Provisional text

JUDGMENT OF THE COURT (Seventh Chamber)

11 April 2024 (*)

(References for a preliminary ruling – Common system of value added tax (VAT) – Directive 2006/112/EC – Turnover taxes – Special scheme for small enterprises – Annual turnover – Difference in treatment between taxable persons – National legislation imposing VAT on a person in the event of late submission of an application for registration – Punitive nature)

In Case C?122/23,

REQUEST for a preliminary ruling under Article 267 TFEU from the Varhoven administrativen sad (Supreme Administrative Court, Bulgaria), made by decision of 25 January 2023, received at the Court on 1 March 2023, in the proceedings

Direktor na Direktsia ‘Obzhalvane i danachno-osiguritelna praktika’ Sofia pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite

v

‘Legafact’ EOOD,

THE COURT (Seventh Chamber),

composed of F. Biltgen, President of the Chamber, J. Passer and M.L. Arastey Sahún (Rapporteur), Judges,

Advocate General: A.M. Collins,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Bulgarian Government, by T. Mitova and R. Stoyanov, acting as Agents,

– the European Commission, by D. Drambozova and J. Jokubauskait?, 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 Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1), as amended by Council Directive 2009/162/EU of 22 December 2009 (OJ 2010 L 10, p. 14) (‘the VAT Directive’).

2 The request has been made in proceedings between the Direktor na Direktsia ‘Obzhalvane i danachno-osiguritelna praktika’ Sofia pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite (Director of the Sofia Territorial Directorate ‘Appeals and Practice in Tax and Social Security Matters’ of the National Revenue Agency, Bulgaria) (‘the Direktor’) and ‘Legafact’ EOOD concerning a tax adjustment notice establishing a value added tax (VAT) debt on the part of that company.

Legal context

European Union law

3 Recital 49 of the VAT Directive states:

‘Member States should be allowed to continue to apply their special schemes for small enterprises, in accordance with common provisions, and with a view to closer harmonisation.’

4 Article 2 of the VAT Directive sets out the transactions that are to be subject to VAT.

5 Title XI of that directive, entitled ‘Obligations of taxable persons and certain non-taxable persons’, includes Chapter 2, entitled ‘Identification’, which contains Articles 213 and 214 of that directive. Chapter 7 of that title, entitled ‘Miscellaneous provisions’, includes Article 273 of the VAT Directive.

6 Under Article 213 of that directive:

‘1. Every taxable person shall state when his activity as a taxable person commences, changes or ceases.

Member States shall allow, and may require, the statement to be made by electronic means, in accordance with conditions which they lay down.

2. Without prejudice to the first subparagraph of paragraph 1, every taxable person or non-taxable legal person who makes intra-Community acquisitions of goods which are not subject to VAT pursuant to Article 3(1) must state that he makes such acquisitions if the conditions, laid down in that provision, for not making such transactions subject to VAT cease to be fulfilled.’

7 Article 214 of that directive is worded as follows:

‘1. Member States shall take the measures necessary to ensure that the following persons are identified by means of an individual number:

(a) every taxable person, with the exception of those referred to in Article 9(2), who within their respective territory carries out supplies of goods or services in respect of which VAT is deductible, other than supplies of goods or services in respect of which VAT is payable solely by the customer or the person for whom the goods or services are intended, in accordance with Articles 194 to 197 and Article 199;

(b) every taxable person, or non-taxable legal person, who makes intra-Community acquisitions of goods subject to VAT pursuant to Article 2(1)(b) and every taxable person, or non-taxable legal person, who exercises the option under Article 3(3) of making their intra-Community acquisitions subject to VAT;

(c) every taxable person who, within their respective territory, makes intra-Community

acquisitions of goods for the purposes of transactions which relate to the activities referred to in the second subparagraph of Article 9(1) and which are carried out outside that territory;

(d) every taxable person who within their respective territory receives services for which he is liable to pay VAT pursuant to Article 196;

(e) every taxable person, established within their respective territory, who supplies services within the territory of another Member State for which VAT is payable solely by the recipient pursuant to Article 196.

2. Member States need not identify certain taxable persons who carry out transactions on an occasional basis, as referred to in Article 12.'

8 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.

The option under the first paragraph may not be relied upon in order to impose additional invoicing obligations over and above those laid down in Chapter 3.'

9 Title XII of the VAT Directive, entitled 'Special schemes', includes Chapter 1, entitled 'Special scheme for small enterprises', which contains Articles 281 to 292 of that directive.

10 Article 287 of that directive provides:

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

…

(17) Bulgaria: EUR 25 600;

…'

Bulgarian law

11 Article 96(1) of the zakon za danak varhu dobavenata stoynost (Law on value added tax, DV No 63 of 4 August 2006), in the version applicable to the dispute in the main proceedings ('the ZDDS'), states:

'Any taxable person established on Bulgarian territory with a taxable turnover of [50 000 Bulgarian leva (BGN)] or more in a period not exceeding twelve consecutive months preceding the current month is required to lodge an application for registration for the purposes of this Law within seven days from the end of the financial year in which that turnover was achieved. Where the turnover is achieved in a period not exceeding two consecutive months, including the current month, the person is required to lodge the application within seven days from the date on which the turnover was achieved.'

12 Article 102 of the ZDDS states that:

‘1. Where the tax authorities conclude that a person has not fulfilled his or her obligation to apply for registration within the time limit laid down, it shall register that person by way of a registration decision if the conditions for registration are satisfied.

2. The decision referred to in paragraph 1 shall state the basis and the date on which the obligation to register arose.

3. …For the purpose of determining the tax liabilities of a person who has not lodged an application for registration within the time limit despite being required to do so, that person shall be deemed to be liable to pay tax on the taxable supplies and intra-Community acquisitions he or she has made, and on the taxable supplies of services he or she has received, for which tax is payable by the recipient:

(1) …for the period from the expiry of the time limit within which the registration decision should have been adopted if the person had lodged an application for registration within the time limit until the date on which he or she was registered by the tax authorities;

(2) …for the period from the expiry of the time limit within which the registration decision should have been adopted if the person had lodged an application for registration within the time limit until the date on which there are no longer grounds for registration.

4. …In the cases referred to in the second sentence of Article 96(1), for the purpose of determining the tax liabilities of a person who has not lodged an application for registration within the time limit despite being required to do so, that person shall be deemed to be liable to pay tax on the taxable supplies that result in that person exceeding the taxable turnover of BGN 50 000 from the date on which the turnover was exceeded until the date on which that person was registered by the tax authorities or until the date on which there are no longer grounds for registration. Tax shall be payable on the taxable supplies that result in that person exceeding the taxable turnover threshold. The person shall also be liable to pay tax on the taxable supplies of services for which tax is payable by the recipient and on taxable intra-Community acquisitions made during that period.

…’

13 Article 178 of the ZDDS provides:

‘Any taxable person within the meaning of this Law who, despite being required to do so, has not lodged an application for registration or an application for cessation of registration within the time limits laid down by this Law shall be liable to a fine – in the case of natural persons who are not traders, or a pecuniary penalty – in the case of legal persons and sole traders, of between BGN 500 and BGN 5 000.’

14 Article 180 of the ZDDS is worded as follows:

‘1. …A registered person who, despite being required to do so, has not charged a tax within the time limits provided for by this Law, shall be liable to a fine, in the case of natural persons who are not traders, or a pecuniary penalty, in the case of legal persons and sole traders, of an amount equal to the tax not charged, but may not be less than BGN 500. In the case of a repeat infringement, the amount of the fine or of the pecuniary penalty shall be double the amount of the tax not charged, but may not be less than BGN 1 000.

2. Paragraph 1 shall also apply where the person has not charged a tax because he or she has not lodged an application for registration and has not been registered within the meaning of this Law within the time limit.

3. …In the event of an infringement as referred to in paragraph 1, where the registered person has charged the tax within six months of the end of the month during which the tax should have been charged, the fine or, as the case may be, the pecuniary penalty shall amount to five per cent of the tax but may not be less than BGN 200 or less than BGN 400 in the case of a repeat infringement.

4. …In the event of an infringement as referred to in paragraph 1, where the registered person has charged the tax after the expiry of the time limit referred to in paragraph 3, but at the latest within 18 months of the end of the month during which the tax should have been charged, the fine or, as the case may be, the pecuniary penalty shall amount to 10 per cent of the tax but may not be less than BGN 400 or less than BGN 800 in the case of a repeat infringement.'

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

15 Legafact provides business consultancy services. That company was not initially registered for VAT.

16 On 21 August 2018, it issued four invoices relating to 'remuneration from the contract of 30 November 2012' of a total value of BGN 114 708 (approximately EUR 58 600), recorded as 'revenue from sales of services'.

17 On 23 and 24 August 2018, Legafact issued two further invoices with the same subject matter for a total value of BGN 57 004 (approximately EUR 29 100), which were recorded in the same way.

18 On 3 September 2018, Legafact lodged an application for compulsory VAT registration. The tax authorities sent that company a notice on the compulsory registration on 14 September 2018, stating that it was registered for VAT with effect from 19 September 2018.

19 The tax authorities considered that the issuing of one of the invoices of 21 August 2018 for an amount of BGN 34 202 (approximately EUR 17 500) had resulted in the taxable turnover threshold of BGN 50 000 (approximately EUR 25 600), above which VAT registration is compulsory, being exceeded and that the supply corresponding to that invoice was taxable pursuant to the second sentence of Article 102(4) of the ZDDS.

20 Those authorities concluded that, under the second sentence of Article 96(1) of the ZDDS, Legafact should have lodged the application for VAT registration within a time limit of seven days from the date on which it had reached that threshold for taxable turnover, that is, at the latest by 28 August 2018, which it did not do. On the basis of Article 102(4) of the ZDDS, those authorities decided that that company was liable to pay VAT on the taxable supplies that had resulted in it exceeding the taxable turnover of BGN 50 000 (approximately EUR 25 600) from the date on which that turnover was exceeded until the date on which Legafact was registered for VAT.

21 Consequently, on 27 December 2019, the tax authorities issued a tax adjustment notice by which they imposed a VAT debt on Legafact in the amount of BGN 24 701.66 (approximately EUR 12 600) in respect of principal and BGN 3 218.33 (approximately EUR 1 650) in respect of interest, for the tax period of August 2018, on account of the taxable supplies made by that company from 21 August 2018 until the date of its registration for VAT ('the adjustment notice at issue').

22 After the adjustment notice at issue was upheld by a decision of the Direktor on 19 March 2020, Legafact brought an action against that adjustment notice with the Administrativen sad – Sofia grad (Administrative Court, Sofia, Bulgaria).

23 On 30 June 2020, in another case, the Konstitutsionen sad (Constitutional Court, Bulgaria), hearing an application from the Visshia advokatski savet (Supreme Bar Council, Bulgaria), ruled that Article 102(4) of the ZDDS was consistent with the Bulgarian Constitution. That court considered that that provision, in so far as it provides for the liability to VAT of persons who are not registered for VAT for a reason within their control, makes it possible to ensure the collection of a tax payable to the State budget that was unlawfully not charged or collected. It further ruled that the obligation to pay VAT in such a case does not constitute a sanction or penalty, but compensation for the loss caused to the State budget by the unlawful conduct of a taxable person.

24 By judgment of 23 September 2021, the Administrativen sad – Sofia grad (Administrative Court, Sofia) annulled the adjustment notice at issue in the main proceedings, holding that it had been issued contrary to the applicable substantive law and, more specifically, EU law in the area of VAT, as interpreted by the Court in the judgment of 9 July 2015, *Salomie and Oltean* (C?183/14, EU:C:2015:454).

25 Despite the judgment of 30 June 2020 of the Konstitutsionen sad (Constitutional Court), the Administrativen sad – Sofia grad (Administrative Court, Sofia) held that Article 102(4) of the ZDDS was punitive in nature in cases of late lodging of the application for compulsory VAT registration and that the penalty resulting from the application of that provision could, in accordance with the judgment of 9 July 2015 in *Salomie and Oltean* (C?183/14, EU:C:2015:454), be imposed only if that penalty observed the principle of proportionality. The latter court considered that, given that, in the present case, Legafact was only three days late in lodging its application for registration for VAT and that the file in the main proceedings did not contain any evidence that the company had acted fraudulently, the penalty imposed on it was disproportionate.

26 The Direktor lodged an appeal on a point of law against the judgment of the Administrativen sad – Sofia grad (Administrative Court, Sofia) before the Varhoven administrativen sad (Supreme Administrative Court, Bulgaria), which is the referring court.

27 The latter court states that Article 102 of the ZDDS was adopted by the Bulgarian legislature in order to transpose Articles 213 and 214 of the VAT Directive, which require Member States to take the necessary measures to ensure that, in principle, every taxable person who within their respective territory carries out supplies of goods or services in respect of which VAT is deductible is identified by means of an individual number.

28 The referring court considers that Article 102(4) of the ZDDS, which makes subject to VAT a supply that is in principle exempt where the supplier has failed to comply with his or her obligation to register for that tax within the prescribed period, is not a penalty provision but must be regarded as a rule of substantive law providing, in such circumstances, for the non-application of the exemption for small enterprises provided for in the provisions of Chapter 1 of Title XII of the VAT Directive and the incurrence of a VAT debt.

29 In those circumstances, the Varhoven administrativen sad (Supreme Administrative Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Is a national provision which treats taxable persons differently in respect of the tax exemption provided for under Title XII, Chapter 1, of [the VAT Directive] depending on the rapidity with which they reach the turnover threshold for compulsory VAT registration in breach of the principles of the common system of value added tax in the European Union?

(2) Does [the VAT Directive] preclude a national provision under which the tax exemption of a supply under Title XII, Chapter 1, of [that directive] depends on the supplier fulfilling the obligation to apply for compulsory VAT registration in due time?

(3) What criteria arising from the interpretation of the VAT Directive must be used to assess whether the aforementioned national provision, which provides for the incurrence of a tax debt in the event of late submission of the application for compulsory VAT registration, is a penalty provision?’

Consideration of the questions referred

The first and second questions

30 By its first and second questions, which it is appropriate to examine together, the referring court asks, in essence, whether the VAT Directive must be interpreted as precluding national legislation, adopted by a Member State pursuant to Article 287 of that directive, which makes entitlement to the VAT exemption provided for in that directive for small enterprises subject to the condition that the taxable person whose annual turnover or turnover measured during a period of two consecutive months exceeds the amount specified for that Member State in that provision must lodge an application for VAT registration within a prescribed period.

31 In that respect, it must be recalled that the VAT Directive allows Member States to apply their special schemes for small enterprises, as set out in recital 49 of the directive (see, to that effect, judgment of 17 May 2018, *Vámos*, C?566/16, EU:C:2018:321, paragraph 30).

32 In the present case, as is apparent from the order for reference, the national legislation at issue in the main proceedings was adopted pursuant to point 17 of Article 287 of the VAT Directive, authorising the Republic of Bulgaria to grant a tax exemption to taxable persons whose annual turnover does not exceed the equivalent of EUR 25 600 in Bulgarian leva.

33 In accordance with that legislation, taxable persons are required to lodge an application for registration within a time limit of seven days starting, for the group of taxable persons who reach the taxable turnover threshold of BGN 50 000 during a twelve-month period, from the end of the tax period in which that turnover was achieved and, for the group of taxable persons who reach that threshold during a period of two consecutive months, from the date on which that turnover is achieved.

34 The special scheme for small enterprises, within the meaning of the VAT Directive, provides for administrative simplifications intended to support the creation, activities and competitiveness of those enterprises, and to retain a reasonable relationship between the administrative charges connected with fiscal supervision and the small amounts of tax to be reckoned with (judgment of 9 July 2020, *AJFP Cara?-Severin and DGRFP Timi?oara*, C?716/18, EU:C:2020:540, paragraph 40 and the case-law cited).

35 In that regard, it must be stated that the VAT Directive grants the Member States a margin of discretion as to how to apply that special scheme.

36 An obligation, such as that laid down by the national legislation at issue in the main proceedings, under which taxable persons must lodge an application for registration where their annual turnover exceeds the threshold laid down in Article 287 of the VAT Directive for the Member State concerned, falls, in principle, within that margin of discretion and makes it possible to retain a reasonable relationship between the administrative charges associated with fiscal supervision and the small amounts of tax to be reckoned with.

37 As regards the point in time at which the obligation to lodge an application for registration arises, the national legislation referred to in paragraph 33 of the present judgment introduces a difference in treatment between two groups of taxable persons, namely, on the one hand, those who reach the threshold at issue during a period of twelve months and, on the other, those who reach it during a period of two consecutive months. In the present case, it is not disputed that that difference in treatment takes account, in particular, of the characteristics of seasonal activities, in connection with which the turnover threshold triggering the obligation to register is reached more quickly during a short period of time.

38 Accordingly, that difference in treatment, introduced by the national legislation at issue in the main proceedings, between those two groups of taxable persons also falls, in principle, within the margin of discretion granted to the Member States by the VAT Directive.

39 In the light of the foregoing considerations, the answer to the first and second questions is that the VAT Directive must be interpreted as not precluding national legislation, adopted by a Member State pursuant to Article 287 of that directive, which makes entitlement to the VAT exemption provided for in that directive for small enterprises subject to the condition that the taxable person whose annual turnover or turnover measured during a period of two consecutive months exceeds the amount specified for that Member State in that provision must lodge an application for VAT registration within a prescribed period.

The third question

40 By its third question, the referring court asks, in essence, whether the VAT Directive must be interpreted as precluding national legislation which provides that a failure by a taxable person to fulfil the obligation to lodge an application for VAT registration within the time limits, in the cases referred to in paragraph 39 of the present judgment, results in the incurrence of a tax debt.

41 In that regard, it should be recalled that, in accordance with settled case-law, although Member States may, in order to ensure the correct levying and collection of the tax and to prevent fraud, inter alia, lawfully lay down, in their respective provisions of national law, appropriate penalties to sanction the failure to observe the obligation to register persons taxable for VAT purposes, such penalties must not, however, go further than is necessary to attain those objectives. In that regard, it is for the national courts to determine whether the amount of the penalty does not go further than is necessary to attain the objectives of ensuring the correct

levying and collection of the tax and the prevention of fraud, having regard to the facts of the case and, inter alia, the sum actually imposed and the possible existence of fraud or circumvention of the applicable legislation attributable to the taxable person whose failure to register is being penalised. The same principles apply to surcharges, which, if they are in the nature of tax penalties, must not be excessive in relation to the seriousness of the breach, by the taxable person, of his or her obligations (see, to that effect, judgment of 9 July 2015, *Salomie and Oltean*, C?183/14, EU:C:2015:454, paragraphs 51 and 52 and the case-law cited).

42 In order to assess whether a penalty is consistent with the principle of proportionality, account must be taken of, inter alia, the nature and the degree of seriousness of the infringement which that penalty seeks to sanction, and of the means of establishing the amount of that penalty (judgment of 8 May 2019, *EN.SA.*, C?712/17, EU:C:2019:374, paragraph 40 and the case-law cited).

43 It should also be borne in mind that, when choosing the penalties, Member States are required to comply with the principle of effectiveness, which requires effective and dissuasive penalties to be established to counter infringements of harmonised VAT rules and to protect the financial interests of the European Union (judgment of 17 May 2023, *Cezam*, C?418/22, EU:C:2023:418, paragraph 28 and the case-law cited).

44 In the present case, first, as is apparent from the order for reference and from the file before the Court, in the event that an application for registration is lodged belatedly, taxable persons whose annual turnover exceeds the threshold above which lodging that application is compulsory are liable, in accordance with the national legislation at issue in the main proceedings, to pay VAT on the taxable supplies made from the expiry of the time limit of seven days within which the registration decision should have been issued until the date of their registration by the tax authorities.

45 That time limit starts to run from the end of the tax period in which that turnover was achieved.

46 In that regard, as the European Commission correctly observed, the national provision at issue in the main proceedings cannot be considered to constitute a penalty, within the meaning of the case-law of the Court referred to in paragraphs 41 to 43 of the present judgment, in so far as its sole purpose is to recover VAT on transactions carried out during the period in which that tax would have been charged if the taxable person had fulfilled his or her obligation to register for VAT within the prescribed period.

47 Second, it is also apparent from the order for reference and the file before the Court that, as regards taxable persons whose turnover, measured during a period of two consecutive months, exceeds the threshold at issue, the national legislation at issue in the main proceedings provides that, in the event of failure to fulfil the obligation to lodge, within the time limit of seven days, an application for VAT registration, those taxable persons are deemed to be liable to pay VAT on the taxable supplies made from the date on which their turnover exceeded the threshold until the date on which they were registered by the tax authorities or the date on which there are no longer grounds for registration.

48 For those taxable persons, that time limit starts to run from the date on which that turnover is achieved.

49 In that regard, it is for the national court, which alone has jurisdiction to interpret and apply national law, to ascertain whether, as regards the taxable persons referred to in paragraph 47 of the present judgment, the national legislation at issue in the main proceedings provides for a

penalty within the meaning of the Court's case-law.

50 To that end, the referring court must ascertain whether that legislation, first, complies with the principle of effectiveness in countering infringements of harmonised VAT rules and, second, satisfies the proportionality requirements, in accordance with the case-law of the Court referred to in paragraphs 41 to 43 of the present judgment.

51 In the light of all the foregoing considerations, the answer to the third question is that the VAT Directive must be interpreted as not precluding national legislation which provides that a failure by a taxable person to fulfil the obligation to lodge an application for VAT registration within the time limits, in the cases referred to in paragraph 39 of the present judgment, results in the incurrence of a tax debt, provided that that legislation, if and in so far as it is not limited to recovering VAT on transactions carried out during the period in which that tax would have been charged if the taxable person had fulfilled his or her obligation to register for VAT within the time limits, complies with the principle of effectiveness in countering infringements of harmonised VAT rules and satisfies the proportionality requirements, in accordance with the case-law of the Court.

Costs

52 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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:

1. **Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, as amended by Council Directive 2009/162/EU of 22 December 2009,**

must be interpreted as not precluding national legislation, adopted by a Member State pursuant to Article 287 of that directive, as amended, which makes entitlement to the value added tax (VAT) exemption provided for in that directive, as amended, for small enterprises subject to the condition that the taxable person whose annual turnover or turnover measured during a period of two consecutive months exceeds the amount specified for that Member State in that provision must lodge an application for VAT registration within a prescribed period.

2. **Directive 2006/112, as amended by Directive 2009/162,**

must be interpreted as not precluding national legislation which provides that a failure by a taxable person to fulfil the obligation to lodge an application for value added tax (VAT) registration within the time limits, in the cases referred to in paragraph 1 of this operative part, results in the incurrence of a tax debt, provided that that legislation, if and in so far as it is not limited to recovering VAT on transactions carried out during the period in which that tax would have been charged if the taxable person had fulfilled his or her obligation to register for VAT within the time limits, complies with the principle of effectiveness in countering infringements of harmonised VAT rules and satisfies the proportionality requirements, in accordance with the case-law of the Court.

[Signatures]

* Language of the case: Bulgarian.