JUDGMENT OF THE COURT (Third Chamber)

7 November 2013 (*)

(Taxation – VAT – Directive 2006/112/EC – Articles 73 and 78 – Immovable property transactions carried out by natural persons – Classification of those transactions as taxable – Determination of the VAT owing when the parties have made no provision for it at the time of conclusion of the contract – Question as to whether or not the vendor may recover the VAT from the purchaser – Consequences)

In Joined Cases C?249/12 and C?250/12,

REQUESTS for a preliminary ruling under Article 267 TFEU from the Înalta Curte de Casa?ie ?i Justi?ie (Romania), made by decision of 15 March 2012, received at the Court on 22 May 2012, in the proceedings

Corina-Hrisi Tulic?

v

Agen?ia Na?ional? de Administrare Fiscal? – Direc?ia General? de Solu?ionare a Contesta?iilor (C?249/12),

and

C?lin Ion Plavo?in

v

Direc?ia General? a Finan?elor Publice Timi? – Serviciul Solu?ionare Contesta?ii,

Activitatea de Inspec?ie Fiscal? – Serviciul de Inspec?ie Fiscal? Timi? (C 250/12),

THE COURT (Third Chamber),

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

Advocate General: M. Wathelet,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Romanian Government, by R.-H. Radu, R.-M. Giurescu and A.?L. Cri?an, acting as Agents,

– the European Commission, by L. Bouyon and C. Soulay, 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) (‘the VAT Directive’), in particular Articles 73 and 78 thereof.

2 The requests have been made in proceedings between, in the first case, Ms Tulic? and the Agen?ia Na?ional? de Administrare Fiscal? – Direc?ia General? de Solu?ionare a Contesta?iilor (National Agency for Fiscal Administration – Directorate-General for the settlement of complaints) and, in the second case, Mr Plavo?in and the Direc?ia General? a Finan?elor Publice Timi? – Serviciul Solu?ionare Contesta?ii (Directorate General of Public Finances, Timi? – Department for the settlement of complaints), concerning the determination of the value added tax (‘VAT’) owing when the parties to a contract have not made provision for it when fixing the price of the object of the transaction.

Legal context

European Union law

3 Recital 7 in the preamble to the VAT Directive is worded as follows:

‘The common system of VAT should, even if rates and exemptions are not fully harmonised, result in neutrality in competition, such that within the territory of each Member State similar goods and services bear the same tax burden, whatever the length of the production and distribution chain.’

4 Article 1 of that directive provides:

‘1. This Directive establishes the common system of [VAT].

2. The principle of the common system of VAT entails the application to goods and services of a general tax on consumption exactly proportional to the price of the goods and services, however many transactions take place in the production and distribution process before the stage at which the tax is charged.

On each transaction, VAT, calculated on the price of the goods or services at the rate applicable to such goods or services, shall be chargeable after deduction of the amount of VAT borne directly by the various cost components.

The common system of VAT shall be applied up to and including the retail trade stage.’

5 Article 73 of that 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.’

6 Article 78 of the same directive provides:

‘The taxable amount shall include the following factors:

(a) taxes, duties, levies and charges, excluding the VAT itself;

(b) incidental expenses, such as commission, packing, transport and insurance costs, charged by the supplier to the customer.

For the purposes of point (b) of the first paragraph, Member States may regard expenses covered by a separate agreement as incidental expenses.’

Romanian law

7 Under Title VI, entitled ‘Value added tax’, of Law No 571/2003 on the Tax Code, in the version applicable to the dispute in the main proceedings (‘the Tax Code’), Article 125a of that law, entitled ‘Meaning of certain terms and expressions’, provides:

‘1. Pursuant to this Title, the following terms and expressions shall have the following meaning:

...

5. “taxable amount” shall mean the consideration for the supply of goods or the provision of taxable services, of taxable importations or taxable intra-Community acquisitions of goods, determined in accordance with Chapter VII;

...’

8 Article 137 of the Tax Code, entitled ‘Taxable amount as regards the supply of goods and the provision of services in the national territory’, provides:

‘1. The taxable amount of [VAT] shall comprise:

(a) in respect of supplies of goods and services, everything which constitutes the consideration which has been or is to be obtained by the supplier from the purchaser, the customer or a third party for such supplies including subsidies directly linked to the price of such supplies;

...

2. This description shall contain:

(a) taxes and charges, unless otherwise provided for by law, excluding the VAT itself;

(b) incidental expenses, such as commission, packing, transport and insurance costs, charged by the supplier/provider to the customer. Expenses invoiced by the supplier of goods or the provider of services to the customer, which are covered by a separate agreement and are linked to the supply of goods or provision of services at issue, shall be regarded as incidental expenses.’

9 The Civil Code, in the version thereof applicable to the dispute in the main proceedings, provides:

‘Article 962

The subject-matter of the contract shall be made up of what the parties have, or one of the parties has, agreed.

...

Article 969

Contracts entered into in accordance with the law shall be legally binding as between the contracting parties. They may be rescinded only by common consent or as provided for by law.

Article 970

Contracts must be executed in good faith. They are binding not only in regard to what is specifically provided for therein but also as regards all consequences which arise therefrom – according to its nature – in accordance with equity, custom or law.'

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

10 Ms Tulic? and Mr Plavo?in concluded numerous contracts for the sale of land, including 134 contracts for the 2007-2008 period and 15 contracts for the 2007-2009 period.

11 Ms Tulic? and Mr Plavo?in made no provision for VAT at the time the contracts were concluded.

12 After the transactions were carried out and following a tax inspection, the tax authorities found that the activities pursued by Ms Tulic? and Mr Plavo?in bore the hallmarks of economic activity.

13 Ms Tulic? and Mr Plavo?in were thus automatically found to be taxable persons subject to the VAT by the tax authorities, who issued tax assessment notices to them, by which they ordered the payment of the VAT, calculated by adding that amount to the price agreed by the contracting parties, plus overdue interest.

14 In the course of the proceedings giving rise to Case C?249/12, Ms Tulic? argued that the tax authorities' practice of calculating the VAT by adding that amount to the price agreed by the contracting parties infringed a number of legal principles, including the principle of contractual freedom. The VAT is a component of the price, not an addition to it. It cannot be taken as a given that the purchaser would have agreed to the purchase of the immovable property in question under the terms assumed by the tax authorities. The VAT demanded by the tax authorities can no longer be recovered from the purchaser, as that would go beyond the scope of the contract and cannot be relied on against the purchaser, either as a contractual obligation or a non-contractual legal obligation.

15 Relying on Article 137 of the Tax Code, the tax authorities argued that, in order to determine the amount of VAT owing, the price agreed by the contracting parties must be used as the basis of the calculation.

16 Ms Tulic? brought an action before the Curtea de Apel Bucure?ti (Court of Appeal, Bucharest), which dismissed her action as unfounded.

17 Ms Tulic? appealed against the judgment of the Curtea de Apel Bucure?ti before the Înalta Curte de Casa?ie ?i Justi?ie (High Court of Cassation and Justice).

18 In her appeal, Ms Tulic? inter alia reiterated her argument that the basis for the calculation of the tax owing is incorrect. In support of that argument she has relied on paragraphs 26 and 27 of the judgment in Case C?317/94 *Elida Gibbs* v *Commissioners of Customs and Excise* [1996]

ECR I?5339.

19 During the proceedings before the Înalta Curte de Casa?ie ?i Justi?ie, Interpretative Decision No 2/2011 of the Central Tax Commission was published in *Monitorul Oficial al României* No 278 of 20 April 2011 ('Interpretative Decision No 2/2011'). That decision was adopted by the Central Tax Commission in the exercise of its role in ensuring uniform application of the tax legislation. That decision confirms the tax authorities' approach for determining the taxable amount for VAT purposes. It is worded as follows:

'... [I]n in the case of the taxable supply of structures and land, the relevant [VAT] collected is to be established on the basis of the intention of the parties, as that intention emerges from the contract or from other evidence submitted in accordance with Government Order No 92/2003 ...:

(a) by applying the VAT rate to the consideration for the supply … in cases in which:

1. the parties agreed that VAT was not included in the consideration for the supply; or

2. the parties made no agreement in regard to VAT;

(b) by applying the "percent increase" … in cases in which the parties agreed that the consideration for the supply included VAT.'

20 In the course of the proceedings giving rise to Case C?250/12, Mr Plavo?in argued that the addition of the VAT to the amount paid as consideration for the sale disregarded the subject-matter of the contract concluded by the parties and produced effects contrary to the objective pursued by VAT. VAT cannot, in his submission, be borne by the supplier since it is, by its very nature, a tax on consumption which must be borne by the end consumer.

21 In Mr Plavo?in's submission, when a contract of sale makes no reference to VAT, the tax owing must be applied to an amount equal to the price agreed by the parties, minus the total tax, with the result that the amount paid by the purchaser covers both the price owing to the supplier and the VAT.

22 The tax authorities rely on Interpretative Decision No 2/2011, which confirms the approach adopted by those authorities for calculating the applicable VAT.

23 Mr Plavo?in brought an action before the Curtea de Apel Timi?oara (Court of Appeal, Timi?oara), which dismissed his action.

24 Mr Plavo?in then appealed against that judgment of the Curtea de Apel Timi?oara before the Înalta Curte de Casa?ie ?i Justi?ie.

25 The latter court has some doubts as to the well-foundedness of Interpretative Decision No 2/2011 as regards the concept of 'consideration obtained' and the scope of Articles 73 and 78 of the VAT Directive when the parties to a sale have made no agreement in regard to VAT. The Înalta Curte de Casa?ie ?i Justi?ie accordingly decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'If a vendor has been reclassified as a taxable person for VAT purposes and the consideration for (price of) the supply of the immovable property has been determined by the parties, without any reference to VAT, must Articles 73 and 78 of [the VAT Directive] be interpreted as meaning that the taxable amount is:

(a) the consideration for (price of) the supply of the property determined by the parties, less the

rate of VAT, or

(b) the consideration for (price of) the supply of the property agreed by the parties?'

26 By order of 22 June 2012, the President of the Court joined Cases C?249/12 and C?250/12 for the purposes of the written procedure, the oral procedure and judgment.

The question referred for a preliminary ruling

27 The referring court asks, in essence, in the light of Articles 73 and 78 of the VAT Directive whether, when the price of a good has been established by the parties without any reference to VAT and the supplier of that good is the taxable person for the VAT owing on the taxed transaction, the price agreed must be regarded as already including the VAT or as not including the VAT, which must be added thereto.

28 It is apparent from the case-file with the Court that the applicants in the main proceedings, who are suppliers of immovable property, are the taxable parties for the VAT owing on the taxable transactions carried out by them. The file also shows that the parties to the contracts at issue in the main proceedings made no provision in regard to VAT when they fixed the price of the immovable property which was the subject-matter of the sale. However, no information has been provided by the referring court as to whether or not, under national law, a means is available to those suppliers of recovering from the purchasers, in addition to the agreed price, the VAT now being claimed by the tax authorities.

29 Ms Tulic?, Mr Plavo?in and the European Commission submit, in essence, that the VAT is by its very nature a tax on consumption which must be borne by the end consumer and which must not therefore be borne by a supplier. The VAT should therefore be a component of the price and not an additional component added to the price.

30 The Romanian Government submits, in essence, that in order to determine the consideration obtained by the supplier, since consideration has a subjective value, it is appropriate to base oneself on the intention of the parties and to have the consideration consist in the amount that the supplier intended to receive and the purchaser was prepared to pay. In the present case, that amount equals the amount set down in the contract, without any deduction of VAT.

31 The Romanian Government adds that if the consideration consisted in the price of the good supplied, minus the amount of the VAT, the supplier would be placed at an advantage in relation to his competitors, which is contrary to the principle of VAT neutrality and could reward irregularities such as those in which the suppliers involved in the main proceedings engaged.

32 It should be borne in mind in that regard that it follows from Articles 1(2) and 73 of the VAT Directive that the principle of the common system of VAT entails the application to goods and services of a general tax on consumption exactly proportional to their price and that the taxable amount includes everything which constitutes consideration obtained or to be obtained by the supplier of goods or services for transactions with the purchaser, customer or a third party. Article 78 of that directive lists certain items which are to be included in the taxable amount. Article 78(a) provides that VAT is not to be included in the taxable amount.

33 In accordance with the general rule set out in Article 73 of the VAT Directive, the taxable amount for the supply of goods or services for consideration is the consideration actually received for them by the taxable person. That consideration is thus the subjective value, that is to say, the value actually received, and not a value estimated according to objective criteria (see, inter alia, Case 154/80 *Coöperatieve Aardappelenbewaarplaats* [1981] ECR 445, paragraph 13, and Joined

Cases C?621/10 and C?129/11 *Balkan and Sea Properties and Provadinvest* [2012] ECR, paragraph 43).

34 This rule must be applied in accordance with the basic principle of that directive: that the VAT system is aimed at taxing only the end consumer (see, inter alia, *Elida Gibbs*, paragraph 19, and order of 9 December 2011 in Case C?69/11 *Connoisseur Belgium*, paragraph 21).

35 When a contract of sale has been concluded without reference to VAT, in a situation where the supplier has no means under national law of recovering from the purchaser the VAT claimed subsequently by the tax authorities, taking the total price, without deducting the VAT, as the taxable amount on which the VAT is to be levied, leads to a situation where it is the supplier which bears the VAT burden, thereby conflicting with the principle that VAT is a tax on consumption to be borne by the end consumer.

36 Taking that amount as the taxable amount also conflicts with the rule that the tax authorities may not charge a VAT amount exceeding the amount paid by the taxable person (see, inter alia, *Elida Gibbs*, paragraph 24; Case C?330/95 *Goldsmiths* [1997] ECR I?3801, paragraph 15; and *Balkan and Sea Properties and Provadinvest*, paragraph 44).

37 The situation is otherwise when the supplier has the possibility under national law of adding to the agreed price a supplement equal to the tax applicable to the transaction and recovering it from the purchaser of the good.

38 It should also be noted that one of the essential characteristics of VAT resides in the fact that it is exactly proportional to the price of the goods and services concerned. This means that all suppliers contribute to the payment of VAT in the same proportion in relation to the total amount received for the goods sold.

39 In the present case, it is for the national court to ascertain whether Romanian law allows suppliers to recover from their purchasers the VAT subsequently claimed by the tax authorities.

40 Should the result of that line of inquiry be that such recovery is not possible, the conclusion must be that the VAT Directive precludes a rule such as that laid down in Interpretative Decision No 2/2011.

41 In so far as the Romanian Government argues that a rule such as that at issue in the main proceedings has the effect of dissuading irregularities, it should be noted that all Member States have the power – and indeed are under an obligation – to take all legislative and administrative measures appropriate for ensuring collection of all the VAT due and for preventing evasion (Case C?617/10 *Åkerberg Fransson* [2013] ECR, paragraph 25 and the case-law cited)

42 Those measures must not, however, go further than is necessary to attain the objective pursued (Case C?284/11 *EMS-Bulgaria Transport* [2012] ECR, paragraph 67 and the case-law cited). That is precisely what the rule at issue in the main proceedings does if it turns out that it leads to a situation where the VAT is borne by the supplier and is therefore not collected in a manner which is compatible with the basic principle of the VAT system, as outlined in paragraph 34 above.

43 In the light of the foregoing, the answer to the question referred is that the VAT Directive, in particular Articles 73 and 78 thereof, must be interpreted as meaning that, when the price of a good has been established by the parties without any reference to VAT and the supplier of that good is the taxable person for the VAT owing on the taxed transaction, in a case where the supplier is not able to recover from the purchaser the VAT claimed by the tax authorities, the price

agreed must be regarded as already including the VAT.

Costs

44 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 (Third Chamber) hereby rules:

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, in particular Articles 73 and 78 thereof, must be interpreted as meaning that, when the price of a good has been established by the parties without any reference to value added tax and the supplier of that good is the taxable person for the value added tax owing on the taxed transaction, in a case where the supplier is not able to recover from the purchaser the value added tax claimed by the tax authorities, the price agreed must be regarded as already including the value added tax.

[Signatures]

* Language of the case: Romanian.