Provisional text

JUDGMENT OF THE COURT (Sixth Chamber)

12 October 2017 (*)

(Reference for a preliminary ruling — VAT — Directive 2006/112/EC — Article 90(1) — Direct effect — Taxable amount — Reduction in the case of cancellation or refusal — Reduction in the case of total or partial non-payment — Distinction — Financial leasing agreement terminated for non-payment of public charges)

In Case C?404/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Szegedi Közigazgatási és Munkaügyi Bíróság (Administrative and Labour Court, Szeged, Hungary), made by decision of 8 July 2016, received at the Court on 19 July 2016, in the proceedings

Lombard Ingatlan Lízing Zrt.

v

Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatóság,

THE COURT (Sixth Chamber),

composed of J.-C. Bonichot (Rapporteur), acting as President of the Chamber, A. Arabadjiev and E. Regan, Judges,

Advocate General: M. Szpunar,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Lombard Ingatlan Lízing Zrt., by Cs. Tordai, ügyvéd,

– the Hungarian Government, by A.M. Pálfy and M.Z. Fehér, acting as Agents,

– the European Commission, by V. Bottka and A. Sipos and by M. Owsiany-Hornung, 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 90(1) and (2) 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 Lombard Ingatlan Lízing Zrt. (‘Lombard’) and Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága (Appeals Directorate of the National Taxation and Customs Authority, Hungary) (‘Appeals Directorate’) concerning the latter’s refusal to allow the correction of invoices which Lombard had made with a view to obtaining a reduction of the taxable amount for value added tax (VAT) following the termination of several financial leasing agreements owing to breaches of contract by the lessees.

Legal context

EU law

3 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.’

4 Article 90 of the directive is worded as follows:

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

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

5 Article 273 of the directive provides:

‘Member States may impose other obligations which they deem necessary to ensure the correct collection of VAT and to prevent evasion, subject to the requirement of equal treatment as between domestic transactions and transactions carried out between Member States by taxable persons and provided that such obligations do not, in trade between Member States, give rise to formalities connected with the crossing of frontiers.

The option under the first paragraph may not be relied upon in order to impose additional invoicing obligations over and above those laid down in Chapter 3.’

Hungarian law

6 Paragraph 77 of the általános forgalmi adóról szóló 2007. évi CXXVII. törvény (Law No CXXVII of 2007 on Value Added Tax), in its version applicable to the dispute in the main proceedings, provided as follows:

‘(1) In the case of the supply of goods or services or intra-Community acquisitions of goods, the taxable amount shall be reduced subsequently by the amount of the consideration which is repaid or to be repaid to the person entitled if, following completion of the transaction:

(a) where the transaction is invalid:

(aa) the situation obtaining before the completion of the transaction is restored, or

(ab) the transaction, although invalid, is declared to have had effects throughout the period preceding the decision declaring that it is invalid; or

(ac) the transaction is declared valid by way of elimination of a disproportionate advantage;

(b) where performance is defective:

(ba) the transaction is rescinded by the person entitled, or

(bb) the person entitled is given a price reduction.

(2) The taxable amount is also reduced subsequently where

(a) the amount advanced is repaid because the transaction is not completed;

(b) in the case of goods on which a deposit is paid, the amount paid by way of deposit is returned.

(3) The taxable amount may be reduced subsequently in the case of a price reduction, in accordance with Paragraph 71(1)(a) and (b), following completion of the transaction.'

7 The self-correction mechanism is governed by Paragraph 49 of the adózás rendjér?l szóló 2003. évi XCII. törvény (Law No XCII of 2003 on the taxation scheme). Paragraph 49(1) and (3) is worded as follows:

'(1) Taxpayers may, by submitting a return, correct the tax, whether already determined or pending determination, the taxable amount for the purposes of tax — with the exception of document duties and public charges — and any budgetary aid. If the taxpayer, before the commencement of a tax inspection, notices that he has not calculated the tax, the taxable amount or the budgetary aid in accordance with the law, or if his tax return contains errors in relation to the basis or amount of tax or budgetary aid as a consequence of calculation or clerical errors, he may amend his tax return by means of self-correction. A situation in which the taxpayer submits his return late and cannot justify that delay, or in which the tax authority rejects his application for an extension, will not be considered self-correction. Self-correction may not be carried out if the taxpayer has taken advantage, in accordance with the law, of the option possibilities recognised by the law and wishes to alter them by means of self-correction. The taxpayer may subsequently claim tax advantages or benefit from them by means of self-correction.

...

(3) By means of self-correction it will be possible to correct the taxable amount, the tax and the budgetary aid in accordance with the rules in force at the time the obligation arose, within the limitation period laid down by law for determining the tax and in relation to the tax period corresponding to the tax which has to be corrected. Self-correction covers determination of the taxable amount, of the tax identified, of the amount of budgetary aid and, if required by law, of the self-correction supplement; the tax return and simultaneous payment of the corrected taxable amount, of the corrected tax, of the budgetary aid and of the supplement; and the request for tax refund or for budgetary aid. The situation in which it is necessary to correct the value added tax as a consequence of the amendment to the decision of the customs authority determining the tax on imported goods will not be considered self-correction. If the customs authority subsequently amends its decision determining the tax on imported goods, the amendment must be regularised

in the tax return for the month in which payment was made.’

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

8 Lombard, a Hungarian company providing financing services, concluded three financial leasing agreements with definite transfer of ownership concerning various immovable assets. At the time when possession was taken of the assets concerned, in April 2006, February 2007 and May 2008 respectively, the company invoiced the lessees for the full amounts of the leasing instalments, including VAT, and, at that point in time, its VAT liability arose.

9 In November 2007, December 2008 and November 2009, Lombard terminated the financial leasing agreements in question as a consequence of partial non-payment of the amounts payable and recovered the assets concerned. Consequently, in 2010 and 2011, Lombard issued corrected invoices in which it reduced the taxable amount as against the initial invoices and deducted the resulting shortfall from the VAT payable in February, March and May 2011.

10 In the context of a verification of VAT returns for the period from January to July 2011, the first-level tax authority found a tax shortfall payable by Lombard, imposed a penalty and calculated default interest.

11 Lombard brought the matter before the Appeals Directorate, which upheld the decision, holding that, in accordance with Paragraph 77 of Law No CXXVII of 2007 on Value Added Tax, in its version applicable to the dispute in the main proceedings, it was possible to reduce the taxable amount only by means of the self-correction mechanism. According to the Appeals Directorate, that requirement complied with Article 90(1) of the VAT Directive since that provision confers on Member States the possibility of determining the conditions in which the taxable amount may be reduced. In any event, the termination of an agreement for non-payment or late payment may be considered to be a case of non-payment within the meaning of Article 90(2) of the VAT Directive, which allows Member States to exclude the reduction of the taxable amount in that situation.

12 In its action against the decision of the Appeals Directorate, Lombard submits that, in the case of refusal of an agreement for the supply of goods, Article 90(1) of the VAT Directive does not allow Member States to deny the right to reduce the taxable amount. In fact, for the purposes of the application of that provision, which, in addition, has direct effect according to Lombard, the ground for refusal of the agreements in question, namely, in the present case, non-payment of consideration, is irrelevant.

13 The referring court notes in that respect that Lombard concluded financial leasing agreements with definite transfer of ownership that provided that, upon expiry, the lessees would acquire ownership of the assets in question. Therefore, those transactions fell within the meaning of ‘supply of goods’ for the purposes of VAT, which became payable at the date on which the lessees took possession of the assets in question.

14 Moreover, the referring court explains that if the lessee cannot or will not continue paying the leasing instalments, the transaction will fail. In such a situation involving continuing contracts, it is not possible to reconstruct the situation that existed before the transaction was concluded because the right of possession of the leased asset has been transferred and cannot be transferred back, but the parties may agree that, in such a case, they will regard the agreement as having had effects until the transaction failed. As to the financial lease agreements at issue in the main proceedings, the lessees took possession of the leased assets but, because that agreement was terminated, the property right under civil law was not transferred.

15 In that regard, the referring court takes the view that it follows from the judgment of 15 May

2014, *Almos Agrárkülkereskedelmi* (C?337/13, EU:C:2014:328, paragraph 28), that Article 90 of the VAT Directive does not preclude a national provision which, in accordance with the derogation set out in Article 90(2) thereof, excludes the reduction of the taxable amount for VAT in the event of non-payment of the price.

16 That said, the referring court wonders whether the concept of 'refusal' in Article 90(1) of the VAT Directive includes a situation in which the lessor may no longer claim payment of the leasing instalment because the financial leasing agreement has been terminated owing to breach of contract by the lessee. It asks whether, where appropriate, the derogation set out in Article 90(2) of the directive may nevertheless apply.

17 In addition, the referring court is of the opinion that the national rules governing the implementation of the right to reduce the taxable amount are contrary to the principle of fiscal neutrality. Indeed, the referring court argues that those rules provide for a limitation period that does not take account of the fact that the termination of a long-term financial leasing agreement may occur after expiry of that period. In such a situation, the part of the tax that has already been invoiced, declared and paid, and that the lessee has not reimbursed, constitutes a real cost for the lessor, which is inconsistent with the very principle of fiscal neutrality.

18 Against that background, the Szegedi Közigazgatási és Munkaügyi Bíróság (Administrative and Labour Court, Szeged, Hungary) stayed the proceedings and referred the following questions to the Court for a preliminary ruling:

'(1) Is the concept of "refusal" in Article 90(1) of the VAT Directive to be interpreted as including a situation in which, under a financial leasing agreement with definitive transfer of ownership, the lessor may no longer claim payment of the leasing instalment from the lessee because the lessor has terminated the agreement owing to breach of contract by the lessee?

(2) If the answer is in the affirmative, may the lessor, in accordance with Article 90(1) of the VAT Directive, reduce the taxable amount, even if the national legislature, availing itself of the option provided in Article 90(2) of the VAT Directive, has not allowed reduction of the taxable amount in the event of total or partial non-payment?'

Consideration of the questions referred

The first question

19 By its first question, the referring court asks whether the concept of 'refusal' in Article 90(1) of the VAT Directive is to be interpreted as including a situation in which, under a financial leasing agreement with definite transfer of ownership, the lessor may no longer claim payment of the leasing instalment from the lessee because the lessor has terminated the agreement owing to breach of contract by the lessee.

20 It should be recalled that Article 90(1) of the VAT Directive provides for the reduction of the taxable amount in the event of cancellation, refusal, total or partial non-payment, or where the price is reduced after the supply takes place.

21 In that regard, the Court has consistently held that provisions of EU law must be interpreted and applied uniformly in the light of the versions existing in all the languages of the European Union. Where there is divergence between the various language versions of an EU legislative text, the provision in question must be interpreted by reference to the general scheme and the purpose of the rules of which it forms part (judgment of 17 May 2017, *ERGO Poist'ov?a*, C?48/16, EU:C:2017:377, paragraph 37).

22 With regard to the terms 'cancellation' and 'refusal', it should be noted that most language versions of that provision, including the German and the French versions, refer to three possible situations, whereas other language versions, such as the English and the Hungarian versions, refer to two situations only.

23 As observed by the European Commission, the intent to include cancellation with retroactive (*ex tunc*) as well as with prospective (*ex nunc*) effect may explain the use in Article 90(1) of the VAT Directive of three terms, inter alia, in the German and the French versions.

24 The terms 'elállás' and 'teljesítés meghiúsulása' in the Hungarian version of that article do not preclude that interpretation in that they refer, respectively, to the retroactive refusal of an agreement and to a failed transaction.

25 That interpretation of Article 90(1) of the VAT Directive corresponds, in any event, to the general scheme and the purpose of that provision.

26 According to the case-law of the Court, in the situations covered by that provision, Article 90(1) of the VAT Directive requires the Member States to reduce the taxable amount and, consequently, the amount of VAT payable by the taxable person whenever, after a transaction has been concluded, part or all of the consideration has not been received by the taxable person. That provision embodies one of the fundamental principles of the VAT Directive, according to which the taxable amount is the consideration actually received and the corollary of which is that the tax authorities may not collect an amount of VAT exceeding the tax which the taxable person received (see, to that effect, judgment of 15 May 2014, *Almos Agrárkülkereskedelmi*, C?337/13, EU:C:2014:328, paragraph 22).

27 However, Article 90(2) permits Member States to derogate from the abovementioned rule in the case of total or partial non-payment of the transaction price (judgment of 15 May 2014, *Almos Agrárkülkereskedelmi*, C?337/13, EU:C:2014:328, paragraph 23).

28 The power to derogate, which is strictly limited to the situation of total or partial non-payment of the transaction price, is based on the notion that in certain circumstances and because of the legal situation prevailing in the Member State concerned, non-payment of consideration may be difficult to establish or may only be temporary (see, by analogy, judgment of 3 July 1997, *Goldsmiths*, C?330/95, EU:C:1997:339, paragraph 18).

29 Unlike refusal or cancellation of the contract, non-payment of the purchase price does not restore the parties to their original situation. If the total or partial non-payment of the purchase price occurs without there being cancellation or refusal of the contract, the purchaser remains liable for the agreed price and the seller, even though no longer proprietor of the goods, in principle continues to have the right to receive payment, which he or she can rely on in court. Since it cannot be excluded, however, that such a debt will become definitively irrecoverable, the EU legislature intended to leave it to each Member State to decide whether the situation of non-payment of the purchase price leads to an entitlement to have the taxable amount reduced accordingly under conditions it determines, or whether such a reduction is not allowed in that

situation (judgment of 15 May 2014, *Almos Agrárkülkereskedelmi*, C?337/13, EU:C:2014:328, paragraph 25).

30 It follows from the foregoing that non-payment is characterised by the inherent uncertainty that stems from its non-definitive nature.

31 By contrast, the terms ‘cancellation’ and ‘refusal’ in Article 90(1) of the VAT Directive refer to situations in which, following either cancellation with retroactive effect or refusal with effect in the future only, the debtor’s obligation to discharge his or her debt is either fully extinguished or set at a definitive level, with corresponding consequences for the creditor.

32 In that regard, it is apparent from the order for reference that, in the case in the main proceedings, a party to a financial leasing agreement with definite transfer of ownership has definitively put an end to the agreement, which was terminated. Accordingly, the lessor recovered the leased assets and could no longer claim payment of the lease instalment from the lessee, and the latter did not acquire ownership of those assets. In addition, none of the information submitted to the Court shows that the reality of those transactions was challenged.

33 Inasmuch as that situation is characterised by the definitive reduction of the consideration initially payable by a party to an agreement, it cannot be considered to be a case of ‘non-payment’ within the meaning of Article 90(2) of the VAT Directive; rather, it amounts to ‘cancellation’ or ‘refusal’ within the meaning of Article 90(1) of the directive.

34 In the light of all the foregoing, the answer to the first question is that the concepts of ‘cancellation’ and ‘refusal’ in Article 90(1) of the VAT Directive must be interpreted as including the situation in which, under a financial leasing agreement with definite transfer of ownership, the lessor may no longer claim payment of the leasing instalment from the lessee because the lessor has terminated the agreement owing to breach of contract by the lessee.

The second question

35 By its second question, the referring court asks, in essence, whether, where a financial leasing agreement has been definitively terminated because of non-payment of the lease instalments payable by the lessee, the lessor may rely on Article 90(1) of the VAT Directive against a Member State with a view to obtaining a reduction of the taxable amount for VAT, even if the applicable national law considers that situation to be a case of ‘non-payment’ within the meaning of Article 90(2) of the directive and does not allow the taxable amount to be reduced in the case of non-payment.

36 It should be recalled that, according to settled case-law of the Court, whenever the provisions of a directive appear, so far as their subject matter is concerned, to be unconditional and sufficiently precise, they may be relied upon before the national courts by individuals against the State where the State has failed to implement the directive in domestic law by the end of the period prescribed or where it has failed to implement the directive correctly. A provision of EU law is unconditional where it sets forth an obligation which is not qualified by any condition, or subject, in its implementation or effects, to the taking of any measure either by the institutions of the European Union or by the Member States (see judgment of 15 May 2014, *Almos Agrárkülkereskedelmi*, C?337/13, EU:C:2014:328, paragraphs 31 and 32).

37 In the present case, Article 90(1) of the VAT Directive provides that, in the cases it refers to, the taxable amount is to be reduced accordingly under conditions which are to be determined by the Member States.

38 Although that provision grants the Member States a certain degree of discretion when adopting the measures to determine the amount of the reduction, that does not alter the precise and unconditional nature of the obligation to allow the reduction in the taxable amount in the cases referred to by that provision. It therefore fulfils the conditions for it to have direct effect (judgment of 15 May 2014, *Almos Agrárkülkereskedelmi*, C?337/13, EU:C:2014:328, paragraph 34).

39 It is true, as noted in paragraph 27 above, that Article 90(2) permits Member States to derogate from the abovementioned rule in the case of total or partial non-payment of the transaction price. Hence taxable persons cannot rely, on the basis of Article 90(1) of the VAT Directive, on a right to a reduction of their taxable amount for VAT in the case of non-payment of the price if the Member State concerned intended to apply the derogation provided for in Article 90(2) of that directive (see judgment of 15 May 2014, *Almos Agrárkülkereskedelmi*, C?337/13, EU:C:2014:328, paragraph 23).

40 However, as is apparent from paragraphs 29 to 33 above, an act of refusal by which a party to a financial leasing agreement with definite transfer of ownership has definitively terminated the agreement results in the definitive reduction of the debt initially payable by the lessee. That act cannot be considered to be a case of ‘non-payment’ within the meaning of Article 90(2) of the VAT Directive; rather, it amounts to a ‘cancellation’ or a ‘refusal’ within the meaning of Article 90(1) of the directive.

41 In addition, to the extent that the referring court has doubts about the formalities to which the exercise of the right to a reduction of the taxable amount may be subject, it should be noted that, under Article 273 of the VAT Directive, Member States may impose the obligations which they deem necessary to ensure the correct collection of VAT and to prevent evasion, provided, inter alia, that that option is not relied upon in order to impose additional invoicing obligations over and above those laid down in Chapter 3 of that directive (judgment of 15 May 2014, *Almos Agrárkülkereskedelmi*, C?337/13, EU:C:2014:328, paragraph 36).

42 Given that Article 90(1) and Article 273 of the VAT Directive do not, outside the limits laid down therein, specify either the conditions or the obligations which the Member States may impose, it must be held that those provisions give the Member States a margin of discretion, inter alia, as to the formalities to be complied with by taxable persons vis-à-vis the tax authorities of those States in order to ensure that the taxable amount is reduced (judgment of 15 May 2014, *Almos Agrárkülkereskedelmi*, C?337/13, EU:C:2014:328, paragraph 37).

43 It is, however, apparent from the case-law of the Court that measures to prevent tax evasion or avoidance may not, in principle, derogate from the rules relating to the taxable amount except within the limits strictly necessary for achieving that specific aim. They must have as little effect as possible on the objectives and principles of the VAT Directive and may not therefore be used in such a way that they would have the effect of undermining the neutrality of VAT (judgment of 15 May 2014, *Almos Agrárkülkereskedelmi*, C?337/13, EU:C:2014:328, paragraph 38).

44 Consequently, the formalities to be complied with by taxable persons to exercise,vis-à-vis the tax authorities, the right to reduce the taxable amount for VAT must be limited to those which make it possible to provide proof that, after the transaction has been concluded, part or all of the consideration will definitely not be received. It is for the national courts to ascertain whether that is true of the formalities required by the Member State concerned (judgment of 15 May 2014, *Almos Agrárkülkereskedelmi*, C?337/13, EU:C:2014:328, paragraph 39).

45 In the light of all the foregoing, the answer to the second question is that where a financial leasing agreement has been definitively terminated because of non-payment of the lease

instalments payable by the lessee, the lessor may rely on Article 90(1) of the VAT Directive against a Member State with a view to obtaining a reduction of the taxable amount for VAT, even if the applicable national law considers that situation to be a case of ‘non-payment’ within the meaning of Article 90(2) of the directive and does not allow the taxable amount to be reduced in the case of non-payment.

Costs

46 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 (Sixth Chamber) hereby rules:

1. **The concepts of ‘cancellation’ and ‘refusal’ in Article 90(1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as including a situation in which, under a financial leasing agreement with definite transfer of ownership, the lessor may no longer claim payment of the leasing instalment from the lessee because the lessor has terminated the agreement owing to breach of contract by the lessee.**

2. **Where a financial leasing agreement has been definitively terminated because of non-payment of the lease instalments payable by the lessee, the lessor may rely on Article 90(1) of Directive 2006/112 against a Member State with a view to obtaining a reduction of the taxable amount for value added tax, even if the applicable national law considers that situation to be a case of ‘non-payment’ within the meaning of Article 90(2) of the directive and does not allow the taxable amount to be reduced in the case of non-payment.**

[Signatures]

* Language of the case: Hungarian.