JUDGMENT OF THE COURT (Second Chamber)

2 July 2015 (*)

(Reference for a preliminary ruling — VAT — Directive 2006/112/EC — Supply of goods or services — Lease agreement — Return of immovable property that is the subject-matter of a lease agreement to the lessor — Concept of ‘cancellation, refusal or total or partial non-payment’ — Lessor’s right to a reduction of the taxable amount — Double taxation — Separate supplies — Principle of fiscal neutrality)

In Case C?209/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Vrhovno sodiš?e (Slovenia), made by decision of 16 April 2014, received at the Court on 25 April 2014, in the proceedings

NLB Leasing d.o.o.

v

Republika Slovenija,

THE COURT (Second Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, J.-C. Bonichot (Rapporteur), A. Arabadjiev, J.L. da Cruz Vilaça and C. Lycourgos, Judges,

Advocate General: N. Jääskinen,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– NLB Leasing d.o.o., by J. Podlipnik, tax advisor,

– the Slovenian Government, by T. Miheli? Žitko, acting as Agent,

– the European Commission, by C. Soulay, L. Lozano Palacios and M. Žebre, 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 Articles 2(1), 14, 24(1) and 90(1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1; ‘the VAT Directive’).

2 The request has been made in proceedings between NLB Leasing d.o.o. (‘NLB’) and the

Republika Slovenija (Republic of Slovenia), represented by the Ministrstvo za finance (Ministry of Finance), concerning the latter's refusal to allow NLB to adjust the amount of value added tax ('VAT') paid following the conclusion of two lease agreements.

Legal context

EU law

3 Under Article 2(1) of the VAT Directive:

'The following transactions shall be subject to VAT:

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

…

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

…'

4 Article 14 of the VAT Directive provides:

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

2. In addition to the transaction referred to in paragraph 1, each of the following shall be regarded as a supply of goods:

…

(b) the actual handing over of goods pursuant to a contract for the hire of goods for a certain period, or for the sale of goods on deferred terms, which provides that in the normal course of events ownership is to pass at the latest upon payment of the final instalment;

…'

5 Article 24(1) of the VAT Directive provides:

'"Supply of services" shall mean any transaction which does not constitute a supply of goods.'

6 Article 90 of the VAT Directive is worded as follows:

'1. In the case of cancellation, refusal or total or partial non-payment, or where the price is reduced after the supply takes place, the taxable amount shall be reduced accordingly under conditions which shall be determined by the Member States.

2. In the case of total or partial non-payment, Member States may derogate from paragraph 1.'

Slovenian law

7 Under Article 3(1) of the Law on value added tax (Zakon o davku na dodano vrednost, 'ZDDV-1'), the following transactions are subject to VAT:

‘1. The supply of goods for consideration within the territory of the Republic of Slovenia … by a taxable person in the course of his economic activity;

…

3. The supply of services for consideration within the territory of the Republic of Slovenia … by a taxable person in the course of his economic activity;

…’

8 Under Article 6 of the ZDDV-1:

‘1. A “supply of goods” shall mean the transfer of the right to dispose of tangible property as if the lessee was the owner of the property.

2. The following shall also be regarded as a supply of goods:

…

b) the actual handing over of goods pursuant to a contract for the hire of goods for a certain period … which provides that in the normal course of events ownership is to pass at the latest upon payment of the final instalment;

…’

9 Article 14(1) of the ZDDV-1 provides that a ‘supply of services’ means any transaction which does not constitute a supply of goods.

10 Article 39(2) and (3) of the ZDDV-1 is worded as follows:

‘2. In the case of cancellation or return, or where the price is reduced after the supply has taken place, the taxable amount shall be reduced accordingly. A taxable person may adjust (reduce) the amount of VAT declared provided that the recipient of the goods or services adjusts (reduces) the amount of the VAT which he deducted and informs the supplier of this in writing.

3. A taxable person may adjust (reduce) the amount of VAT to be paid where it has not been paid, or where it has been paid only in part, on the basis of a court decision that has acquired the force of res judicata approving bankruptcy proceedings which have concluded, or on the basis of a procedure for an arrangement with creditors brought to completion … Where a taxable person receives, at a later stage, full or partial payment in consideration of him supplying goods or services, in respect of which he has adjusted the taxable amount in accordance with the present paragraph, he shall pay VAT on the amount received.’

11 Article 13 of the regulation implementing the ZZDV-1 (Pravilnik o izvajanju Zakona o davku na dodano vrednost) provides:

‘1. VAT shall not be declared or paid on compensation for damage.

2. Compensation for damage, for the purposes of the previous paragraph, shall include, in particular:

– the supply made by a supplier by way of compensation for harm caused by an earlier supply where the supplier is legally or contractually liable for the harm and its consequences;

– default interest which a taxable person charges his debtor, up to the statutory rate, together with the costs of making a formal demand for payment;

– contractual penalties;

– compensation for the loss caused by the cancellation of a contract, where the purchaser under the contract has received no goods or services.

3. Where a contract is performed in part, such partial performance shall be subject to VAT.'

12 Under Article 41 of the implementing regulation of the ZDDV-1:

'…

2. In accordance with Article 39(2) of the ZDDV-1, a taxable person may reduce the amount of VAT in a manner commensurate with the discounts agreed to at a later stage, such as, for example, large-scale discounts or rebates agreed to owing to the inferior quality of the goods, where the supplier and the recipient are in direct agreement as to those discounts or rebates.

3. A supplier may not reduce the taxable amount, pursuant to Article 39(2) of the ZDDV-1, before the tax period in which he receives written notice from the recipient informing him that the recipient has adjusted the VAT deduction.

…'

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

13 In February 2008, NLB, as lender, and Domino ing, d.o.o. ('Domino'), as borrower, entered into two short-term loan agreements with a specific purpose and 'business cooperation' agreements. The latter agreements stipulated, inter alia, that the purpose of the loans which NLB granted to Domino was to finance the purchase of property with a view to constructing housing, and that NLB could, if it so wished, finance the construction of that housing, in which it acknowledged that it had an interest. With those loans, Domino purchased property the previous owners of which were third parties to the contracts entered into by NLB and Domino.

14 In April 2009, NLB and Domino entered into two sets of agreements, which, according to the information provided by the Vrhovno sodiš?e (Supreme Court), constitute a 'sale and lease back' transaction. First, by two sales contracts, NLB became owner of the property which Domino had previously purchased and, second, by two lease agreements, NLB undertook simultaneously to lease back that property to Domino for a period of a few months. Without prejudice to the business cooperation agreements concluded previously between those two companies, the lease agreements provided that, before they expired, Domino would have to choose between the following three options: to extend the duration of the agreements, to return the property to NLB or, finally, to exercise its option to purchase that property by paying all the outstanding instalments to NLB.

15 When the lease agreements were concluded, NLB paid VAT on the amount invoiced to Domino under those agreements, namely the sum corresponding to all the monthly instalments, including the purchase options granted to Domino.

16 Since Domino had not, upon the expiry of those lease agreements, paid all the instalments due to NLB, the latter, as those agreements permitted it to do, took back possession of the property which was the subject-matter of the lease agreement. In July 2010, NLB sold that

property, as building land, to a third party company, Sava IP, d.o.o. (‘Sava IP’), and declared the VAT due on that occasion.

17 As Domino failed to fulfil its obligations under those lease agreements, NLB requested that the VAT amount declared be adjusted for an amount corresponding to the value of the purchase options provided for in those agreements.

18 In that regard, it is clear from the order for reference that NLB and Domino drew up, in accordance with the terms of the lease agreements, a final account, pursuant to which NLB paid Domino a sum corresponding to the difference between, first, the capital gain realised on the sale of the property to Sava IP and, second, Domino’s outstanding liabilities, including the purchase options.

19 NLB deducted from the sale price of the property in question an amount corresponding to the sum of (i) the VAT which it had paid at the time of that transfer, (ii) the purchase option instalments not yet paid by Domino, and, finally, (iii) the monthly instalments for which Domino was still liable to NLB. NLB, in turn, paid the remaining balance to Domino. Subsequently, NLB issued Domino with two credit notes for an amount equivalent to the purchase option instalments and, in doing so, cancelled those instalments.

20 By decision of 5 June 2012, the Slovenian tax authorities refused to grant NLB’s request to reduce the amount of the VAT paid by that company on the occasion of the conclusion of the lease agreements, on the ground that the two credit notes did not constitute a legal basis for reducing NLB’s taxable amount. They consider that those agreements were not ‘terminated’ and the repossession of the properties by NLB is not a case of ‘return’ within the meaning of Article 39(2) of the ZDDV-1, which transposes Article 90(1) of the VAT Directive into Slovenian law. In the view of those authorities, the lessor in fact took on the role of the lessee’s pledgee and sold the properties on the lessee’s behalf to Sava IP.

21 NLB contested the Slovenian tax administration’s decision by bringing, first, an administrative action before the Ministry of Finance and, then, an action before the court of first instance with jurisdiction to hear its complaint. Both those actions were dismissed.

22 In its appeal, NLB argues that the tax authorities and the court of first instance erred in their interpretation of Article 39 of the ZDDV-1 and Article 90(1) of the VAT Directive. The return of the property, which Domino undertook owing to its failure to fulfil its contractual obligations, corresponds to one of the cases referred to in the abovementioned provisions. NLB also claims that, were it not allowed to reduce its taxable amount in a context such as that in the main proceeding, that would amount to a breach of the principle of fiscal neutrality, given that it paid VAT a second time when it sold the property to a third party company.

23 It was in those circumstances that the Vrhovno sodiš?e decided to stay the proceedings and to refer to the Court the following questions for a preliminary ruling:

‘(1) Having regard to circumstances of the case in the main proceedings, on a proper construction of Article 90(1) of the VAT Directive, does the return of immovable property that is the subject-matter of a lease agreement, as a result of the lessee’s failure to perform its obligations in full, into the possession of the lessor for the purposes of its subsequent sale and performance of the other obligations under the lease agreement, once all the payment instalments under the lease have fallen due, constitute a case of “cancellation, refusal or total or partial non-payment” after the supply has taken place, in consequence of which the taxable amount is to be reduced accordingly?

(2) On a proper construction of Articles 2(1), 14 and 24(1) of the VAT Directive, must the financial consideration relating to two purchase options be regarded as consideration for the performance of the agreement and as a supply of goods and, as such, subject to VAT, when it represents a substantial part of the total amount due under lease agreements and is paid by the lessee to the lessor in such a way that, as a result of the failure in part to perform obligations, the lessor regains possession of the subject-matter of the lease agreement, sells it to a third party and pays the surplus proceeds of the sale to the lessee after deducting, in the final account, the sum relating to the purchase options, or must it be regarded as consideration for the service of the rent of, or for the use of, the property (and, as such, subject to VAT, or at the option of the taxable persons), or must it rather be regarded as compensation for damage for the termination of the agreement, paid in order to make good the loss caused by the lessee's failure to perform and having no direct connection with any provision of services for consideration and, as such, not subject to VAT?

(3) If the answer to the second question is that the sum in question is to be regarded as consideration for the supply of goods and performance of the agreement, does the principle of the neutrality of VAT preclude a lessor's having to pay output VAT twice, that is to say, once upon conclusion of the lease agreements (including in respect of the purchase options, which represented the greater part of the contract value) and, as a result of the lessee's failure to fulfil its obligations in full, a second time, on the subsequent sale of the immovable property in question to a third party, even though the liability to pay VAT on the second supply has been passed on to the lessee in the final account?'

Consideration of the questions referred

The second question

24 It is clear from the order for reference that NLB, as lessor, and Domino, as lessee, entered into two lease agreements the purpose of which was the lease of two pieces of property. It also appears from that order that, owing to Domino's failure to fulfil its obligations, NLB regained, in accordance with those agreements, possession of that property, sold it to a third party and paid the surplus proceeds of sale to the lessee, after deducting, in the final account, the sum relating to the purchase options. It is in that context that, by its second question, which it is appropriate to consider first, the referring court asks, in essence, whether Articles 2(1), 14 and 24(1) of the VAT Directive must be interpreted as meaning that a leasing service such as that at issue in the main proceedings constitutes a supply of goods or a supply of services within the meaning of those provisions.

25 It must be recalled that, in proceedings under Article 267 TFEU, the Court of Justice has no jurisdiction to apply rules of EU law to a particular case (judgment in *Patriciello*, C?163/10, EU:C:2011:543, paragraph 21). In a case such as that in the main proceedings, it is for the court making the reference to carry out the legal classifications necessary to resolve the dispute in the main proceedings. On the other hand, it is for the Court of Justice to provide the national court with all necessary information with a view to offering guidance in that determination (judgment in *Patriciello*, C?163/10, EU:C:2011:543, paragraph 23).

26 Accordingly, irrespective of whether, given the facts material to the dispute in the main proceedings, the lease service in question forms, in fact, part of a single transaction composed of several elements, which it is for the referring court to determine, that court must be provided with guidance enabling it to determine, for VAT purposes, the legal nature of leasing services.

27 In that regard, it should be recalled that, in accordance with Article 24(1) of the VAT

Directive, a '"supply of services" shall mean any transaction which does not constitute a supply of goods.' As regards the concept of a 'supply of goods', it requires, under Article 14(1) of the VAT Directive, the 'transfer of the right to dispose of tangible property as owner'. Furthermore, Article 14(2)(b) of the VAT Directive states that the actual handing over of goods pursuant to a contract for the hire of those goods for a certain period, which provides that in the normal course of events ownership is to pass at the latest upon payment of the final instalment is to be regarded as a 'supply of goods'.

28 It is clear from the Court's case-law that an operating lease must be distinguished from a finance lease, the nature of the latter being that substantially all the risks and rewards of legal ownership are transferred to the lessee. The fact that a transfer of ownership is provided for on the expiry of the contract or the fact that the present value of the lease payments is practically identical to the market value of the property constitute, separately or together, criteria which permit a determination of whether a contract can be categorised as a finance lease (see, to that effect, judgment in *Eon Aset Menidjmunt*, C?118/11, EU:C:2012:97, paragraph 38).

29 In addition, the concept of supply of goods does not refer to the transfer of ownership in accordance with the procedures prescribed by the applicable national law but covers any transfer of tangible property by one party which empowers the other party actually to dispose of it as if the recipient were the owner of the property (judgment in *Eon Aset Menidjmunt*, C?118/11, paragraph 39 and the case-law cited).

30 Accordingly, where a financial leasing agreement relating to immovable property provides either that ownership of that property is to be transferred to the lessee on the expiry of that agreement or that all the essential powers attaching to ownership of that property are to be enjoyed by the lessee and, in particular, substantially all the rewards and risks incidental to legal ownership of that property are transferred to the lessee and the present value of the amount of the lease payments is practically identical to the market value of the property, the transaction resulting from that agreement must be treated as an acquisition of capital goods (see, to that effect, judgment in *Eon Aset Menidjmunt*, C?118/11, paragraph 40).

31 In that regard, the facts material to the dispute in the main proceedings, namely, the terms of the 'business cooperation' agreements and the transactions carried out according to the final account, suggest that the objective of the lease agreements was the transfer to Domino of ownership of the property forming the subject-matter of those agreements, which it is for the referring court to determine in the light of the criteria set out in paragraphs 26 to 30 above.

32 It follows from the foregoing considerations that Articles 2(1), 14 and 24(1) of the VAT Directive must be interpreted as meaning that where a lease agreement relating to immovable property provides either that ownership of that property is to be transferred to the lessee on the expiry of that agreement or that all the essential powers attaching to ownership of that property are to be enjoyed by the lessee and, in particular, substantially all the rewards and risks incidental to legal ownership of that property are transferred to the lessee, and the present value of the amount of the lease payments is practically identical to the market value of the property, the transaction resulting from that agreement must be treated as an acquisition of capital goods.

The first question

33 By its first question, the referring court asks, in essence, whether, in the circumstances of the main proceedings as described at paragraph 24 above, Article 90(1) of the VAT Directive must be interpreted as meaning that the return to the lessor of immovable property forming the subject-matter of a lease agreement constitutes a case of cancellation, refusal, total or partial non-payment or price reduction for the purpose of that provision.

34 While it is for the referring court to determine the legal characterisation of the transactions carried out by NLB and Domino, it is for this Court to provide the referring court with all necessary information with a view to offering guidance in that determination.

35 In that regard, it must be noted that Article 90(1) of the VAT Directive, which relates to cases of cancellation, refusal or total or partial non-payment, or where the price is reduced after the supply takes place, requires the Member States to reduce the taxable amount and, consequently, the amount of VAT payable by the taxable person whenever, after a transaction has been concluded, that person has not received part or any of the consideration. That provision embodies one of the fundamental principles of the VAT Directive, according to which the taxable amount is the consideration actually received and the corollary of which is that the tax authorities may not collect an amount of VAT exceeding the tax which the taxable person received (judgment in *Almos Agrárkülkereskedelmi*, C?337/13, EU:C:2014:328, paragraph 22).

36 It follows from the Court's case-law that, apart from cases of cancellation or termination of contracts, in which the parties are restored to the position which they were in before concluding the contract and the taxable person no longer has a claim, Article 90(1) of the VAT Directive applies only to those situations in which the other party to the contract fails to settle, or only settles in part, a liability for which it is, none the less, liable under that contract (see, to that effect, judgment in *Almos Agrárkülkereskedelmi*, C?337/13, EU:C:2014:328, paragraphs 23 and 24).

37 Accordingly, the taxable amount of a taxable person cannot be reduced where, under the terms of the contract, that person has in fact received all the payments in consideration for the service which he supplied or where, without the contract having been refused or cancelled, the recipient of that service is no longer liable to the taxable person for the agreed price.

38 It follows from the foregoing considerations that Article 90(1) of the VAT Directive must be interpreted as not permitting a taxable person to reduce the taxable amount where that person has in fact received all the payments in consideration for the service which he supplied or where, without the agreement having been refused or cancelled, the recipient of that service is no longer liable to the taxable person for the agreed price.

The third question

39 By the third question, the referring court asks, in essence, whether the principle of fiscal neutrality must be interpreted as precluding a taxable person from paying VAT, once, upon conclusion of a lease agreement including a purchase option and, a second time, when that person sells the goods forming the subject-matter of that agreement to a third party company because the lessee under the agreement failed to fulfil his obligations.

40 In that regard, it should be recalled that it follows from the Court's case-law that the principle of fiscal neutrality inherent in the common system of VAT precludes the taxation of a taxable person's business activities leading to double taxation (see, to that effect, judgments in *Puffer*, C?460/07, EU:C:2009:254, paragraph 45 and 46, and *Klub*, C?153/11, EU:C:2012:163, paragraph 42).

41 The Court has also held that, for VAT purposes, every supply must normally be regarded as distinct and independent, as follows from the second subparagraph of Article 1(2) of the VAT Directive (judgment in *BG? Leasing*, C?224/11, EU:C:2013:15, paragraph 29). However, in certain circumstances several formally distinct services, which could be supplied separately and thus give rise, in turn, to taxation or exemption, must be considered to be a single transaction when they are not independent (see, to that effect, judgment in *RR Donnelley Global Turnkey Solutions Poland*, C?155/12, EU:C:2013:434, paragraph 20).

42 In accordance with that case law, it is for the referring court to ascertain whether the transactions at issue in the main proceedings, namely, first, the services provided to Domino and, second, the sale of immovable property to a third company, must be regarded as a ‘single supply’. Such is the case, inter alia, where several elements or acts supplied by the taxable person are so closely linked that they form, objectively, a single, indivisible economic supply, which it would be artificial to split.

43 When it is shown that such transactions cannot be regarded as forming a single supply, the principle of fiscal neutrality does not preclude those transactions from being taxed separately for VAT purposes.

44 It follows from the foregoing considerations that the principle of fiscal neutrality must be interpreted as not precluding, first, a leasing service relating to immovable property and, second, the sale of that property to a person who is a third party to the lease agreement, being taxed separately for VAT purposes, where those transactions cannot be regarded as forming a single supply, which is a matter for the referring court to determine.

Costs

45 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 (Second Chamber) hereby rules:

1. **Articles 2(1), 14 and 24(1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning that where a lease agreement relating to immovable property provides either that ownership of that property is to be transferred to the lessee on the expiry of that agreement or that all the essential powers attaching to ownership of that property are to be enjoyed by the lessee and, in particular, substantially all the rewards and risks incidental to legal ownership of that property are transferred to the lessee and the present value of the amount of the lease payments is practically identical to the market value of the property, the transaction resulting from that agreement must be treated as an acquisition of capital goods.**

2. **Article 90(1) of Directive 2006/112 must be interpreted as not permitting a taxable person to reduce the taxable amount where that person has in fact received all the payments in consideration for the service which he supplied or where, without the agreement having been refused or cancelled, the recipient of that service is no longer liable to the taxable person for the agreed price.**

3. **The principle of fiscal neutrality must be interpreted as not precluding, first, a leasing service relating to immovable property and, second, the sale of that property to a person who is a third party to the lease agreement, being taxed separately for value added tax purposes, where those transactions cannot be regarded as forming a single supply, which is a matter for the referring court to determine.**

[Signatures]

* Language of the case: Slovenian.