JUDGMENT OF THE COURT (Ninth Chamber)

12 February 2015 (*)

(Reference for a preliminary ruling — VAT — Directive 2006/112/EC — Deduction of input tax — Transactions constituting an abusive practice — National tax law — Special national procedure where the existence of abusive practices is suspected in the field of taxation — Principles of effectiveness and equivalence)

In Case C?662/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Supremo Tribunal Administrativo (Portugal), made by decision of 4 December 2013, received at the Court on 13 December 2013, in the proceedings

Surgicare — Unidades de Saúde SA

v

Fazenda Pública,

THE COURT (Ninth Chamber),

composed of K. Jürimäe (Rapporteur), President of the Chamber, J. Malenovský and M. Safjan, Judges,

Advocate General: P. Mengozzi,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Surgicare — Unidades de Saúde SA, by R. Barreira, advogado,

– the Portuguese Government, by L. Inez Fernandes, R. Laires and M. Rebelo, acting as Agents,

– the European Commission, by P. Guerra e Andrade and L. Lozano Palacios, 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).

2 The request has been made in proceedings between Surgicare — Unidades de Saúde SA (‘Surgicare’) and the Fazenda Pública (revenue authority) concerning the latter’s refusal to reimburse input value added tax (‘VAT’) paid by Surgicare, on the ground that Surgicare had abused its right to deduction.

Legal context

EU law

3 The first paragraph of Article 273 of Directive 2006/112 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.’

4 According to Article 342 of that directive:

‘Member States may take measures concerning the right of deduction in order to ensure that the taxable dealers covered by special arrangements as provided for in Section 2 do not enjoy unjustified advantage or sustain unjustified harm.’

Portuguese law

5 The General Tax Law (Lei Geral Tributária), adopted by Decree Law No 398/98, of 17 December 1998, lays down the fundamental principles of the taxation system, the guarantees of tax payers and the powers of the revenue authorities. Article 38 thereof, entitled ‘Absence of effect of legal acts and transactions’, provides:

‘1. The absence of effect of legal transactions does not preclude a tax assessment, at the time prescribed by law, in so far as those transactions have already produced the economic results expected by the persons concerned.

2. Legal acts and transactions intended essentially or principally, through artificial or fraudulent means and by abusing the legal procedures available, to reduce, exclude or delay tax which would be due or to obtain tax advantages that would not be granted, in whole or in part, without recourse to those means shall not have effect for revenue purposes. The tax shall therefore be imposed in accordance with the rules applicable in the absence of those legal acts or transactions, and the persons concerned shall not benefit from the tax advantages concerned.’

6 The Code of Taxation Procedure and Proceedings (Código de Procedimento e de Processo Tributário, ‘the CPPT’) was adopted by Decree Law No 433/99 of 26 October 1999, and entered into force on 1 January 2000. Article 63 of the CPPT, entitled ‘Application of anti-abuse rules’ was worded, in the version applicable to the factual circumstances of the case in the main proceedings, as follows:

‘1. The payment of taxes on the basis of any anti-abuse provision laid down in the codes and other tax laws shall be subject to the initiation of a special procedure relating thereto.

2. For the purposes of this Code, anti-abuse provisions shall be deemed to be any legal rules rendering ineffective with regard to the tax authorities legal transactions or acts concluded or carried out in manifest abuse of legal procedures and giving rise to the avoidance or reduction of

taxes that would otherwise be payable.

3. The procedure referred to in the previous paragraph may be initiated within a period of three years following the carrying out of the act or the conclusion of the legal transaction that is the subject-matter of the application of anti-abuse provisions.

4. The application of the anti-abuse provisions shall be subject to the taxpayer's being granted a hearing, in accordance with the law.

5. The right to a hearing shall be exercised within a period of 30 days of the corresponding notification to the taxpayer by registered post.

6. Within the period referred to in the previous paragraph, the taxpayer may submit any evidence he considers relevant.

7. The application of the anti-abuse provisions shall be preceded, once the requirements of the previous paragraphs have been satisfied, by the authorisation of the head of the department or the official to whom he has delegated the relevant power.

8. The anti-abuse provisions shall not be applicable to cases in which the taxpayer has applied to the tax authorities for binding information concerning the facts on which that application is based and the tax authorities have not replied within a period of six months.

9. Save as otherwise provided by law, the grounds of the decision referred to in Paragraph 7 shall contain:

(a) a description of the legal transaction concluded or legal act carried out and of its true economic nature;

(b) evidence that the sole or decisive aim of the conclusion of the transaction or the carrying out of the act was to evade tax payable on transactions or acts of that economic nature;

(c) a description of transactions or acts of the same economic nature as those actually concluded or carried out and of the tax rules applicable to them.

10. An independent administrative appeal may be brought against the authorisation referred to in Paragraph 7 of this article.'

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

7 Surgicare is a company established under Portuguese law the activities of which consist of, on the one hand, the construction, operation and management of healthcare establishments that belong either to it or to third party entities, public or private; and, on the other hand, the supply of medical and surgical services in general, domiciliary and outpatient care, diagnostic and therapeutic activities and other related or additional activities.

8 In the period from 2003 to 2007, Surgicare constructed, on land belonging to it, a hospital and fitted it with medical equipment. During the period of construction and fitting out of the hospital, Surgicare did not carry out taxable transactions, with the result that Surgicare accumulated VAT credit.

9 After the construction of the hospital, Surgicare transferred the operation thereof, with effect from 1 July 2007, to Clínica Parque dos Poetas SA, a company which had the same shareholders and belonged to the same group of companies as Surgicare, namely the Espírito Santo Saúde

group.

10 Following that transfer, which Surgicare considered to be a transaction subject to VAT, Surgicare deducted from the tax due to the Treasury in respect of the rent paid by the transferee the VAT paid on the acquisition of goods and services for the construction and fitting out of the hospital. Surgicare applied, as a mixed taxable person, the method of actual application of the goods and services acquired.

11 The Fazenda Pública carried out a tax review of Surgicare's activities for the years 2005 to 2007 and concluded that the company had abused the right to a VAT refund. According to the revenue authority, the transfer of the operation of the hospital to a company created for that purpose by the same group of companies was concluded with the sole aim of subsequently enabling Surgicare to establish the existence of a right to deduct the input VAT paid during the period when the building was constructed and fitted, even though Surgicare would not have been able to benefit from that right if it had operated the hospital itself, since that activity is exempt from VAT. Consequently, the Fazenda Pública served on Surgicare, in 2010, a notice of assessment in respect of VAT wrongly deducted by Surgicare during the financial years 2005 to 2007, together with interest for late payment, amounting in total to EUR 1 762 111.04.

12 Surgicare challenged the notice of assessment before the tribunal tributário de Lisboa (Tax Court, Lisbon), on the basis that the assessment was tainted with illegality on the grounds that, first, the Fazenda Pública had not used the mandatory special procedure laid down in Article 63 of the CPPT and, second, that the practices in question were not abusive.

13 By judgment of 25 October 2012, that court dismissed the action as unfounded. Surgicare appealed to the referring court against that judgment.

14 The referring court takes the view that the Fazenda Pública, when it suspects the existence of an abusive practice, must use the procedure laid down by Article 63 of the CPPT. That court is uncertain, however, whether that procedure must be followed given that the system of VAT has its origins in EU law.

15 In those circumstances, the Supremo Tribunal Administrativo (Supreme Administrative Court) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'When the tax authorities suspect the existence of an abusive practice designed to obtain a VAT refund and Portuguese law provides for a mandatory preliminary procedure applicable to abusive practices in taxation matters, is that procedure to be regarded as inapplicable to VAT, given the Community origin of that tax?'

The question referred for a preliminary ruling

Admissibility

16 The Portuguese government submits, as its principal argument, that the reference for a preliminary ruling is manifestly inadmissible on the grounds that the referring court: first, does not specify the provisions or rules of EU Law of which an interpretation is requested; second, does not explain the reasons why it is uncertain as to the compatibility of the rule of national law at issue in the main proceedings with EU law; and, third, sets out two different versions of Article 63 of the CPPT even though only one of the two is relevant for the purposes of the assessment of the factual situation at issue in the main proceedings. Furthermore, Article 63 of the CPPT is a provision of purely internal law that is not intended either to reproduce or to transpose any rule of

EU law whatsoever, so that the Court does not have jurisdiction to give a ruling under the preliminary reference procedure on the meaning, content or scope of that provision of national law.

17 As regards, in the first place, the lack of precision as to the provisions of EU law of which an interpretation is requested, it should be recalled that, according to the case-law of the Court, where a question referred for a preliminary ruling merely refers to EU law, and does not state which provisions of EU law are in issue, the Court must extract from all the factors provided by the referring court, and in particular from the statement of grounds contained in the order for reference, the provisions of EU law requiring an interpretation, having regard to the subject-matter of the dispute (see, to that effect, judgments in *Bekaert*, 204/87, EU:C:1988:192, paragraphs 6 and 7, and *Kattner Stahlbau*, C?350/07, EU:C:2009:127, paragraph 26).

18 It is clear from the order for reference that the question seeks to determine whether EU law in the field of VAT, and in particular the provisions of law relating to the prevention of VAT fraud, preclude the establishment, under domestic law, of an administrative procedure that the revenue authorities are required to follow if they suspect the existence of an abusive tax practice.

19 It must be borne in mind, in that regard, that the prevention of tax evasion, avoidance and abuse is an objective recognised and encouraged by EU Directives in the field of VAT (see judgments in *Gemeente Leusden and Holin Groep*, C?487/01 and C?7/02, EU:C:2004:263, paragraph 76; *Halifax and Others*, C?255/02, EU:C:2006:121, paragraph 71; *R*., C?285/09, EU:C:2010:742, paragraph 36; *Tanoarch*, C?504/10, EU:C:2011:707, paragraph 50; and *Bonik*, C?285/11, EU:C:2012:774, paragraph 35).

20 Thus, in accordance with Article 273 of Directive 2006/112, Member States may take the necessary measures to ensure the correct collection of VAT and to prevent evasion. As regards, in particular, the right to deduct VAT, the Member States have the power, under Article 342 of that directive, to lay down measures that ensure that taxable persons do not enjoy unjustified advantage or sustain unjustified harm.

21 In the second place, as regards the fact that the referring court has not specified the reasons for which it has doubts as to the compatibility of national law with EU law, it should be noted that the referring court has set out for the Court the arguments of the parties from which show what those doubts are. As to the necessity, for the outcome of the dispute in the main proceedings, of a response to the question asked, the referring court explains that if the Court were to conclude that the national procedure was compatible with EU law, then it would no longer be necessary to determine whether an abusive practice could be found on the facts of the case in the main proceedings.

22 As regards, in the third place, the allegedly incorrect presentation of the national law in the order for reference, the Court must take account of the factual and legal context as described in the order for reference. The determination of the applicable national legislation *ratione temporis* is a question of interpretation of national law and thus does not fall within the jurisdiction of the Court in the context of a request for a preliminary ruling (see judgment in *Texdata Software*, C?418/11, EU:C:2013:588, paragraphs 29 and 41). Therefore, the question referred must be answered having regard to the version of Article 63 of the CPPT that was, according to the referring court, applicable at the material time.

23 It follows from the foregoing that the request for a preliminary ruling is admissible.

Substance

24 By its question, the referring court asks, in essence, whether Directive 2006/112 precludes

the mandatory preliminary application of a national administrative procedure, such as that laid down by Article 63 of the CPPT, in the event that the revenue authorities suspect the existence of an abusive practice.

25 Although Directive 2006/112 gives Member States the power, in accordance with the case-law recalled at paragraph 19 of this judgment, to adopt the measures necessary to ensure the correct collection of VAT and to prevent evasion, the directive does not lay down any provision specifying in concrete terms the contents of the measures that must be adopted by Member States for that purpose.

26 In the absence of any EU rules in the area, the means of preventing VAT fraud falls within the internal legal order of the Member States under the principle of procedural autonomy of the latter. In that regard, it is apparent from the Court's settled case-law that it is for the domestic legal system of each Member State, in particular, to designate the authorities responsible for combatting VAT fraud and to lay down detailed procedural rules for safeguarding rights which individuals derive from EU law, provided that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the EU legal order (principle of effectiveness) (see, to that effect, judgments in *Marks & Spencer*, C?62/00, EU:C:2002:435, paragraph 34; *Fallimento Olimpiclub*, C?2/08, EU:C:2009:506, paragraph 24; *Alstom Power Hydro* , C?472/08, EU:C:2010:32, paragraph 17; and, *ADV Allround*, C?218/10, EU:C:2012:35, paragraph 35).

27 It is for the referring court to determine whether the national measures are compatible with those principles, having regard to all the circumstances of the case (see, to that effect, judgment in *Littlewoods Retail and Others*, C?591/10, EU:C:2012:478, paragraph 30). However, the Court, when giving a preliminary ruling, may provide the referring court with all indications that may assist it in that regard (see, in particular, to that effect, judgment in *Partena*, C?137/11, EU:C:2012:593, paragraph 30).

28 As regards, first, the principle of effectiveness, it should be recalled that every case in which the question arises whether a national procedural provision makes the exercise of rights arising under the EU legal order impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national bodies. For those purposes account must be taken of the basic principles which lie at the basis of the domestic judicial system, such as the protection of the rights of the defence, the principle of legal certainty and the proper conduct procedure (see the judgments in *Peterbroeck*, C?312/93, EU:C:1995:437, paragraph 14, and *Fallimento Olimpiclub*, EU:C:2009:506, paragraph 27).

29 As regards the case in the main proceedings, it must be held that the special procedure laid down by Article 63 of the CPPT, subject to a limitation period of three years, is characterised by a preliminary hearing within 30 days for the taxpayer concerned, the submission by the taxpayer of all the evidence that he considers to be relevant and the obtaining of an authorisation from the head of the department, or the official to whom he has delegated the relevant power, responsible for the application of anti-abuse rules. Furthermore, in accordance with that provision, reasons must be given for the decision adopted. It follows from those elements that the national procedure in question is favourable to the person suspected of having committed an abuse of rights, inasmuch as it seeks to guarantee the observance of certain fundamental rights, in particular the right to be heard.

30 As regards, second, the principle of equivalence, it should be noted that compliance with that principle requires that the national rule in question apply without distinction to actions based

on infringement of EU law and those based on infringement of national law having a similar purpose and cause of action (see judgment in *Littlewoods Retail and Others*, EU:C:2012:478, paragraph 31).

31 In the case in the main proceedings, as is clear from paragraph 29 of this judgment, it cannot be excluded that compliance with the principle of equivalence requires the application of the special procedure when a taxpayer is suspected of VAT fraud.

32 In any event, having regard to the information submitted to the Court by the national court, it does not appear that the application of the national procedure laid down in Article 63 of the CPPT is contrary, in itself, to the objective of the prevention of tax evasion, avoidance and abuse, recognised in the case-law referred to in paragraph 19 above.

33 Furthermore, even though the national legislature must ensure the effective implementation of that objective, it remains the case that it is required, in that regard, to respect the requirements of effective judicial protection of the rights that individuals derive from EU law, as guaranteed by Article 47 of the Charter of Fundamental Rights of the European Union (see, to that effect, judgment in *Banif Plus Bank*, C?472/11, EU:C:2013:88, paragraph 29 and case-law cited).

34 Having regard to all the foregoing considerations, the answer to the question referred is that Directive 2006/112 must be interpreted as meaning that it does not preclude the mandatory preliminary application of a national administrative procedure, such as that laid down by Article 63 of the CPPT, in the event that the revenue authorities suspect the existence of an abusive practice.

Costs

35 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 (Ninth Chamber) hereby rules:

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning that it does not preclude the mandatory preliminary application of a national administrative procedure, such as that laid down by Article 63 of the Code of Taxation Procedure and Proceedings (Código de Procedimento e de Processo Tributário), in the event that the revenue authorities suspect the existence of an abusive practice.

[Signatures]

* Language of the case: Portuguese.