JUDGMENT OF THE COURT (First Chamber)

13 December 2012 (*)

(Taxation – Sixth VAT Directive – Decision 2004/290/EC – Manner in which a Member State applies a derogating measure – Authorisation – Article 2, point (1) – ‘Construction work’ – Interpretation – Supplies of goods covered – Possibility for the derogating measure to be applied only in part – Restrictions)

In Case C-395/11,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Bundesfinanzhof (Germany), made by decision of 30 June 2011, received at the Court on 27 July 2011, in the proceedings

BLV Wohn- und Gewerbebau GmbH

v

Finanzamt Lüdenscheid,

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, M. Ileši?, E. Levits, M. Safjan and M. Berger (Rapporteur), Judges,

Advocate General: P. Mengozzi,

Registrar: A. Calot Escobar,

after considering the observations submitted on behalf of:

– the German Government, by T. Henze and K. Petersen, acting as Agents,

– the Finnish Government, by H. Leppo, acting as Agent,

– the European Commission, by F. Erlbacher and C. Soulay, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 12 September 2012

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of point (1) of Article 2 of Council Decision 2004/290/EC of 30 March 2004 authorising Germany to apply a measure derogating from Article 21 of the Sixth Council Directive 77/388/EEC on the harmonisation of the laws of the Member States relating to turnover taxes (OJ 2004 L 94, p. 59).

2 The reference was made in proceedings between BLV Wohn- und Gewerbebau GmbH (‘BLV’) and the Finanzamt Lüdenscheid (Lüdenscheid Tax Office) (‘the Finanzamt’) in relation to value added tax (‘VAT’) payable by BLV on the construction of a building for it by another

company.

Legal context

European Union ('EU') law

3 Under Article 5(1) and (2)(e) of Second Council Directive 67/228/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes – Structure and procedures for application of the common system of value added tax (OJ, English Special Edition 1967, p. 16), which is not applicable in the present case *ratione temporis*:

'1. "Supply of goods" means the transfer of the right to dispose of tangible property as owner.

2. The following shall also be considered as supply within the meaning of paragraph 1:

...

(e) the delivery up of works of construction, including those in which moveable property is incorporated in immoveable property.

...'

The Sixth VAT Directive

4 Under Article 5(1) and (5) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1), as amended by Council Directive 2004/7/EC of 20 January 2004 (OJ 2004 L 27, p. 44) ('the Sixth Directive'):

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

...

5. Member States may consider the handing over of certain works of construction to be supplies within the meaning of paragraph 1.'

5 Article 6(1) of the Sixth Directive provides:

'"Supply of services" shall mean any transaction which does not constitute a supply of goods within the meaning of Article 5.'

6 Under the first sentence of point (1)(a) of Article 21 of that directive:

'1. Under the internal system, the following shall be liable to pay value added tax:

(a) the taxable person carrying out the taxable supply of goods or of services …'

7 Article 27(1) of that directive provides:

'1. The Council, acting unanimously on a proposal from the Commission, may authorise any Member State to introduce special measures for derogation from the provisions of this Directive, in order to simplify the procedure for charging the tax or to prevent certain types of tax evasion or avoidance …'

Decision 2004/290

8 Recital 2 in the preamble to Decision 2004/290 is worded as follows:

‘Considerable [VAT] losses were established in the construction and in the building-cleaning businesses, where VAT was openly invoiced but not paid to the fiscal authorities, while the recipient exercised his right to deduct. The non-compliant operators could not be identified or identification was achieved too late to recover lost VAT. The number of such cases has increased to an extent requiring legal measures. The envisaged liability of the recipient for VAT only concerns businesses which can exercise their right to deduct and does not cover private persons. It is limited to two specific branches, where the losses in terms of VAT have achieved an intolerable dimension ...’

9 Recital 4 to that decision states:

‘The derogation does not affect the amount of [VAT] due at the final consumption stage and has no impact on the Communities’ own resources from VAT ...’

10 Under Article 1 of Decision 2004/290:

‘By way of derogation from Article 21(1)(a) of [the Sixth] Directive … the Federal Republic of Germany is hereby authorised, with effect from 1 April 2004, to designate the recipients of the supplies of goods and services referred to in Article 2 of this Decision as the persons liable to pay VAT’.

11 Under point (1) of Article 2 of Decision 2004/290:

‘In the following instances the recipient of the supply of goods and services may be designated as the person liable to pay VAT:

1. where building-cleaning services are supplied to a taxable person, except where the recipient of the supply exclusively rents not more than two residences or where construction work is supplied to a taxable person’.

German law

12 Paragraph 3(4) of the Law on turnover tax (Umsatzsteuergesetz, 2005, BGBl. 2005 I, p. 386), in the version applicable to the dispute before the referring court (the ‘UStG’), provides:

‘Where the trader has taken on the task of forming or processing an object and, to this end, uses materials which he himself procures, the supply shall be regarded as a supply of goods (supply of work) if the materials are more than merely accessories or other subsidiary items. This shall apply even if the objects are fixed to or in the ground. ...’

13 Under Paragraph 13b(1)(4) and the second sentence of Paragraph 13b(2) of the UStG, which are based on Decision 2004/290:

‘(1) Tax shall become due on the issuing of the invoice, and at the latest at the end of the calendar month following the effecting of the supply, in respect of the following taxable transactions:

...

4. Supplies of pieces of work and supplies of services for the construction, repair, maintenance,

alteration or demolition of structures, with the exception of planning and supervisory services. ...

(2) ... In the cases specified in subparagraph 1, first sentence, point 4, first sentence, the recipient of the supply shall be liable to the tax if he is a trader who makes supplies within the meaning of subparagraph 1, first sentence, point 4, first sentence ...'

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

14 BLV is an undertaking engaged in the activity of acquiring land, providing it with basic infrastructure and building on it. It is a 'taxable person' within the meaning of Article 4 of the Sixth VAT Directive.

15 In September 2004, BLV engaged Rolf & Co. OHG ('Rolf & Co.') to build a residential block of six flats at a fixed price. On 17 November 2005, Rolf & Co. issued a final invoice representing consideration for the work carried out, on which VAT was not itemised, referring to BLV as liable in that it was the recipient of the supply.

16 BLV initially declared to the tax authorities that, as the transaction in question had been carried out during the 2005 tax year, it was liable to pay the VAT. Later, however, BLV claimed that the conditions which must be met if it is to incur liability for VAT had not been satisfied, as the Federal Republic of Germany is not permitted under EU law to make the recipient of the supply, rather than the provider, pay VAT on such a transaction. The Finanzamt, on the other hand, disagreed, its position being that BLV was liable for the VAT. BLV brought the matter before the administrative courts.

17 The Finanzamt – the defendant in the main proceedings – regarded BLV as liable to pay VAT in accordance with point 4 of the first sentence of Paragraph 13b(1), and the second sentence of Paragraph 13b(2), of the UStG. In the circumstances, the Bundesfinanzhof (Federal Finance Court) believes that the settlement of the dispute depends on the proper interpretation of Decision 2004/290.

18 In those circumstances, the Bundesfinanzhof decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Does the term 'construction work' as used in point (1) of Article 2 of Decision 2004/290 … encompass not only services but also supplies of goods?

(2) If the authorisation to designate the recipient of the supply as the person liable for tax also extends to supplies of goods:

Is the authorised Member State entitled to exercise the authorisation merely partially in respect of certain subcategories, such as particular types of construction work, and in respect of supplies to certain recipients?

(3) If the Member State is entitled to form subcategories: is the Member State subject to restrictions when forming subcategories?

(4) If the Member State is not entitled to form subcategories generally (see Question 2 above) or on account of its failure to observe restrictions (see Question 3 above):

(a) What are the legal consequences of the impermissible formation of subcategories?

(b) Is the effect of the impermissible formation of subcategories that the provision of national law is not to be applied only to the benefit of particular taxable persons or in general?'

Consideration of the questions referred

Question 1

19 By Question 1, the referring court is essentially asking whether point (1) of Article 2 of Decision 2004/290 must be interpreted to the effect that the term 'construction work', as used in that provision, covers the supply of goods within the meaning of Article 5(1) of the Sixth Directive, in addition to the transactions to be regarded as supplies of services, as defined in Article 6(1) of that directive.

20 The Bundesfinanzhof finds that, if Decision 2004/290 authorised the Federal Republic of Germany to designate the recipient of the supply as the person liable for VAT ('reverse charge' system) in respect of construction work only where that work took the form of services and no supply of goods was involved, BLV would undoubtedly be liable for VAT pursuant to Paragraph 13b of the UStG, but not pursuant to Decision 2004/290.

21 In that regard, it should be noted at the outset that Decision 2004/290 contains no definition of 'construction work'.

22 Moreover, none of the language versions of the Sixth VAT Directive, to which Article 1 of Decision 2004/290 refers, mentions 'construction work', with the exception of the German language version. Article 5(5) of the Sixth VAT Directive mentions only 'works of construction'.

23 However, even supposing that the meaning of the term 'works of construction' as used in the Sixth VAT Directive overlaps with that of the term 'construction work' as used in Decision 2004/290, the Sixth VAT Directive is silent as to the meaning of the term 'works of construction'. Admittedly, Article 5(2)(e) of Directive 67/228 (Second VAT Directive), read in conjunction with point 5 of Annex A thereto, provided an example of what is covered by the term 'works of construction' and that directive provided – expressly, moreover – that such works were to be 'considered as [the] supply [of goods]'. However, no such definition is to be found in the Sixth VAT Directive.

24 When, therefore, on the basis of Article 27(1) of the Sixth VAT Directive, the EU legislature authorised the Federal Republic of Germany under Decision 2004/290 to provide for a measure in derogation from the VAT rules in relation to 'construction work', in particular, it was not referring to a well-defined concept which already existed in that branch of EU law.

25 However, settled case-law has established that, in the absence of any definition of the term 'construction work', the meaning and scope of that term must be determined by reference to the general context in which it is used and its usual meaning in everyday language (see, to that effect, Case C-431/04 *Massachusetts Institute of Technology* [2006] ECR I-4089, paragraph 17 and the case-law cited). Moreover, in construing a provision of EU law, it is necessary to consider the objectives pursued by the legislation in question and its effectiveness (see inter alia, to that effect, Case C-19/08 *Petrosian* [2009] ECR I-495, paragraph 34 and the case-law cited).

26 As regards, first, the usual meaning of the term 'construction work' in everyday language, it should be observed that transactions such as that at issue in the main proceedings – which include the construction of a building – are indisputably covered by that term. In that connection, it is unimportant not only whether the company carrying out the construction owns the built-up area,

or the materials used, but also whether the transaction at issue falls to be categorised as the ‘supply of services’ or the ‘supply of goods’.

27 As regards, secondly, the general context and the objectives pursued by the legislation at issue, recital 2 to Decision 2004/290 states that, in Germany, ‘[c]onsiderable VAT losses were established in the construction … businesses, where VAT was openly invoiced but not paid to the fiscal authorities. That is why, under Article 1 of that decision, ‘the Federal Republic of Germany is hereby authorised ... to designate the recipients of the supplies of goods and services referred to in Article 2 of this Decision as the persons liable to pay VAT’.

28 However, if point (1) of Article 2 of Decision 2004/290 – under which ‘the recipient of the supply of goods and services may be designated as the person liable to pay VAT ... where construction work is supplied to a taxable person’ – were to be narrowly construed, as not covering the ‘supply of goods’ as defined in Article 5(1) of the Sixth VAT Directive, that interpretation would be in clear contradiction of the objective pursued by point (1) of Article 2 of Decision 2004/290.

29 Furthermore, it is common ground that the categorisation of a particular transaction as the ‘supply of goods’ or as the ‘supply of services’ constitutes a complex appraisal which must in principle – as the Advocate General emphasises in point 30 et seq. of his Opinion – be based on a case-by-case analysis (see also, to that effect, Joined Cases C-497/09, C-499/09, C-501/09 and C-502/09 *Bog and Others* [2011] ECR I-1457, paragraph 61 et seq.).

30 In that context, there is nothing to suggest that, in adopting point (1) of Article 2 of Decision 2004/290, the EU legislature intended to confine the application of that provision solely to cases where that complex appraisal would ultimately lead to a finding that the transaction in question should be categorised as the ‘supply of services’.

31 Moreover, the categorisation of the transaction at issue in the main proceedings is unimportant in relation to the attainment of the objective pursued by Decision 2004/290, given that the risk of ‘considerable VAT losses’ is the same, whether that transaction is treated as the ‘supply of services’ or as the ‘supply of goods’.

32 All the foregoing considerations suggest that the term ‘construction work’, as used in point (1) of Article 2 of Decision 2004/290, should be interpreted as covering not only the supply of services but also the supply of goods.

33 That conclusion is unaffected by the fact that point (1) of Article 2 of Decision 2004/290, being a derogation from the general rule laid down in the first sentence of Article 21(1)(a) of the Sixth VAT Directive, must be narrowly construed. Although it is settled law that, in matters of VAT, provisions which are in the nature of exceptions to a principle must be narrowly construed, it is nonetheless appropriate to ensure that the exception is not deprived of its effectiveness (*Bog and Others*, paragraph 84 and the case-law cited; see also, to that effect, Case C-540/09 *Skandinaviska Enskilda Banken* [2011] ECR I-1509, paragraph 20 and the case-law cited).

34 However, if the supply of goods were to be excluded from the scope of point (1) of Article 2 of Decision 2004/290, the effectiveness of that provision could be impaired. One of the consequences of such an interpretation would be that the construction of a building could be excluded from the scope of the derogating measure authorised by Decision 2004/290. As it is, that transaction naturally belongs with ‘construction work’ and represents a subcategory of transactions which, as the German Government correctly remarks in its observations, accounts for a considerable proportion of the transactions at issue.

35 Consequently, the answer to Question 1 is that point (1) of Article 2 of Decision 2004/290

must be interpreted to the effect that the term ‘construction work’, as used in that provision, covers the supply of goods within the meaning of Article 5(1) of the Sixth Directive, in addition to the transactions to be regarded as supplies of services, as defined in Article 6(1) of that directive.

Questions 2 and 3

36 By Questions 2 and 3, which it is appropriate to consider together, the Bundesfinanzhof asks, in essence, whether Decision 2004/290 must be interpreted to the effect that it is open to the Federal Republic of Germany to avail itself only partially of the authorisation granted by that decision, exercising it in respect of certain subcategories, such as particular types of construction work, and in respect of supplies to certain recipients, and whether that Member State is, where appropriate, subject to restrictions when establishing those subcategories.

37 The Bundesfinanzhof therefore asks whether, if Decision 2004/290 is to be understood as permitting the Federal Republic of Germany to designate the recipient as the person liable for VAT where the transaction concerns the supply of goods relating to construction work, that Member State is required, pursuant to point (1) of Article 2 of that decision, to designate the recipient as the person liable for VAT in respect of all transactions concerning such supplies and, accordingly, on such supplies to any taxable person.

38 First, the Bundesfinanzhof observes, Paragraph 13b of the UStG designates the recipient as the person liable for VAT, not in respect of all the supplies of goods at issue, but only for the supply of work consisting in the forming of an object, as referred to in Paragraph 3(4) of the UStG; and, secondly, it is only the taxable persons who themselves carry out the supply of ‘construction’ work who, under the German legislation, are liable for VAT, not all recipients of such supplies.

39 In addition, the Bundesfinanzhof asks the Court whether, if the Member State concerned is indeed entitled to establish subcategories, it is subject to restrictions when doing so, in particular as regards respect for the principle of legal certainty on the part of that Member State.

40 In that connection, the Court’s case-law should be borne in mind, according to which the derogating measures referred to in Article 27(1) of the Sixth Directive, which are allowed inter alia ‘in order … to prevent certain types of tax evasion or avoidance’, must be interpreted strictly and must also be necessary and appropriate for the purposes of attaining the specific objective which they pursue and affect as little as possible the objectives and principles of that directive (See Case C-489/09 *Vandoorne* [2011] ECR I-225, paragraph 27 and the case-law cited).

41 In addition, and as the Court has already explained in a different context, restriction of the application of an exception to a general VAT rule to concrete and specific aspects is consistent with the principle that exemptions or derogations must be narrowly construed (see, to that effect, Case C-384/01 *Commission* v *France* [2003] ECR I-4395, paragraph 28), subject to respect for the principle of fiscal neutrality inherent in the common system of VAT (Case C-442/05 *Zweckverband zur Trinkwasserversorgung und Abwasserbeseitigung Torgau-Westelbien* [2008] ECR I-1817, paragraph 43; see also, to that effect, Case C-94/09 *Commission* v *France* [2010] ECR I-4261, paragraph 30).

42 That case-law, which carries implications also for the possibility open to Member States to derogate, in exceptional cases, from the general VAT rule – the principle that the same VAT rate applies for all supplies of goods and services – can be transposed to a case such as that before the referring court. Consequently, the Federal Republic of Germany could legitimately avail itself of the authorisation only in part, applying it for certain subcategories, such as particular types of construction work, and for supplies to certain recipients – subject, however, to respect for the principle of fiscal neutrality and, since the Member State concerned has implemented EU law, for

the general principles of EU law.

43 First, it should be borne in mind in that connection that, as is stated in recital 4 to Decision 2004/290, that decision authorised the Federal Republic of Germany to provide for a derogating measure which did not affect the amount of VAT due at the final consumption stage and had no impact on the European Union's own resources accruing from VAT. In the case of the measures actually adopted on that basis, their application was limited to cases where the recipient in the transactions at issue was himself a taxable person for the purposes of the Sixth VAT Directive in the construction sector, who is accordingly entitled to deduct the tax paid upstream of the VAT due or to claim, where applicable, a refund of that VAT. Consequently, aside from the fact that those measures had no impact on the VAT due at the final consumption stage, they did not have the effect of creating a financial burden for the persons directly concerned by them. It does not appear, therefore, that the German legislation at issue has given rise to a breach of the principle of fiscal neutrality inherent in the common system of VAT.

44 Secondly, as regards respect on the part of the Federal Republic of Germany for the general principles of EU law when establishing subcategories of transaction and classes of recipient to which the measure at issue in the main proceedings was to be applicable, the only doubts to which, prima facie, the legislation in question could give rise relate to the principles of proportionality and legal certainty.

45 As regards the principle of proportionality, there is nothing in the documents before the Court to cast doubt on the proportionality of the derogations adopted by the Federal Republic of Germany on the basis of Decision 2004/290. As was noted in paragraph 43 above, those measures merely made provision for the reverse charge regime to apply to certain transactions and did not, in principle, create a financial burden for the persons concerned by those measures, whilst, on the other hand, they made it possible for considerable VAT losses to be avoided. In the absence of other specific circumstances, which do not emerge, moreover, from the documents before the Court, measures of that kind cannot be regarded as disproportionate. Nevertheless, it is for the referring court to check, where appropriate, whether such other specific circumstances obtain.

46 As regards the principle of legal certainty, the referring court points out that the national legislation at issue could make it difficult for taxable persons to determine the person liable to pay the VAT if they do not know the recipient's situation. In the context of construction work, if the recipient of the supply is to be liable for the tax, one of the conditions that must be met is that at least 10% of the 'worldwide turnover' achieved by that recipient during the preceding financial year must be attributable to such work. However, as in the case before the referring court, the taxable person might initially suppose that this threshold had been exceeded before realising that this was not the case.

47 In that regard, it should be borne in mind, first of all, that settled case-law has established that EU legislation must be certain and its application foreseeable by those subject to it. That requirement of legal certainty must be observed all the more strictly in the case of rules liable to entail financial consequences, in order that those concerned may know precisely the extent of the obligations which those rules impose on them (see Case C-288/07 *Isle of Wight Council and Others* [2008] ECR I-7203, paragraph 47 and the case-law cited). The principle of legal certainty is binding on every national authority responsible for applying EU law (see Case C-347/06 *ASM Brescia* [2008] ECR I-5641, paragraph 65 and the case-law cited).

48 Although the legislation at issue is not generally liable to entail financial consequences for taxable persons within the meaning of the case-law devolving from *Isle of Wight Council and Others*, the fact remains that, as could occur in a case such as that before the referring court, such

a financial burden could arise as a result of the way in which the competent national authorities apply that legislation, if that mode of application, at least temporarily, does not enable the taxable persons concerned to know precisely the extent of their obligations in relation to VAT.

49 It is therefore for the referring court to determine, taking into account all the relevant facts and points of law, whether that is the position in the case before it and, if appropriate, to take the measures necessary to remedy the harmful consequences brought about by the application of the provisions at issue in a manner inconsistent with the principle of legal certainty.

50 Consequently, the answer to Questions 2 and 3 is that Decision 2004/290 must be interpreted to the effect that it is open to the Federal Republic of Germany to avail itself only partially of the authorisation granted by that decision, exercising it in respect of certain subcategories, such as particular types of construction work, and in respect of supplies to certain recipients. When establishing those subcategories, that Member State is required to respect the principle of fiscal neutrality and the general principles of EU law and, in particular, the principles of proportionality and legal certainty. It is for the referring court to determine, taking into account all the relevant facts and points of law, whether that is the position in the case before it and, if appropriate, to take the measures necessary to remedy the harmful consequences brought about by the application of the provisions at issue in a manner inconsistent with the principles of proportionality or legal certainty.

Question 4

51 In view of the answer to Questions 2 and 3, there is no need to answer Question 4.

Costs

52 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 (First Chamber) hereby rules:

1. **Point (1) of Article 2 of Council Decision 2004/290/EC of 30 March 2004 authorising Germany to apply a measure derogating from Article 21 of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes must be interpreted to the effect that the term ‘construction work’, as used in that provision, covers the supply of goods within the meaning of Article 5(1) of that directive, in addition to the transactions to be regarded as supplies of services, as defined in Article 6(1) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment, as amended by Council Directive 2004/7/EC of 20 January 2004.**

2. **Decision 2004/290 must be interpreted to the effect that it is open to the Federal Republic of Germany to avail itself only partially of the authorisation granted by that decision, exercising it in respect of certain subcategories, such as particular types of construction work, and in respect of supplies to certain recipients. When establishing those subcategories, that Member State is required to respect the principle of fiscal neutrality and the general principles of European Union law and, in particular, the principles of proportionality and legal certainty. It is for the referring court to determine, taking into account all the relevant facts and points of law, whether that is the position in the case before it and, if appropriate, to take the measures necessary to remedy the harmful consequences brought about by the application of the provisions at issue in a manner inconsistent with the principles of proportionality or legal certainty.**

[Signatures]

* Language of the case: German.