

Provisional text

JUDGMENT OF THE COURT (Seventh Chamber)

16 March 2017 (*)

(Reference for a preliminary ruling — Taxation — Value added tax — Article 4(3) TEU — Sixth Directive — State aid — Procedure discharging bankrupt natural persons from debts (esdebitazione) — Ineligibility of VAT debts)

In Case C-493/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Corte suprema di cassazione (Court of cassation, Italy), made by decision of 6 May 2015, received at the Court on 21 September 2015, in the proceedings

Agenzia delle Entrate

v

Marci Identi,

THE COURT (Seventh Chamber),

composed of A. Prechal, President of the Chamber, C. Toader and E. Jarašiūnas (Rapporteur),
Judges,

Advocate General: E. Sharpston,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- the Italian Government, by G. Palmieri, acting as Agent, assisted by G. De Bellis, avvocato dello Stato,
- the Spanish Government, by M. A. Sampol Pucurull, acting as Agent,
- the European Commission, by A. Caeiros and by L. Lozano Palacios and F. Tomat, 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 Article 4(3) TEU and Articles 2 and 22 of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax:

uniform basis of assessment (OJ 1977 L 145, p. 1; ‘the Sixth Directive’).

2 The request has been made in proceedings between the Agenzia delle Entrate (the Revenue Authority; ‘the tax authorities’) and Mr Marco Identi concerning a tax assessment in relation to value added tax (VAT) and regional tax on productive activities for the tax year 2003.

Legal context

European Union law

3 Under Article 2 of the Sixth Directive, the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such and the importation of goods are to be subject to VAT.

4 Article 22 of the Sixth Directive provides:

‘...

4. Every taxable person shall submit a return within an interval to be determined by each Member State ...

...

5. Every taxable person shall pay the net amount of the [VAT] when submitting the return. The Member States may, however, fix a different date for the payment of the amount or may demand an interim payment.

...

8. ... Member States may impose other obligations which they deem necessary for the correct levying and collection of the tax and for the prevention of fraud.

...’

Italian law

5 The decreto legislativo n. 5 (Legislative Decree No. 5), of 9 January 2006 (Ordinary Supplement to the GURI No 13, of 16 January 2006) established the bankruptcy discharge procedure (*esdebitazione*), amending Articles 142 to 144 of the legge fallimentare (Law on insolvency and bankruptcy), approved by the regio decreto n. 267 (Royal Decree No 267), of 16 March 1942 (GURI No 81, of 6 April 1942), and amended by the decreto legislativo n. 169 (Legislative Decree No 169), of 12 September 2007 (GURI No 241, of 16 October 2007) (‘the Law on insolvency and bankruptcy’).

6 Under Article 142 of the Law on insolvency and bankruptcy, entitled ‘Discharge from bankruptcy’:

‘A natural person who is bankrupt shall be granted the benefit of discharge from the remaining debts owed to creditors with a declared interest who have not been satisfied in the bankruptcy proceedings, provided that he:

(1) has cooperated with the authorities carrying out the procedure by providing all information and documentation necessary to clear the liabilities and by making every effort to ensure the effective conduct of the transactions;

- (2) has not in any way delayed, or helped to delay, the conduct of the proceedings;
- (3) has not infringed Article 48;
- (4) has not benefited from any other discharge from bankruptcy in the ten years preceding the request;
- (5) has not deducted assets or set out non-existent liabilities, caused or aggravated the imbalance, thereby making it seriously difficult to reconstruct the property and turnover, or committed credit fraud;
- (6) has not been found guilty, by a final judgment, of fraudulent bankruptcy, or of offences against the national economy, industry and commerce, or of any other offence committed in connection with the pursuit of the undertaking's activity, save where he has been rehabilitated in respect of those offences. If criminal proceedings are ongoing in respect of one of those offences, the court shall stay the proceedings pending the outcome of those criminal proceedings.

Discharge from bankruptcy cannot be granted if the creditors with a declared interest in the bankruptcy proceedings have not been satisfied, at least in part.

The following are excluded from the discharge from bankruptcy:

- (a) maintenance obligations and, in any event, obligations arising from relationships unconnected with the operations of the undertaking;
- (b) debts relating to compensation for damage resulting from non-contractual liability, and criminal and administrative penalties of a pecuniary nature which are not ancillary to debts which have been extinguished.

Rights claimed by creditors vis-à-vis persons jointly liable, joint and several debtors and persons liable by way of recourse shall remain unaffected.'

7 Under Article 143 of the Law on insolvency and bankruptcy, entitled 'Bankruptcy discharge procedure':

'[T]he court shall, by a decree of bankruptcy closure or in response to a request by the debtor lodged within the following year, and having checked the conditions laid down in Article 142 and also taken account of the debtor's cooperative conduct, and heard the bankruptcy administrator and the creditors' committee, declare collective debts not settled in full to be irrecoverable in relation to a debtor who has already been declared bankrupt. ...

The debtor, creditors who have not been satisfied in full, the public prosecutor and any interested party may submit a complaint against the above order, pursuant to Article 26.'

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

8 By an order of 14 April 2008, the Tribunale di Mondovì (Mondovì District court, Italy) granted Mr Identi, general partner of the insolvent company PVA di Identi Marco e C. Sas (and himself bankrupt), discharge from bankruptcy. Subsequent to that order, the tax authorities issued a tax assessment to Mr Identi for VAT and the regional tax on productive activities in respect of the tax year 2003.

9 The tax authorities have sought, before the Corte suprema di cassazione (Supreme Court of

Cassation, Italy), to have set aside on a point of law the judgment of the Commissione tributaria regionale del Piemonte (Regional tax court, Piedmont, Italy), of 26 March 2012, which confirmed a decision at first instance finding that tax assessment to be unlawful and dismissed the appeal brought by the tax authorities against that decision.

10 The referring court states that the bankruptcy discharge procedure applicable to the debtor — a natural person who is a commercial trader who has been declared bankrupt — is intended to allow the person benefiting from it to ‘make a fresh start’ after being discharged from all his previous debts owed to creditors with a declared interest in the bankruptcy proceedings and which have not been settled at the close of those proceedings, so that the debtor concerned may become an active economic entity again without having to bear limitations on initiative or his potential to generate wealth as a result of the burden of past debts. The court dealing with insolvency and bankruptcy matters, sitting as a collegiate body, takes the decision to allow the debtor to benefit from that procedure after receiving the non-binding opinions of the bankruptcy administrator and the creditors’ committee and checking, *inter alia*, whether the conditions laid down in Article 142, first paragraph, of the Law on insolvency and bankruptcy are met.

11 The referring court raises the issue of whether the bankruptcy discharge procedure complies with EU law. According to that court, the question arises as to whether, as in the case of the arrangement with creditors at issue in the case which gave rise to the judgment of 7 April 2016, *Degano Trasporti* (C-546/14, EU:C:2016:206), practical considerations established by a court, such as the bankruptcy or insolvency or a meritorious debtor or the possibility of collecting only part of the VAT claim, can justify the waiver, in full or in part, of that claim.

12 The referring court takes the view that by listing exhaustively in the third paragraph of Article 142 of the Law on insolvency and bankruptcy the debts from which the debtor may not be discharged, without referring to tax debts, the national legislature considered that a person eligible for the bankruptcy discharge procedure must be discharged also from tax debts. However, in the referring court’s view it is also necessary to ascertain that the application of that procedure to VAT debts does not infringe EU law.

13 It adds that the issue is also raised of whether the national legislation concerned in the main proceedings is compatible with the EU rules on competition, since that legislation promotes the return to economic activity of persons benefiting from that procedure over other persons declared bankrupt who are ineligible *ex lege*.

14 In those circumstances, the Corte suprema di cassazione (Supreme Court of Cassation) decided to stay the proceedings and refer the following question to the Court of Justice for a preliminary ruling:

‘Must Article 4(3) TEU and Articles 2 and 22 of [the Sixth Directive] be interpreted as precluding the application, in relation to [VAT], of a provision of national law which provides for the extinguishment of debts arising from VAT in favour of taxable persons admitted to the bankruptcy discharge procedure governed by Articles 142 and 143 of [the Law on insolvency and bankruptcy]?’

Consideration of the question referred

15 By its question, the referring court asks, in essence whether EU law, in particular Article 4(3) TEU and Articles 2 and 22 of the Sixth Directive and the rules on State aid, must be interpreted to the effect that it precludes VAT debts from being declared irrecoverable under national legislation, such as that at issue in the main proceedings, providing for a bankruptcy discharge procedure by means of which a court may, under certain conditions, declare irrecoverable the debts of a natural

person which have not been settled by the close of the bankruptcy proceedings initiated against that person.

16 It should be borne in mind that it follows from Articles 2 and 22 of the Sixth Directive, and from Article 4(3) TEU that the Member States are required to take all legislative and administrative measures appropriate for ensuring collection of all the VAT due on their territory (see, to that effect, judgment of 7 April 2016, *Degano Trasporti*, C?546/14, EU:C:2016:206, paragraph 19 and the case-law cited).

17 Under the common system of VAT, the Member States are required to ensure compliance with the obligations to which taxable persons are subject, and they enjoy in that respect a certain latitude, inter alia, as to how they use the means at their disposal (judgment of 7 April 2016, *Degano Trasporti*, C?546/14, EU:C:2016:206, paragraph 20 and the case-law cited).

18 That latitude is nevertheless limited by the obligation to ensure effective collection of the EU's own resources and not to create significant differences in the manner in which taxable persons are treated, either within a Member State or throughout the Member States. The VAT Directive must be interpreted in accordance with the principle of fiscal neutrality inherent in the common system of VAT, according to which economic operators carrying out the same transactions must not be treated differently in relation to the levying of VAT. Any action by the Member States concerning the collection of VAT must comply with that principle (judgment of 7 April 2016, *Degano Trasporti*, C?546/14, EU:C:2016:206, paragraph 21 and the case-law cited).

19 The European Union's own resources include, in particular, as provided in Article 2(1) of Council Decision 2007/436/EC, Euratom of 7 June 2007 on the system of the European Communities' own resources (OJ 2007 L 163, p. 17), revenue from the application of a uniform rate to the harmonised VAT basis of assessment determined according to European Union rules. There is thus a direct link between the collection of VAT revenue in compliance with the EU law applicable and the availability to the European Union budget of the corresponding VAT resources, since any lacuna in the collection of the first potentially causes a reduction in the second (judgment of 7 April 2016, *Degano Trasporti*, C?546/14, EU:C:2016:206, paragraph 22 and the case-law cited).

20 In view of those factors, it is appropriate to ascertain whether the possibility, under certain conditions, of declaring irrecoverable VAT debts under the bankruptcy discharge procedure at issue in the main proceedings is contrary to the obligation on Member States to ensure collection of all of the VAT due on their territory as well as the effective collection of the European Union's own resources. In order to do so, it is necessary to examine the conditions for the application of that procedure.

21 First of all, it is apparent that the bankruptcy discharge procedure, as described by the referring court and set out in paragraphs 5 to 7 above, is intended to allow a natural person who has been declared bankrupt to be discharged from debts which, at the end of the bankruptcy proceedings initiated against that person, have not been settled, so that he may resume a business activity. Whether it is applied concurrently to or subsequent to the bankruptcy proceedings, the bankruptcy discharge procedure thus presupposes that the debtor's property has been liquidated in full and the division of the assets resulting from that liquidation between the creditors has not enabled all the debts to be settled. Furthermore, discharge from bankruptcy is not granted, under the second paragraph of Article 142 of the Law on insolvency and bankruptcy, unless the creditors in the bankruptcy proceedings have been at least satisfied in part.

22 Secondly, the bankruptcy discharge procedure applies only to natural persons who meet certain conditions, set out in the first paragraph of Article 142 of the Law on insolvency and

bankruptcy, which relate to the debtor's conduct prior to the initiation of the bankruptcy proceedings and in the course of those proceedings. It is apparent, inter alia, from those conditions that the debtor, on one hand, cannot have benefited already from such a procedure in the ten years preceding the request, cannot have been found guilty of fraudulent bankruptcy, an economic offence or an offence committed in connection with the pursuit of an undertaking's activity, or have deducted the assets of the undertaking, organised its insolvency or aggravated that insolvency by committing credit fraud and, on the other hand, must have been cooperative and acted with diligence during the bankruptcy proceedings. Those conditions seem to concern, essentially, the debtor's probity and good faith and thereby are such as to allow only debtors of good faith to benefit from the bankruptcy discharge procedure.

23 Lastly, as regards the conduct of the procedure, Article 143 of the Law on insolvency and bankruptcy provides, first, that the court deciding on the procedure must check that the conditions laid down in Article 142 of that law are met, second, that the bankruptcy administrator and the creditors' committee must be consulted and, third and lastly, that the creditors who have not been satisfied in full, the public prosecutor and any other interested party may bring an action against the decision of that court declaring irrecoverable the debts which have not been settled in full in the bankruptcy proceedings. Thus, the bankruptcy discharge procedure involves an examination conducted on a case-by-case basis by a judicial body. It also permits the Member State concerned, holding a VAT claim, first, to issue an opinion at the request of the debtor seeking to benefit from that procedure, prior to the decision ruling on that request, and, secondly, to bring an action, as appropriate, against the decision declaring the VAT debts which have not been settled in full to be irrecoverable, leading to a second review by a court.

24 It is apparent from those considerations that, like the procedure for an arrangement with creditors examined in the judgment of 7 April 2013, *Degano Trasporti* (C-546/14, EU:C:2016:206, paragraph 28), the bankruptcy discharge procedure at issue in the main proceedings is subject to strict conditions for its application offering guarantees so far as concerns, inter alia, the recovery of VAT claims and that, having regard to those conditions, it does not constitute a general and indiscriminate waiver of collecting VAT and is not contrary to the obligation on Member States to ensure collection of all of the VAT due on their territory as well as the effective collection of the European Union's own resources (see judgment of 7 April 2016, *Degano Trasporti*, C-546/14, EU:C:2016:206, paragraph 28).

25 As regards the rules on State aid, it is settled case-law that classification of a national measure as 'State aid' requires all the following conditions to be fulfilled. First, there must be an intervention by the State or through State resources. Second, the intervention must be liable to affect trade between the Member States. Third, it must confer a selective advantage on the recipient. Fourth, it must distort or threaten to distort competition (judgments of 21 December 2016, *Commission v Hansestadt Lübeck*, C-524/14 P, EU:C:2016:971, paragraph 40, and of 21 December 2016, *Commission v World Duty Free Group and Others*, C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 53 and the case-law cited).

26 So far as concerns the condition relating to the selectivity of the advantage, which is a constituent factor in the concept of 'State aid', within the meaning of Article 107(1) TFEU, it is clear from equally settled case-law of the Court that the assessment of that condition requires a determination whether, under a particular legal regime, a national measure is such as to favour 'certain undertakings or the production of certain goods' over other undertakings which, in the light of the objective pursued by that regime, are in a comparable factual and legal situation and who accordingly suffer different treatment that can, in essence, be classified as discriminatory (judgment of 21 December 2016, *Commission v World Duty Free Group and Others*, C?20/15 P and C?21/15 P, EU:C:2016:981, paragraph 54 and the case-law cited).

27 Further, it must be recalled that the fact that only taxpayers satisfying the conditions for the application of a measure can benefit from the measure cannot, in itself, make it into a selective measure (see, to that effect, judgments of 29 March 2012, *3M Italia*, C?417/10, EU:C:2012:184, paragraph 42, and of 21 December 2016, *Commission v World Duty Free Group and Others*, C?20/15 P and C?21/15 P, EU:C:2016:981, paragraph 59).

28 In the present case, it is sufficient to note that, under the provisions of the Law on insolvency and bankruptcy governing the bankruptcy discharge procedure, the persons not granted the benefit of that procedure, either because they do not fall within the scope of the procedure or because the conditions laid down in Article 142 of that law are not fulfilled, are not in a comparable factual and legal situation to that of the persons granted the benefit of that procedure, having regard to the objective of those provisions, which is, as is apparent from paragraphs 10 and 12 and from paragraphs 21 and 22 above, to allow a natural person declared bankrupt, who has acted in good faith as a debtor, to resume a business activity discharged of the debts which, at the end of the bankruptcy proceedings initiated against that person have not been settled.

29 It follows, without there being any need to examine the other conditions mentioned in paragraph 25 above, that discharge from bankruptcy as provided for in the Law on insolvency and bankruptcy cannot be classified as State aid.

30 Having regard to all those considerations, the answer to the question referred is that EU law, in particular Article 4(3) TEU and Articles 2 and 22 of the Sixth Directive and the rules on State aid, must be interpreted to the effect that they do not preclude VAT debts from being declared irrecoverable under national legislation, such as that at issue in the main proceedings, providing for a bankruptcy discharge procedure by means of which a court may, under certain conditions, declare irrecoverable the debts of a natural person which have not been settled by the close of the bankruptcy proceedings initiated against that person.

Costs

31 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 (Seventh Chamber) hereby rules:

EU law, in particular Article 4(3) TEU and Articles 2 and 22 of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment, and the rules on State aid, must be interpreted to the effect that it does not preclude value added tax debts from being declared irrecoverable under national legislation, such as that at issue in the main proceedings, providing for a bankruptcy discharge procedure by means of which a court may, under certain conditions, declare irrecoverable the debts of a natural person which have not been settled by the close of the bankruptcy proceedings

initiated against that person.

[Signatures]

* Language of the case: Italian