JUDGMENT OF THE COURT (Eighth Chamber)

11 June 2015 (*)

(References for a preliminary ruling — Value added tax (VAT) — Directive 2006/112/EC — Articles 9, 73, 78, first paragraph, point (a), and 79, first paragraph, point (c) — Taxable amount — Inclusion of the amount of municipal land use taxes paid by the company holding the concession for the gas distribution network in the taxable amount for VAT applicable to supplies of services made by that company to the company responsible for marketing the gas)

In Case C?256/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunal Arbitral Tributário (Centro de Arbitragem Administrativa — CAAD) (Portugal), made by decision of 19 November 2013, received at the Court on 28 May 2014, in the proceedings

Lisboagás GDL — Sociedade Distribuidora de Gás Natural de Lisboa SA

v

Autoridade Tributária e Aduaneira,

THE COURT (Eighth Chamber),

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

Advocate General: N. Jääskinen,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Lisboagás GDL — Sociedade Distribuidora de Gás Natural de Lisboa SA, by N. Pena and L. Scolari, advogados,

– the Greek Government, by M. Germani and K. Karavasili, acting as Agents,

– the Portuguese Government, by L. Inez Fernandes and R. Campos Laires, and by A. Cunha, 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) (‘the VAT Directive’).

2 The request has been made in proceedings between Lisboagás GDL — Sociedade Distribuidora de Gás Natural de Lisboa SA (‘Lisboagás’) and the Autoridade Tributária e Aduaneira (fiscal and customs authority) concerning self-assessments for value added tax (‘VAT’) pertaining to the months of May, June and July 2012.

Legal context

EU law

3 Article 9(1) of the VAT Directive provides:

‘“Taxable person” shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity.

Any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions, shall be regarded as “economic activity”. The exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as an economic activity.’

4 Under the first subparagraph of Article 13(1) of that directive:

‘States, regional and local government authorities and other bodies governed by public law shall not be regarded as taxable persons in respect of the activities or transactions in which they engage as public authorities, even where they collect dues, fees, contributions or payments in connection with those activities or transactions.’

5 Article 73 of the VAT 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 According to point (a) of the first paragraph of Article 78 of that directive, taxes, duties, levies and charges, excluding the VAT itself, are to be included in the taxable amount.

7 By contrast, point (c) of the first paragraph of Article 79 of the VAT Directive provides that amounts received by a taxable person from the customer, as repayment of expenditure incurred in the name and on behalf of the customer, and entered in his books in a suspense account, are not to be included in the taxable amount.

Portuguese law

8 Article 2 of the Value Added Tax Code (Código do Imposto sobre o Valor Acrescentado) (‘the CIVA’) provides:

‘1 — The following shall be liable to the tax:

(a) natural and legal persons who, independently and habitually, pursue activities of producers, traders or persons supplying services, including mining and agricultural activities and activities of

the professions, and also those who, equally independently, complete a single taxable transaction, in so far as that transaction is auxiliary to the pursuance of those activities, irrespective of where it is completed or where, irrespective of such a link, that transaction fulfils the requirements to be regarded as having an actual impact on the income tax of natural persons ... and the income tax of legal persons ...

...

2 — The State and other legal persons governed by public law shall not, however, be taxable persons as regards the tax where they undertake operations in the exercise of their powers as authorities even if, for those operations, they receive fees or other consideration, provided that this exemption does not lead to distortions of competition.

...'

9 Article 16 of the CIVA provides:

'1 — Without prejudice to paragraphs 2 and 10, the taxable amount in respect of the taxable supply of goods or services shall be equivalent to the value of the consideration received or to be received from the purchaser, the customer or a third party.

...

5 — The taxable amount in respect of taxable supplies of goods or services shall include the following factors:

(a) taxes, duties, levies and charges, excluding the value added tax itself;

...

6 — The taxable amount referred to in the preceding paragraph shall not include the following factors:

...

(c) amounts paid in the name and on behalf of the purchaser of the goods or the customer of the services, duly registered in third party accounts by the taxpayer;

...'

10 Under Article 3 of Law No 53-E/2006 approving the general tax scheme for local authorities (Lei No 53-E/2006, Aprova o regime geral das taxas das autarquias locais, *Diário da República*, 1re série, No 249) of 29 December 2006:

'Local authority taxes are charges for the specific performance of a local public service, for the private use of the publicly- and privately-owned property of local authorities or for the removal of a legal hindrance to the conduct of individuals, where by statute that falls within the sphere of the local authorities.'

11 Article 6(1)(c) of that law allows municipalities to charge that tax 'in the event of use or operation of publicly- or privately-owned municipal property'.

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

12 Lisboagás is the company holding the exclusive concession for the public service regional gas distribution network in municipilities in the region of Lisbon (Portugal), responsible, in particular, for the development, operation and maintenance of the distribution network. As the natural gas distribution network comprises, in particular, pipes which are installed on the publicly-owned property of certain municipalities situated in the concession area, Lisboagás is obliged to pay the land use taxes imposed by those municipalities.

13 In accordance with the concession agreement, Lisboagás, after having paid the land use taxes to the municipalities, passes on the amount of those taxes to the company responsible for marketing gas in the concession area when it bills that company for the use of the network infrastructures for supplying gas to consumers. That company then passes on the amount of land use taxes to consumers in their gas supply bill.

14 Following the instructions of the tax authorities, Lisboagás self-assessed VAT at the standard rate of 23% on the land use tax amounts, which were subsequently passed on to consumers in May, June and July 2012. It included that VAT in the relevant regular VAT returns and paid it in a timely manner.

15 Following the dismissal of its complaint seeking recovery of the VAT, on 29 April 2013 Lisboagás brought an action before the Tribunal Arbitral Tributário (Centro de Arbitragem Administrativa — CAAD) (Arbitration Tribunal, Centre for Administrative Arbitration).

16 In support of that action, Lisboagás submits, inter alia, that the passing on of the land use taxes does not constitute an ‘economic activity’ within the meaning of Article 9(1) of the VAT Directive since there is no direct or indirect compensation, with the result that, as a transaction involving no consideration, it does not create added value.

17 Lisboagás further states that point (a) of the first paragraph of Article 78 of the VAT Directive, transposed by Article 16(5)(a) of the CIVA, is (i) not applicable to land use taxes, since they are not directly linked to the taxable transactions carried out by it, (ii) the land use taxes are not linked to the pursuance of the activity covered by the concession agreement, and (iii) in particular, that their collection does not represent actual compensation for a taxable transaction carried out by it for the entity which markets the gas.

18 It adds that since land use taxes fall outside the scope of VAT when the municipalities collect them under Article 2 of the CIVA, the act of simply passing them on without any additional amount cannot lead to their inclusion in the taxable amount for VAT. The principle of VAT neutrality requires that the VAT treatment of a given cost be maintained when the exact amount of the cost is
re-billed to a third party.

19 The Autoridade Tributária e Aduaneira states that repaying Lisboagás the amount of the VAT which it assessed and collected from its customer would amount to unjust enrichment which national law and EU law do not allow.

20 It further observes that the use or utilisation of publicly-owned property entails an act of consumption which, for the purposes of VAT, is equivalent to the supply of services and that it cannot be argued that the payment of the land use tax has no direct relationship with Lisboagás’s taxable transactions, since gas distribution is carried out through land in a particular district or municipality.

21 It considers that, although the charging of the land use taxes is not subject to VAT in so far

as granting the concession in respect of publicly-owned property is done by the municipalities in the exercise of their public powers, the passing-on of the tax assessed by a legal person governed by private law, by contrast, forms part of a supply of services which culminates in the supply of gas to consumers.

22 The referring court observes that the claimant in the main proceedings has asked for a reference to be made for a preliminary ruling and that no appeal lies against its decision on the dispute in the main proceedings.

23 In those circumstances, the Tribunal Arbitral Tributário (Centro de Arbitragem Administrativa — CAAD) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Does EU law preclude the assessment of VAT, when a private undertaking providing infrastructures for the distribution of natural gas passes on to an undertaking acquiring its services, without including any additional amount, the amounts relating to land use taxes paid to the municipalities in which the pipes comprising those infrastructures are located?

(2) Given that local authorities assess land use taxes in the exercise of their public powers, without including VAT, does EU law preclude the assessment of VAT when the amounts relating to those taxes paid by a private undertaking providing infrastructures for the distribution of natural gas are passed on to an undertaking acquiring its services?’

Consideration of the questions referred

24 The Commission observes, with regards to the admissibility of the request for a preliminary ruling, that the referring court has not specified which provisions of EU law in respect of which it seeks an interpretation or the reasons which led it to seek that interpretation. It is useful to point out that Article 94(c) of the Court’s Rules of Procedure provide that the request for a preliminary ruling must contain a statement of the reasons which prompted the referring court or tribunal to inquire about the interpretation or validity of certain provisions of EU law, and the relationship between those provisions and the national legislation applicable to the main proceedings.

25 However, since questions concerning EU law enjoy a presumption of relevance, the Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of EU law that is sought is unrelated to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, inter alia, judgments in *Cipolla and Others*, C?94/04 and C?202/04, EU:C:2006:758, paragraph 25, and also *Chartered Institute of Patent Attorneys*, C?307/10, EU:C:2012:361, paragraph 32).

26 In the case under consideration, despite the lack of explanations in the order for reference about the provisions of EU law interpretation of which is sought and the reasons which prompted the referring court to inquire about the interpretation of EU law, it may be inferred from the description of the dispute in the main proceedings as set out in the order for reference, as well as the questions referred, that they concern the interpretation of the VAT Directive and that the relevant provisions for answering those questions, in the light of, inter alia, the arguments put forward by Lisboagás, are Articles 9(1) and 73, point (a) of the first paragraph of Article 78 and point (c) of the first paragraph of Article 79. It is further apparent from the order for reference that an answer to those questions about the interpretation of EU law is necessary for the outcome of that dispute.

27 The request for a preliminary ruling is therefore admissible.

28 Turning to the merits of the case, by its two questions, which it is appropriate to consider together, the referring court asks, in essence, whether Articles 9(1) and 73, point (a) of the first paragraph of Article 78 and point (c) of the first paragraph of Article 79 of the VAT Directive must be interpreted as meaning that the amount of taxes, such as those at issue in the main proceedings, which is paid to municipalities by the exclusive concessionaire company in return for the use of publicly-owned property belonging to those municipalities and which is then passed on by that company to another company responsible for marketing the gas, then by that company on to the final consumers, must be included in the taxable amount for VAT applicable to the supply of services effected by the first company to the second company.

29 Under point (a) of the first paragraph of Article 78 of the VAT Directive, taxes, excluding the VAT itself, are to be included in the taxable amount. The Court has held previously that, in order for taxes to be included in the taxable amount for VAT, even though they do not represent any added value and do not constitute the financial consideration for the supply of goods or services, they must have a direct link with that supply and the question whether the chargeable event for the tax coincides with that for VAT is a decisive factor for the purposes of establishing the existence of such a direct link (see, to that effect, judgments in *De Danske Bilimportører*, C?98/05, EU:C:2006:363, paragraph 17; *Commission* v *Poland*, C?228/09, EU:C:2010:295, paragraph 30; *Commission* v *Austria*, C?433/09, EU:C:2010:817, paragraph 34; and *TVI*, C?618/11, C?637/11 and C?659/11, EU:C:2013:789, paragraphs 37 and 39).

30 In the case under consideration, it is apparent from the order for reference that the land use taxes are paid by Lisboagás to the municipalities prior to the transaction subject to VAT taking place between Lisboagás and the company responsible for marketing the gas to consumers and independently of that transaction, in return for the use of municipal publicly-owned property arising from the presence on that property of the gas network infrastructures used by Lisboagás. Lisboagás then passes on the amount of those land use taxes to the company responsible for marketing the gas when it bills the latter for the use of those infrastructures to supply gas to consumers.

31 It follows that the land use taxes do not represent any added value and do not constitute the financial consideration for the transaction subject to VAT taking place between the company holding the gas distribution concession and the company responsible for marketing the gas and that the chargeable event for those land use taxes does not coincide with that for VAT, with the result that they do not have a direct link with that transaction.

32 Consequently, land use taxes are not taxes which fall to be included in the taxable amount for VAT under point (a) of the first paragraph of Article 78 of the VAT Directive.

33 Moreover, in passing on the amount of the land use taxes to the company responsible for marketing the gas when it bills that company for the use of those infrastructures to supply gas to consumers, Lisboagás passes on not the land use taxes as such, but rather the price of using publicly-owned municipal property. That price is part of the set of costs borne by Lisboagás which in turn forms part of the price for its supply of services to be paid for by the company responsible for marketing the gas. The fact that, under the concession agreement, the amount of the land use taxes is listed as a separate item in the invoice issued by Lisboagás then in the invoices issued by the company responsible for marketing the gas to consumers is irrelevant in that regard.

34 Consequently, the amount of land use taxes constitutes part of the consideration received by Lisboagás from the company responsible for marketing the gas for its supply of services. It is

not disputed that it constitutes an ‘economic activity’ within the meaning of Article 9(1) of the VAT Directive. Accordingly, under Article 73 of that directive, that amount must be included in the taxable amount for VAT on that supply.

35 Moreover, the amount of land use taxes cannot be excluded from the taxable amount for VAT on the latter supply on the basis of point (c) of the first paragraph of Article 79 of the VAT Directive, since that amount is charged not by way of reimbursement of costs incurred on behalf of the company responsible for marketing the gas or of consumers, but as consideration for the cost of using the municipal property borne by Lisboagás for the needs of its activity.

36 Contrary to Lisboagás’s assertions, the inclusion of the amount of land use taxes in the taxable amount for VAT applicable to its supply of services to the company responsible for marketing the gas is not contrary to the the principle of fiscal neutrality, which precludes treating similar supplies of goods and of services, which are in competition with each other, differently for VAT purposes (see, to that effect, judgment in *BG? Leasing*, C?224/11, EU:C:2013:15, paragraph 65 and the case-law cited).

37 Under the first subparagraph of Article 13(1) of the VAT Directive, municipalities are not regarded as taxable persons when they collect taxes such as land use taxes whereas, under Article 9 of that directive, companies such as Lisboagás are regarded as taxable persons when they carry out ‘economic activity’ within the meaning of that provision. On the other hand, as evidenced by the findings in paragraphs 31, 33 and 34 above, the collection of land use taxes by municipalities and the assignment, by Lisboagás to the company responsible for marketing the gas, of the right to use the gas network operated by it in return for payment of consideration integrating the amount of land use taxes do not constitute ‘similar transactions’.

38 In the light of all the foregoing considerations, the answer to the two questions referred is that Articles 9(1) and 73, point (a) of the first paragraph of Article 78 and point (c) of the first paragraph of Article 79 of the VAT Directive must be interpreted as meaning that the amount of taxes, such as those at issue in the main proceedings, which is paid to municipalities by the company holding the gas distribution concession in return for the use of publicly-owned property belonging to those municipalities and which is then passed on by that company to another company responsible for marketing the gas, then by that company on to the final consumers, must be included in the taxable amount for VAT applicable to the supply of services effected by the first company to the second company under Article 73 of that directive.

Costs

39 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 (Eighth Chamber) hereby rules:

Articles 9(1) and 73, point (a) of the first paragraph of Article 78 and point (c) of the first paragraph of Article 79 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning that the amount of taxes, such as those at issue in the main proceedings, which is paid to municipalities by the company holding the gas distribution concession in return for the use of publicly-owned property belonging to those municipalities and which is then passed on by that company to another company responsible for marketing the gas, then by that company on to the final consumers, must be included in the taxable amount for value added tax applicable to the supply of services effected by the first company to the second company under Article 73 of that directive.

[Signatures]

* Language of the case: Portuguese.