62016CJ0251
JUDGMENT OF THE COURT (Fourth Chamber)

22 November 2017 (*1)

(Reference for a preliminary ruling — Common system of value added tax (VAT) — Sixth Directive 77/388/EEC — Article 4(3)(a) and Article 13B(g) — Exemption of the supply of buildings, and of the land on which they stand, other than as described in Article 4(3)(a) — Principle that abusive practices are prohibited — Applicability in the absence of national provisions transposing that principle — Principles of legal certainty and of the protection of legitimate expectations)

In Case C?251/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Supreme Court (Ireland), made by decision of 21 April 2016, received at the Court on 2 May 2016, in the proceedings

Edward Cussens,

John Jennings,

Vincent Kingston

v

T.G. Brosnan,

THE COURT (Fourth Chamber),

composed of T. von Danwitz (Rapporteur), President of the Chamber, C. Vajda, E. Juhász, K. Jürimäe and C. Lycourgos, Judges,

Advocate General: M. Bobek,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 27 April 2017,

after considering the observations submitted on behalf of:

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Mr Cussens, Mr Jennings and Mr Kingston, by D. Lynch and J. O’Malley, Solicitors, B. Murray, Senior Counsel and F. Mitchell, Barrister,

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Ireland, by E. Creedon, J. Quaney and A. Joyce, acting as Agents, and N. Travers, Senior Counsel,

–

the Italian Government, by G. Palmieri, acting as Agent, and G. Galluzzo, avvocato dello Stato,

–

the European Commission, by M. Owsiany-Hornung and R. Lyal, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 7 September 2017,

gives the following

Judgment

1

This request for a preliminary ruling relates to the interpretation 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’) and to the principle that abusive practices are prohibited in the sphere of value added tax (VAT).

2

The request has been made in proceedings brought by Edward Cussens, John Jennings and Vincent Kingston against T.G. Brosnan, Inspector of Taxes (Ireland), as representative of the Office of the Revenue Commissioners (Ireland) (‘the Commissioners’), concerning the recovery of VAT relating to sales of immovable property.

Legal context

EU law

3

Under Article 2(1) 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’ is to be subject to VAT.

4

Article 4(3) of the Sixth Directive provides:

‘Member States may also treat as a taxable person anyone who carries out, on an occasional basis, a transaction relating to the activities referred to in paragraph 2 and in particular one of the following:

(a)

the supply before first occupation of buildings or parts of buildings and the land on which they stand; Member States may determine the conditions of application of this criterion to transformations of buildings and the land on which they stand.

Member States may apply criteria other than that of first occupation, such as the period elapsing between the date of completion of the building and the date of first supply or the period elapsing between the date of first occupation and the date of subsequent supply, provided that these periods do not exceed five years and two years respectively.

“A building” shall be taken to mean any structure fixed to or in the ground;

...’

5

Article 13B(g) of the Sixth Directive states:

‘Without prejudice to other Community provisions, Member States shall exempt the following under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of the exemptions and of preventing any possible evasion, avoidance or abuse:

...

(g)

the supply of buildings or parts thereof, and of the land on which they stand, other than as described in Article 4(3)(a).’

6

Article 94 of the Rules of Procedure of the Court of Justice provides:

‘In addition to the text of the questions referred to the Court for a preliminary ruling, the request for a preliminary ruling shall contain:

(a)

a summary of the subject matter of the dispute and the relevant findings of fact as determined by the referring court or tribunal, or, at least, an account of the facts on which the questions are based;

(b)

the tenor of any national provisions applicable in the case and, where appropriate, the relevant national case-law;

(c)

a statement of the reasons which prompted the referring court or tribunal to inquire about the interpretation or validity of certain provisions of European Union law, and the relationship between those provisions and the national legislation applicable to the main proceedings.’

Irish law

7

The Value Added Tax Act 1972, in the version applicable to the dispute in the main proceedings (‘the VAT Act’), provides in section 4(1), (2) and (4):

(a)

This section applies to immovable goods—

(i)

which have been developed by or on behalf of the person supplying them ...

...

(b)

In this section “interest”, in relation to immovable goods, means an estate or interest therein which, when it was created was for a period of at least 10 years … and a reference to the disposal of an interest includes a reference to the creation of an interest …

...

(2) ... a supply of immovable goods shall be deemed, for the purposes of this Act, to take place if, but only if, a person having an interest in immovable goods to which this section applies disposes (including by way of surrender or by way of assignment), as regards the whole or any part of those goods, of that interest or of an interest which derives therefrom.

...

(4) Where a person having an interest in immovable goods to which this section applies disposes, as regards the whole or any part of those goods, of an interest which derives from that interest in such circumstances that he retains the reversion on the interest disposed of, he shall, in relation to the reversion so retained, be deemed … to have made an appropriation of the goods or of the part thereof, as the case may be, for a purpose other than the purpose of his business.’

8

Section 4(6)(a) of the VAT Act provides that VAT is not to be charged inter alia on the supply of immovable goods:

‘in relation to which a right in favour of the person making the supply to a deduction under section 12 in respect of any tax borne or paid on the supply or development of the goods did not arise and would not … have arisen ...’

9

Section 4(9) of the VAT Act states:

‘Where a disposal of an interest in immovable goods is chargeable to tax and where those goods have not been developed since the date of the disposal of that interest (hereinafter referred to in this subsection as “the taxable interest”) any disposal of an interest in those goods after that date by a person other than the person who acquired the taxable interest shall, for the purposes of this Act, be deemed to be a supply of immovable goods to which subsection (6) applies.’

10

Section 10(9) of the VAT Act relates to assessment of the amount on which VAT is chargeable so far as concerns the supply of immovable goods and the supply of services consisting of the

development of immovable goods. Section 10(9)(a) and (b) provides:

‘(a)

... the value of any interest in the goods disposed of in connection with the supply shall be included in the consideration.

(b)

The value of any interest in immovable goods shall be the open market price of such interest. ...’

11

Under Regulation 19(2)(b) of the Value Added Tax Regulations 1979, which implements section 10(9) of the VAT Act, the value of the reversionary interest retained by a disponer on the disposal of an interest deriving from an interest in immovable goods is disregarded if, under the terms of the disposition, the interest is disposed of for a period of 20 years or more.

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

12

The appellants in the main proceedings jointly owned a development site in the town of Baltimore, in Ireland, on which they constructed 15 holiday homes intended for sale.

13

Before making the sales, they carried out, in March and April 2002, a number of transactions with a company associated with them, namely Shamrock Estates Limited. On 8 March 2002 they entered into two leases with that company, namely (i) a lease by which they granted it those properties for a term of 20 years and one month from that date (‘the long lease’) and (ii) a lease under which Shamrock Estates leased the properties back to them for a term of two years.

14

On 3 April 2002 those two leases were extinguished by mutual surrender of the lessees, and the appellants in the main proceedings therefore recovered full ownership of the properties at issue in those proceedings.

15

In May 2002 the appellants in the main proceedings sold all the properties to third parties, who acquired full ownership of them.

16

It is apparent from the order for reference that, under section 4(9) of the VAT Act, no VAT was payable on those sales, as the properties at issue in the main proceedings had previously been the subject of a first supply on which VAT was chargeable, when the long lease was granted. According to the national legislation at issue in the main proceedings, VAT was chargeable only on the long lease.

17

By tax assessment of 27 August 2004, the Commissioners asked the appellants in the main

proceedings to pay additional VAT, in respect of the property sales carried out in May 2002. The Commissioners took the view that the leases at issue in the main proceedings, providing for the lease and lease back of the properties, constituted a first supply artificially created in order to avoid the subsequent sales being liable to VAT and that supply should therefore be disregarded for the purposes of assessing VAT.

18

The appellants in the main proceedings appealed against the tax assessments of 27 August 2004 to an Appeal Commissioner (Ireland), who dismissed the appeal.

19

The Circuit Court, Cork (Ireland), after dismissing the appeal brought against the Appeal Commissioner's determination by the appellants in the main proceedings, nevertheless, at the latter's request, stated a case for the opinion of the High Court (Ireland) on certain questions of law, taking as a basis the finding that the leases at issue in the main proceedings had no commercial reality and had been entered into in order to reduce the amount of VAT payable in connection with the sale of the properties at issue in the main proceedings.

20

In reply to those questions, the High Court ruled that, as those leases had lacked commercial reality, they constituted an abusive practice in accordance with the judgment of 21 February 2006, Halifax and Others (C?255/02, 'the judgment in Halifax', EU:C:2006:121). Furthermore, it held that the principle that abusive practices are prohibited, as resulting from the case-law that stems from the judgment in Halifax, is of general application and requires national courts to redefine abusive measures in accordance with reality, even in the absence of national legislation transposing that principle.

21

The appellants in the main proceedings appealed against the decision of the High Court to the Supreme Court (Ireland). They contend that, in the absence of national legislation transposing the principle that abusive practices are prohibited, that principle cannot be deployed against them to remove their right to exemption of the sales of the properties at issue in the main proceedings that results from section 4(9) of the VAT Act. Such application of that principle is said to infringe the principles of legal certainty and of the protection of legitimate expectations.

22

They also maintain that the transactions at issue in the main proceedings do not constitute an abuse of rights for the purposes of the Court's case-law resulting from the judgment in Halifax on the ground that, in their submission, those transactions did not formally comply with the provisions of the Sixth Directive or national provisions implementing that directive, as those transactions were founded on section 4(9) of the VAT Act, which is, again in their submission, incompatible with the Sixth Directive. Furthermore, the aim pursued by those transactions, consisting in the disposal of the properties at issue in the main proceedings in a tax efficient way, is not contrary to the objectives of the Sixth Directive. The Commissioners oppose their arguments.

23

The referring court observes that it is bound by the findings of the Circuit Court, Cork, set out in paragraph 19 above. It states that, in the context of the main proceedings, the Commissioners did

not make any allegation of fraud against the appellants in those proceedings, nor did they demonstrate that there are national rules which would require them to disregard transactions constituting an abusive practice.

24

In those circumstances, the Supreme Court decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1)

Is the principle of abuse of rights, as recognised in the judgment of the Court in Halifax as being applicable in the sphere of VAT, directly effective against an individual in the absence of a national measure, whether legislative or judicial, giving effect to that principle, in circumstances where, as here, the redefining of the pre-sale transactions and the purchaser sales transactions (collectively referred to as the appellants’ transactions) as advocated by the Commissioners, would give rise to a liability on the part of the appellants to VAT where such liability, on the proper application of the provisions of national legislation in force at the relevant time to the appellants’ transactions did not arise?

(2)

If the answer to question (1) is that the principle of abuse of rights is directly effective against an individual, even in the absence of a national measure whether legislative or judicial giving effect to that principle was the principle sufficiently clear and precise to be applied to the appellants’ transactions, which were completed before the judgment of the Court in Halifax was delivered and in particular having regard to the principles of legal certainty and the protection of the appellants’ legitimate expectations?

(3)

If the principle of abuse of rights applies to the appellants’ transactions so that they are to be redefined –

(a)

what is the legal mechanism by means of which the VAT due on the appellants’ transactions is assessed and is collected since no VAT is due assessable or collectable in accordance with national law and

(b)

how are the national courts to impose such liability?

(4)

In determining whether the essential aim of the appellants’ transactions was to obtain a tax advantage should the national court consider the pre-sale transactions (which it has been found were effected solely for tax reasons) in isolation or must the aim of the appellants’ transactions as a whole be considered?

(5)

Is [section] 4(9) of the VAT Act to be treated as national legislation implementing the Sixth

Directive notwithstanding that it is incompatible with the legislative provision envisaged in Article 4(3) of the Sixth Directive on the proper application of which the appellants in relation to the supply before first occupation of the properties, would be treated as taxable persons notwithstanding that there had been a previous disposal which was chargeable to tax?

(6)

If [section] 4(9) [of the VAT Act] is incompatible with the Sixth Directive are the appellants by relying on that subsection engaged in an abuse of rights contrary to the principles recognised in the judgment of the Court in Halifax?

(7)

In the alternative if [section] 4(9) [of the VAT Act] is not incompatible with the Sixth Directive have the appellants achieved a tax advantage which is contrary to the purpose of the directive and/or [section] 4?

(8)

Even if [section] 4(9) [of the VAT Act] is not to be treated as implementing the Sixth Directive, does the principle of abuse of rights as established by the judgment of the Court in Halifax nevertheless apply to the transactions in issue by reference to the criteria laid down by the Court in Halifax?'

Consideration of the questions referred

The first and second questions

25

By its first and second questions, which it is appropriate to examine together, the referring court asks, in essence, whether the principle that abusive practices are prohibited must be interpreted as being capable, regardless of a national measure giving effect to it in the domestic legal order, of being applied directly in order to refuse to exempt sales of immovable goods, such as the sales at issue in the main proceedings, from VAT. As the transactions at issue in the main proceedings were carried out before the judgment in Halifax was delivered, the referring court also raises the issue whether such application to those transactions of the principle that abusive practices are prohibited is consistent with the principles of legal certainty and of the protection of legitimate expectations and, in particular, whether the aforesaid principle may be regarded as having a sufficiently clear and precise content.

26

First of all, it should be noted that those questions are worded in terms that call to mind the case-law relating to the direct effect of directives. According to that case-law, provisions of a directive that appear, so far as their subject matter is concerned, to be unconditional and sufficiently precise may be relied on directly against the State, but cannot of themselves impose obligations on an individual and cannot therefore be relied on as such against such a person before a national court (see to that effect, inter alia, judgment of 12 December 2013, Portgás, C?425/12, EU:C:2013:829, paragraphs 18 and 22 and the case-law cited). Thus, obligations arising from a directive must be transposed into national law in order to be capable of being relied on directly against an individual.

27

By contrast, the principle that abusive practices are prohibited, as applied in the sphere of VAT by

the case-law stemming from the judgment in Halifax, is not a rule established by a directive, but is based on the settled case-law, cited in paragraphs 68 and 69 of that judgment, that, first, EU law cannot be relied on for abusive or fraudulent ends (see, inter alia, judgments of 12 May 1998, Kefalas and Others, C?367/96, EU:C:1998:222, paragraph 20; of 23 March 2000, Diamantis, C?373/97, EU:C:2000:150, paragraph 33; and of 3 March 2005, Fini H, C?32/03, EU:C:2005:128, paragraph 32) and, secondly, the application of EU legislation cannot be extended to cover abusive practices by economic operators (see to that effect, inter alia, judgments of 11 October 1977, Cremer, 125/76, EU:C:1977:148, paragraph 21; of 3 March 1993, General Milk Products, C?8/92, EU:C:1993:82, paragraph 21; and of 14 December 2000, Emsland-Stärke, C?110/99, EU:C:2000:695, paragraph 51).

28

Whilst the Court held, in paragraphs 70 and 71 of the judgment in Halifax, that the principle that abusive practices are prohibited also applies to the sphere of VAT, pointing out that preventing possible tax evasion, avoidance and abuse is an objective recognised and encouraged by the Sixth Directive, it does not follow that the application of that principle in that sphere is subject to a requirement of transposition, as the provisions of the Sixth Directive are.

29

In addition, it should be pointed out, first, that the case-law cited in paragraph 27 above has been formulated in various areas of EU law, such as company law (judgments of 12 May 1998, Kefalas and Others, C?367/96, EU:C:1998:222, and of 23 March 2000, Diamantis, C?373/97, EU:C:2000:150), the common agricultural policy (judgments of 11 October 1977, Cremer, 125/76, EU:C:1977:148; of 3 March 1993, General Milk Products, C?8/92, EU:C:1993:82; and of 14 December 2000, Emsland-Stärke, C?110/99, EU:C:2000:695) and the sphere of VAT (judgment of 3 March 2005, Fini H, C?32/03, EU:C:2005:128).

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Secondly, it is apparent from the Court’s case-law that the principle that abusive practices are prohibited is applied to the rights and advantages provided for by EU law irrespective of whether those rights and advantages have their basis in the Treaties (see, so far as concerns the fundamental freedoms, inter alia judgments of 3 December 1974, van Binsbergen, 33/74, EU:C:1974:131, paragraph 13, and of 9 March 1999, Centros, C?212/97, EU:C:1999:126, paragraph 24), in a regulation (judgments of 6 April 2006, Agip Petroli, C?456/04, EU:C:2006:241, paragraphs 19 and 20, and of 13 March 2014, SICES and Others, C?155/13, EU:C:2014:145, paragraphs 29 and 30) or in a directive (see, in relation to VAT, inter alia judgment of 3 March 2005, Fini H, C?32/03, EU:C:2005:128, paragraph 32; judgment in Halifax, paragraphs 68 and 69; and judgment of 13 March 2014, FIRIN, C?107/13, EU:C:2014:151, paragraph 40). It is thus apparent that that principle is not of the same nature as the rights and advantages to which it applies.

31

The principle that abusive practices are prohibited, as applied to the sphere of VAT by the case-law stemming from the judgment in Halifax, thus displays the general, comprehensive character which is naturally inherent in general principles of EU law (see, by analogy, judgment of 15 October 2009, Audiolux and Others, C?101/08, EU:C:2009:626, paragraph 50).

32

It should also be added that, according to the Court’s case-law, refusal of a right or an advantage on account of abusive or fraudulent acts is simply the consequence of the finding that, in the event of fraud or abuse of rights, the objective conditions required in order to obtain the advantage sought are not, in fact, met, and accordingly such a refusal does not require a specific legal basis (see, to that effect, judgment of 14 December 2000, Emsland-Stärke, C?110/99, EU:C:2000:695, paragraph 56; judgment in Halifax, paragraph 93; and judgment of 4 June 2009, Pometon, C?158/08, EU:C:2009:349, paragraph 28).

33

Therefore, the principle that abusive practices are prohibited may be relied on against a taxable person to refuse him, inter alia, the right to exemption from VAT, even in the absence of provisions of national law providing for such refusal (see, to that effect, judgment of 18 December 2014, Schoenimport Italmoda Mariano Previti and Others, C?131/13, C?163/13 and C?164/13, EU:C:2014:2455, paragraph 62).

34

Contrary to the contentions of the appellants in the main proceedings, the fact that the situation that gave rise to the judgment cited in the preceding paragraph concerned cases of fraud does not lead to the conclusion that that case-law is applicable only to such cases, and not to cases of abuse. As is apparent, in particular, from paragraphs 56 and 57 of the judgment of 18 December 2014, Schoenimport Italmoda Mariano Previti and Others (C?131/13, C?163/13 and C?164/13, EU:C:2014:2455), in reaching the finding set out in the preceding paragraph, the Court relied, in particular, on its settled case-law, recalled in paragraphs 27 and 32 above, which relates both to cases of fraud and to situations involving abusive practices.

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Nor can the conclusion in paragraph 33 above be called into question by the case-law on which the appellants in the main proceedings rely in their written observations submitted to the Court.

36

Whilst the Court held, in paragraphs 87, 90 and 91 of the judgment in Halifax, that, as the Sixth Directive contains no provision dealing with the recovery of VAT, it is for the Member States to lay down the conditions under which, where an abusive practice has been found to exist, the tax authorities may recover VAT after the event, it ruled, however, not on the conditions for application of the principle that abusive practices are prohibited, but only on the procedural rules for the recovery of VAT that is required of the national authorities after they have established, in accordance with that principle, the existence of an abusive practice.

37

The judgments of 13 February 2014, Maks Pen (C?18/13, EU:C:2014:69), and of 12 February 2015, Surgicare (C?662/13, EU:C:2015:89), on which the appellants in the main proceedings rely in that context, also concern — like the case-law, stemming from the judgment in Halifax, cited in the preceding paragraph — the procedural rules relating to implementation of that principle, on the power or obligation of a national court to review of its own motion whether there is tax evasion (judgment of 13 February 2014, Maks Pen, C?18/13, EU:C:2014:69, paragraph 39) and on the possibility of making application of the national rules for preventing abuse of rights and fraud subject to a preliminary procedure characterised, in particular, by the hearing of the person

concerned (judgment of 12 February 2015, Surgicare, C?662/13, EU:C:2015:89, paragraph 34).

38

As regards, finally, the judgment of 5 July 2007, Kofoed (C?321/05, EU:C:2007:408), it is apparent from paragraphs 38 and 48 of that judgment that the Court ruled not on the conditions for application of the principle that abusive practices are prohibited, but on the conditions for application of a specific provision contained in a directive and enabling the Member States to refuse the exemption provided for by that directive where the transaction concerned has tax evasion or tax avoidance as its principal objective or as one of its principal objectives. Whilst, in paragraph 48 of that judgment, the Court placed emphasis on the existence of national rules relating to abuse of rights, tax evasion or tax avoidance that are capable of being interpreted in accordance with the aforesaid provision, that case-law concerns that provision of secondary legislation and is therefore not applicable to the general principle that abusive practices are prohibited.

39

The referring court also raises the issue whether it is consistent with the principles of legal certainty and of the protection of legitimate expectations to apply the principle that abusive practices are prohibited, as resulting from the judgment in Halifax, to the transactions at issue in the main proceedings, which were carried out before that judgment was delivered.

40

However, such application of EU law is consistent with the principles of legal certainty and of the protection of legitimate expectations (see to that effect, inter alia, judgments of 22 January 2015, Balazs, C?401/13 and C?432/13, EU:C:2015:26, paragraphs 49 and 50 and the case-law cited, and of 19 April 2016, DI, C?441/14, EU:C:2016:278, paragraphs 38 to 40).

41

The interpretation which the Court, in the exercise of the jurisdiction conferred upon it by Article 267 TFEU, gives to EU law clarifies and defines, where necessary, the meaning and scope of that law as it must be, or ought to have been, understood and applied from the date of its entry into force. It follows that, unless there are truly exceptional circumstances, which is not however claimed to be the case here, EU law as thus interpreted must be applied by the courts even to legal relationships which arose and were established before the judgment ruling on the request for interpretation, provided that in other respects the conditions for bringing a dispute relating to the application of that law before the courts having jurisdiction are satisfied (see, inter alia, judgments of 29 September 2015, Gmina Wroc?aw, C?276/14, EU:C:2015:635, paragraphs 44 and 45 and the case-law cited, and of 19 April 2016, DI, C?441/14, EU:C:2016:278, paragraph 40).

42

In addition, it is to be noted that in the judgment in Halifax the Court did not restrict the temporal effects of the interpretation which it gave to the principle that abusive practices are prohibited in the sphere of VAT. Such a restriction can be allowed only in the actual judgment ruling upon the interpretation requested, a requirement which guarantees the equal treatment of the Member States and of other persons subject to EU law, under that law, and thereby fulfils the requirements arising from the principle of legal certainty (see, to that effect, judgments of 6 March 2007, Meilicke and Others, C?292/04, EU:C:2007:132, paragraph 36, and of 23 October 2012, Nelson and Others, C?581/10 and C?629/10, EU:C:2012:657, paragraph 91).

43

So far as concerns, furthermore, the question whether the appellants in the main proceedings may, in the context of those proceedings, invoke the principles of legal certainty and of the protection of legitimate expectations in order to contest the refusal to exempt them from VAT, it is settled case-law that a taxable person who has created the conditions for obtaining a right in a fraudulent or abusive manner is not justified in relying on those principles in order to oppose the refusal to grant the right in question pursuant to the principle that abusive practices are prohibited (see, to that effect, judgment of 8 June 2000, Breitsohl, C?400/98, EU:C:2000:304, paragraph 38; judgment in Halifax, paragraph 84; and judgment of 18 December 2014, Schoenimport Italmoda Mariano Previti and Others, C?131/13, C?163/13 and C?164/13, EU:C:2014:2455, paragraph 60).

44

In the light of those considerations, the answer to the first and second questions is that the principle that abusive practices are prohibited must be interpreted as being capable, regardless of a national measure giving effect to it in the domestic legal order, of being applied directly in order to refuse to exempt from VAT sales of immovable goods, such as the sales at issue in the main proceedings, carried out before the judgment in Halifax was delivered, and the principles of legal certainty and of the protection of legitimate expectations do not preclude this.

The third question

45

By its third question, the referring court seeks, in essence, to ascertain how the Sixth Directive is to be interpreted in order to determine, if the transactions at issue in the main proceedings should be redefined pursuant to the principle that abusive practices are prohibited, the legal basis on which those of the transactions which do not constitute such a practice may be subject to VAT.

46

Where an abusive practice has been found to exist, the transactions involved must be redefined so as to re-establish the situation that would have prevailed in the absence of the transactions constituting that abusive practice. That redefinition must, however, go no further than is necessary for the correct charging of the VAT and the prevention of tax evasion (see, to that effect, judgment in Halifax, paragraphs 92, 94 and 98, and judgment of 22 December 2010, Weald Leasing, C?103/09, EU:C:2010:804, paragraphs 48 and 52).

47

It follows from that case-law that application in the sphere of VAT of the principle that abusive practices are prohibited entails first determining the situation that would have prevailed in the absence of the transactions constituting such a practice and then assessing that redefined

situation in the light of the relevant provisions of national law and of the Sixth Directive.

48

Thus, the principle that abusive practices are prohibited obliges the national authorities, in essence, to apply the relevant VAT legislation to the transactions concerned, while disregarding those of the transactions that constitute an abusive practice.

49

In the present instance, in the event that the referring court were to find that the leases preceding the sales of the properties at issue in the main proceedings constituted an abusive practice, any liability of those sales to VAT would have to be based on the relevant provisions of national legislation providing for such liability. The Sixth Directive cannot of itself impose obligations on an individual and cannot therefore be relied on as such against such a person before a national court (see, to that effect, judgment of 21 September 2017, DNB Banka, C?326/15, EU:C:2017:719, paragraph 41 and the case-law cited).

50

Accordingly, in that event the referring court would have the task of verifying, as is apparent from the concordant information provided by Ireland and the European Commission at the hearing before the Court, that the sales of immovable property at issue in the main proceedings would be subject to VAT under section 4(1) and (2) of the VAT Act, which would thus constitute the legal basis on which those sales are subject to VAT.

51

Therefore, the answer to the third question is that the Sixth Directive must be interpreted as meaning that, if the transactions at issue in the main proceedings should be redefined pursuant to the principle that abusive practices are prohibited, those of the transactions which do not constitute such a practice may be subject to VAT on the basis of the relevant provisions of national legislation providing for such liability.

The fourth question

52

By its fourth question, the referring court seeks, in essence, to ascertain whether the principle that abusive practices are prohibited must be interpreted as meaning that, in order to determine, on the basis of paragraph 75 of the judgment in Halifax, whether the essential aim of the transactions at issue in the main proceedings is to obtain a tax advantage, account should be taken of the objective of the leases preceding the sales of immovable property at issue in the main proceedings in isolation, or of the joint objective of those leases and sales as a whole.

53

It should be pointed out at the outset that, contrary to what the appellants in the main proceedings contend in their written observations submitted to the Court, the case-law stemming from the judgment in Halifax does not require it to be established that the accrual of a tax advantage is the only objective of the transactions at issue. Whilst transactions pursuing exclusively such an objective may fulfil the requirement resulting from that case-law, the Court explained in paragraph 45 of its judgment of 21 February 2008, Part Service (C?425/06, EU:C:2008:108), that the same is true when the accrual of a tax advantage constitutes the essential aim of the transactions at issue.

54

So far as concerns assessment of that objective in a situation such as that at issue in the main proceedings, it should be noted that, according to the information set out in the order for reference, the transactions at issue in the main proceedings consist in a number of contracts relating to the same properties and entered into between different persons, that is to say, the two leases between the appellants in the main proceedings and Shamrock Estates and, after the termination of those leases, the sale of those properties to third parties.

55

It follows from Article 2 of the Sixth Directive that every supply must normally be regarded as distinct and independent (judgments of 21 February 2008, Part Service, C?425/06, EU:C:2008:108, paragraph 50 and the case-law cited, and of 27 September 2012, Field Fisher Waterhouse, C?392/11, EU:C:2012:597, paragraph 14).

56

When the Court is prompted to define the examination necessary to determine the essential aim of the transactions at issue, it takes into account only the objective of the transaction or transactions whose abusiveness is to be assessed and not that of the supplies which, as a result of those initial transactions, formally satisfy the conditions for obtaining a tax advantage (see, inter alia, judgments of 22 December 2010, Weald Leasing, C?103/09, EU:C:2010:804, paragraphs 10 to 15 and 31, and of 17 December 2015, WebMindLicenses, C?419/14, EU:C:2015:832, paragraphs 20 and 43 to 45).

57

It is also apparent from the Court’s case-law that application of the principle that abusive practices are prohibited results only in the transactions which constitute such a practice being disregarded, whereas the relevant provisions concerning VAT must be applied to the supplies which are not constituent elements of it (judgment in Halifax, paragraphs 94 to 97). This separate treatment of the transactions which constitute an abusive practice means that their objective is to be assessed separately too.

58

Therefore, in order to determine whether the leases preceding the sales of immovable property at issue in the main proceedings essentially pursued the aim of obtaining a tax advantage, account should be taken, specifically, of the objective of those leases.

59

Accordingly, it is for the national court to determine, in accordance with the rules of evidence of national law, provided that the effectiveness of EU law is not undermined, whether the constituent

elements of an abusive practice are present in the case before it. However, the Court, when giving a preliminary ruling, may, where appropriate, provide clarification designed to give the national court guidance in its interpretation (see, inter alia, judgment in Halifax, paragraphs 76 and 77, and judgment of 17 December 2015, WebMindLicenses, C?419/14, EU:C:2015:832, paragraph 34).

60

In order to determine the substance and real significance of the leases at issue in the main proceedings, the referring court may, in particular, take account of the purely artificial nature of those transactions and the links of a legal, economic and/or personal nature between the operators at issue (see, to that effect, judgment in Halifax, paragraphs 75 and 81). Such aspects are capable of demonstrating that the accrual of a tax advantage constitutes the essential aim pursued, notwithstanding the possible existence, in addition, of economic objectives (judgment of 21 February 2008, Part Service, C?425/06, EU:C:2008:108, paragraph 62).

61

In the present instance, according to the information set out in the order for reference, the leases at issue in the main proceedings had no commercial reality and were entered into, between the appellants in the main proceedings and a company associated with them, with the aim of reducing the VAT liability on the sales of immovable property at issue in the main proceedings which they envisaged carrying out subsequently. As regards the fact that, as the appellants in the main proceedings have contended before the Court, those leases were intended to achieve the sales in the most tax efficient way, that objective cannot be regarded as constituting an aim other than obtaining a tax advantage, as the desired effect was to be achieved specifically by a reduction of the tax liability.

62

In the light of the foregoing considerations, the answer to the fourth question is that the principle that abusive practices are prohibited must be interpreted as meaning that, in order to determine, on the basis of paragraph 75 of the judgment in Halifax, whether the essential aim of the transactions at issue in the main proceedings is to obtain a tax advantage, account should be taken of the objective of the leases preceding the sales of immovable property at issue in the main proceedings in isolation.

The fifth and sixth questions

63

The fifth and sixth questions are based on the premiss that section 4(9) of the VAT Act is incompatible with the Sixth Directive.

64

It should be recalled that, in the context of the cooperation between the Court and national courts provided for in Article 267 TFEU, the need to provide an interpretation of EU law which will be of use to the national court means that the national court is bound to observe scrupulously the requirements concerning the content of a request for a preliminary ruling, expressly set out in Article 94 of the Rules of Procedure, of which the national court is supposed to be aware (see, to that effect, judgments of 5 July 2016, Ognyanov, C?614/14, EU:C:2016:514, paragraphs 18 and 19 and the case-law cited, and of 27 October 2016, Audace and Others, C?114/15, EU:C:2016:813, paragraph 35).

65

Thus, it is essential, as stated in Article 94(c) of the Rules of Procedure, that the order for reference itself contain a statement of the reasons which prompted the referring court 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.

66

In the case of the fifth and sixth questions, the request for a preliminary ruling does not satisfy those requirements.

67

The order for reference does not explain the reasons that may have led the referring court to doubt whether section 4(9) of the VAT Act is compatible with the Sixth Directive, but merely indicates the claims of the parties to the main proceedings in that regard. In particular, it does not specify the link that may exist between that incompatibility and the dispute in the main proceedings. Thus, that order does not reveal in what way any incompatibility would, according to the referring court, mean that section 4(9) of the VAT Act is not to be regarded as transposing the Sixth Directive or make it possible to determine the effect that, again according to the referring court, that finding could have on application of the case-law, stemming from the judgment in Halifax, relating to the principle that abusive practices are prohibited.

68

In the light of the foregoing considerations, the fifth and sixth questions must be held to be inadmissible.

The seventh question

69

By its seventh question, the referring court asks, in essence, whether the principle that abusive practices are prohibited must be interpreted as meaning that supplies of immovable property such as those at issue in the main proceedings result in the accrual of a tax advantage contrary to the purpose of the relevant provisions of the Sixth Directive.

70

It should be noted, first, that the Court held in paragraph 74 of the judgment in Halifax that an abusive practice can be found to exist in the sphere of VAT only if the transactions concerned, notwithstanding formal application of the conditions laid down by the relevant provisions of the Sixth Directive and of the national legislation transposing it, result in the accrual of a tax advantage

the grant of which would be contrary to the purpose of those provisions.

71

Secondly, Article 13B(g) of the Sixth Directive, read together with Article 4(3)(a) of the directive, exempts the supply of buildings or parts thereof, and of the land on which they stand, which have already been the subject of ‘first occupation’. As the Advocate General has noted in point 88 of his Opinion, the criterion of ‘first occupation’ is intended to distinguish new buildings, the construction and marketing of which must be subject to VAT, from old ones. To that end, the criterion determines ‘the moment at which the building leaves the production process and becomes a subject of consumption, that is to say when the building begins to be used by its owner or a tenant’ (see Proposal for a sixth Council Directive on the harmonisation of Member States concerning turnover taxes, Common system of value added tax: Uniform basis of assessment (COM(73) 950 final, of 20 June 1973)).

72

Thus, the exemption laid down in Article 13B(g) of the Sixth Directive relates to supplies of immovable property occurring after the property has actually been used by its owner or its tenant. By contrast, the first supply of a new property to the final consumer is not exempt.

73

Whilst, as noted in paragraph 59 above, it is for the national court to determine whether the constituent element of an abusive practice, as referred to in paragraph 70 above, is present in the main proceedings, it should be pointed out that the use of a new property by its first tenant may indeed, according to the circumstances of the case, constitute first occupation within the meaning of Article 4(3)(a) of the Sixth Directive.

74

However, according to the information set out in the order for reference, two leases were entered into in respect of the new properties at issue in the main proceedings. They were entered into on the same day between the appellants in the main proceedings and a company associated with them, and provided for the lease and immediate lease back of the properties. Furthermore, the leases were terminated, by common accord, less than a month after they were entered into, shortly before the appellants in the main proceedings sold the properties to third party purchasers. It thus appears, as the Advocate General has observed in point 94 of his Opinion, that the properties at issue in the main proceedings had, before their sale to third party purchasers, not yet been actually used by their owner or their tenant, a matter which is for the referring court to verify.

75

In the light of the foregoing considerations, the answer to the seventh question is that the principle that abusive practices are prohibited must be interpreted as meaning that supplies of immovable property such as those at issue in the main proceedings are liable to result in the accrual of a tax advantage contrary to the purpose of the relevant provisions of the Sixth Directive where the properties had, before their sale to third party purchasers, not yet been actually used by their owner or their tenant. It is for the referring court to verify whether that is the case in the main proceedings.

The eighth question

76

By its eighth question, the referring court asks, in essence, whether the principle that abusive practices are prohibited must be interpreted as being applicable in a situation such as that at issue in the main proceedings, which concerns the possible exemption of a supply of immovable property from VAT.

77

In this regard, the general principle resulting from Article 2(1) of the Sixth Directive should be recalled, that VAT is levied on all supplies of goods for consideration by a taxable person. Such a supply relating to immovable property is thus in principle covered by that tax.

78

By way of derogation from that principle, Article 13B(g) of the Sixth Directive provides that the Member States are to exempt the supply of buildings or parts thereof, and of the land on which they stand, other than as described in Article 4(3)(a) of the directive, that is to say, supplies other than supplies before first occupation of the building or part of a building concerned.

79

Thus, only the first supply of a building or part of a building is, in principle, subject to VAT; however, in order to determine which supply is the first one, account should not be taken of supplies of a purely artificial nature whose essential aim is to obtain a tax advantage.

80

In the light of the foregoing considerations, the answer to the eighth question is that the principle that abusive practices are prohibited must be interpreted as being applicable in a situation such as that at issue in the main proceedings, which concerns the possible exemption of a supply of immovable property from VAT.

Costs

81

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 (Fourth Chamber) hereby rules:

1.

The principle that abusive practices are prohibited must be interpreted as being capable, regardless of a national measure giving effect to it in the domestic legal order, of being applied directly in order to refuse to exempt from value added tax sales of immovable goods, such as the sales at issue in the main proceedings, carried out before the judgment of 21 February 2006, Halifax and Others (C?255/02, EU:C:2006:121), was delivered, and the principles of legal certainty and of the protection of legitimate expectations do not preclude this.

2.

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 must be interpreted as meaning that, if the transactions at issue in the main proceedings should be redefined pursuant to the principle that abusive practices are prohibited, those of the transactions which do not constitute such a practice may be subject to value added tax on the basis of the relevant provisions of national legislation providing for such liability.

3.

The principle that abusive practices are prohibited must be interpreted as meaning that, in order to determine, on the basis of paragraph 75 of the judgment of 21 February 2006, Halifax and Others (C?255/02, EU:C:2006:121), whether the essential aim of the transactions at issue in the main proceedings is to obtain a tax advantage, account should be taken of the objective of the leases preceding the sales of immovable property at issue in the main proceedings in isolation.

4.

The principle that abusive practices are prohibited must be interpreted as meaning that supplies of immovable property such as those at issue in the main proceedings are liable to result in the accrual of a tax advantage contrary to the purpose of the relevant provisions of Sixth Directive 77/388 where the properties had, before their sale to third party purchasers, not yet been actually used by their owner or their tenant. It is for the referring court to verify whether that is the case in the main proceedings.

5.

The principle that abusive practices are prohibited must be interpreted as being applicable in a situation such as that at issue in the main proceedings, which concerns the possible exemption of a supply of immovable property from value added tax.

von Danwitz

Vajda

Juhász

Jürimäe

Lycourgos

Delivered in open court in Luxembourg on 22 November 2017.

A. Calot Escobar

Registrar

T. von Danwitz

President of the Fourth Chamber

(*1) Language of the case: English.