation that would have prevailed in the absence of tax evasion.

43 In addition, the Court has held that, outside the limits laid down therein, Article 273 of the VAT directive does not specify either the conditions or the obligations which the Member States may impose and therefore gives the Member States a margin of discretion with regard to the means of achieving the objectives recalled in paragraph 41 above (see, to that effect, judgments of 26 January 2012, *Kraft Foods Polska*, C?588/10, EU:C:2012:40, paragraph 23, and of 26 March 2015, *Macikowski*, C?499/13, EU:C:2015:201, paragraph 36).

44 However, the measures which the Member States may adopt under Article 273 of the VAT directive to ensure the correct collection of the tax and to prevent evasion must not go further than is necessary to attain such objectives and must not undermine the neutrality of VAT (see judgment of 26 March 2015, *Macikowski*, C?499/13, EU:C:2015:201, paragraph 37 and the case-law cited).

45 In the present case, it appears from the observations of the Director and of the Bulgarian Government that, subject to certain findings which are for the referring court to make, Article 122 of the DOPK constitutes a means of fighting tax evasion aiming, where supplies or revenue are concealed and where proper accounts are not kept or presented to the tax authorities pursuant to national legislation, at establishing charges to tax and determining the taxable amount as closely as possible to the consideration actually received by the taxable person according to the factual information available to those tax authorities, such as the type and nature of the activity actually carried out, documents containing credible data, the commercial importance of the place where the activity is carried out, the goods concerned and gross receipts and any other relevant evidence for that purposes.

46 It is for the referring court to determine whether the national measures at issue in the main proceedings are compatible with the requirements stated in paragraph 44 above having regard to all the circumstances of the case in the main proceedings. The Court may, however, provide it with any helpful guidance to resolve the dispute before it (see, to that effect, judgment of 28 July 2016, *Astone*, C-332/15, EU:C:2016:614, paragraph 36 and the case-law cited).

47 First, as regards the first of those requirements, stemming from the principle of proportionality, it should be noted that it is not apparent from the documents submitted to the Court that the measures at issue in the main proceedings go further than is necessary to attain the objectives pursued.

48 It is evident that the national legislation at issue in the main proceedings seeks to determine the taxable amount as closely as possible to the consideration actually received by the taxable person where it is not possible to obtain objective data relating to the dates of the taxable transactions, to the other parties to those transactions and to the taxable revenue of that taxable person due to the latter's fraudulent actions, and in particular his failure to comply with the obligation to keep proper accounts, so as to enable the national competent institutions to re-establish the situation according to the information at hand and having regard to all individual circumstances.

49 Second, as regards the principle of fiscal neutrality which was intended by the EU legislature to reflect, in matters relating to VAT, the general principle of equal treatment (see judgments of 29 October 2009, *NCC Construction Danmark*, C-174/08, EU:C:2009:669, paragraph 41, and of 5 March 2015, *Commission v Luxembourg*, C-502/13, EU:C:2015:143, paragraph 50), it must be held that taxpayers who have committed tax evasion consisting, inter alia, in the concealment of taxable transactions and the resulting revenue are not in a situation comparable to that of taxpayers who comply with their obligations in relation to accounting, filing VAT returns and the payment of VAT. Accordingly, that principle cannot legitimately be invoked by a taxable person who has intentionally participated in tax evasion and who has jeopardised the operation of the common system of VAT (see, to that effect, judgments of 18 December 2014, *Schoenimport 'Italmoda' Mariano Previti and Others*, C-131/13, C-163/13 and C-164/13, EU:C:2014:2455, paragraph 48, and of 28 July 2016, *Astone*, C-332/15, EU:C:2016:614, paragraph 58).

50 In the light of all of the foregoing considerations, the answer to the questions referred is that Article 2(1)(a), Article 9(1), Article 14(1) and Articles 73 and 273 of the VAT directive and the principle of fiscal neutrality must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, under which, where goods are not in the warehouse of the taxable person to whom they have been supplied and the tax documents of relevance to those goods have not been recorded in the accounts of that taxable person, tax authorities may presume that the taxable person subsequently sold those goods to third parties and determine the taxable amount of the sale of those goods according to the factual information at hand pursuant to rules not provided for in that directive. It is, however, for the referring court to ascertain whether the provisions of the national legislation go further than is necessary to ensure the correct collection of VAT and to prevent evasion.

Costs

51 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 (Seventh Chamber) hereby rules:

Article 2(1)(a), Article 9(1) Article 14(1) and Articles 73 and 273 of the Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax and the principle of fiscal neutrality must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, under which, where goods are not in the warehouse of the taxable person to whom they have been supplied and the tax documents of relevance to those goods have not been recorded in the accounts of that taxable person, tax authorities may presume that the taxable person subsequently sold those goods to third parties and determine the taxable amount of the sale of those goods according to the factual information at hand pursuant to rules not provided for in that directive. It is, however, for the referring court to ascertain whether the provisions of the national legislation go further than is necessary to ensure the correct collection of VAT and to prevent evasion.

[Signatures]

* Language of the case: Bulgarian.