Provisional text

JUDGMENT OF THE COURT (Sixth Chamber)

9 November 2017 (*)

(Reference for a preliminary ruling — Taxation — Common system of value added tax — Directive 2006/112/EC — Dissolution of a company resulting in its removal from the value added tax (VAT) register — Obligation to calculate VAT on available assets and to pay the VAT calculated to the State — Maintenance or amendment of the law existing on the date of accession to the European Union — Second paragraph of Article 176 — Effect on the right to deduct — Article 168)

In Case C?552/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Administrativen sad Sofia-grad (Administrative Court of the City of Sofia, Bulgaria), made by decision of 21 October 2016, received at the Court on 2 November 2016, in the proceedings

‘**Wind Inovation 1**’ **EOOD,** in liquidation,

v

Direktor na Direktsia ‘**Obzhalvane i danachno-osiguritelna praktika**’ **— Sofia,**

THE COURT (Sixth Chamber),

composed of C.G. Fernlund (Rapporteur), President of the Chamber, A. Arabadjiev and E. Regan, Judges,

Advocate General: M. Wathelet,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Direktor na Direktsia ‘Obzhalvane i danachno-osiguritelna praktika’ — Sofia, by A. Georgiev, acting as Agent,

– the Bulgarian Government, by E. Petranova and M. Georgieva, acting as Agents,

– the European Commission, by L. Lozano Palacios and N. Nikolova, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 168 and 176 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 Wind Inovation 1 EOOD (‘Wind Inovation’) and the Direktor na Direktsia ‘Obzhalvane i danachno-osiguritelna praktika’ — Sofia (Director of the ‘Appeals and Tax and Social Insurance Practice’ Directorate of Sofia, Bulgaria) (‘the Direktor’) concerning the decision to remove that company from the value added tax (VAT) register.

Legal context

EU law

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

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

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

4 Article 18 of the VAT directive provides:

‘Member States may treat each of the following transactions as a supply of goods for consideration:

…

(c) ... the retention of goods by a taxable person, or by his successors, when he ceases to carry out a taxable economic activity, where the VAT on such goods became wholly or partly deductible upon their acquisition ...’

5 Article 168 of the VAT Directive provides:

‘In so far as the goods and services are used for the purposes of the taxed transactions of a taxable person, the taxable person shall be entitled, in the Member State in which he carries out these transactions, to deduct the following from the VAT which he is liable to pay:

(a) the VAT due or paid in that Member State in respect of supplies to him of goods or services, carried out or to be carried out by another taxable person;

...’

6 Article 176 of the VAT Directive states:

‘The Council, acting unanimously on a proposal from the Commission, shall determine the expenditure in respect of which VAT shall not be deductible. VAT shall in no circumstances be deductible in respect of expenditure which is not strictly business expenditure, such as that on luxuries, amusements or entertainment.

Pending the entry into force of the provisions referred to in the first paragraph, Member States may retain all the exclusions provided for under their national laws at 1 January 1979 or, in the case of the Member States which acceded to the Community after that date, on the date of their accession.’

Bulgarian law

The Law on Value Added Tax applicable from 1 January 2007

7 The Zakon za danak varhu dobavenata stoynost (Law on Value Added Tax, DV No 63, of 4 August 2006; 'the ZDDS') entered into force on 1 January 2007, the date on which the Treaty between the Member States of the European Union and the Republic of Bulgaria and Romania, concerning the accession of the Republic of Bulgaria and Romania to the European Union (OJ 2005 L 157, p. 11) also entered into force.

8 Article 106 of the ZDDS provides:

'1. For the purposes of this Law, termination of registration (removal from the register) is a procedure under which, after being removed from the register, a person is no longer entitled to charge VAT or to deduct VAT input tax, save where that law provides otherwise.

2. Registration shall be terminated:

(1) at the instigation of the registered person, provided that there is a reason for — compulsory or voluntary — removal from the register;

(2) at the instigation of the tax authority:

(a) where it has found there to be a reason for the compulsory removal from the register;

(b) in the situation referred to in Article 176.'

9 Article 107 of the ZDDS provides:

'The following shall constitute grounds for compulsory removal from the register:

...

(4) dissolution of the person in the following cases:

(a) dissolution of a commercially active legal person, whether or not by reason of liquidation;

...'

10 Article 111 of the ZDDS states:

'1. At the time of removal from the register, the person shall be deemed to carry out transactions within the meaning of this Law through the medium of all the existing goods and/or services in respect of which he has deducted input tax in full or in part and which are:

(1) assets within the meaning of the Zakon za schetovodstvoto (Law on Accounting); or

(2) assets within the meaning of the Zakon za korporativnoto podohodno oblagane (Law on Corporation Tax), which are distinct from those referred to in point 1.

...

3. The tax referred to in paragraph 1 shall be included in the VAT due in respect of the final taxation period ... and shall be paid within the prescribed time limit ...'

11 Article 76 of the ZDDS states:

'1. The registered person shall be entitled to deduct the VAT calculated under this law on its removal from the register [on] the assets taxable under Article 111(1)(1) available at the time of its subsequent registration.

2. The claim under paragraph 1 shall arise where the following conditions are met contemporaneously:

(1) the assets available as defined by the Law on Accounting at the time of the subsequent registration under this law were charged to tax under Article 111 (1)(1) on removal from the register;

(2) the tax calculated on removal from the register was actually paid or set off by the competent revenue authority;

(3) The person has achieved taxable turnover within the meaning of Article 69 with the assets available under paragraph 1 above, is achieving or will achieve it;

…'

The Law on Value Added Tax prior to 1 January 2007

12 According to the referring court, the Administrativen sad Sofia-grad (Administrative Court of the City of Sofia, Bulgaria), the Law on Value Added Tax, in the version in force until 31 December 2006, already provided for a system equivalent to that set out in Article 111(1) and (3) of the ZDDS, which entered into force on 1 January 2007, according to which it is assumed that, on the date of removal from the VAT register, the entity achieved a turnover with all available assets and the tax payable is to be included in the VAT due in respect of the final taxation period.

13 The Law on Value Added Tax, in the version in force until 31 December 2006, also included a provision equivalent to that of Article 76(2)(2) of the ZDDS, which entered into force on 1 January 2007, according to which, in order to benefit from the right to deduct on a new registration, the tax calculated as at removal from the register must actually be paid or set off by the competent revenue authority. However, that provision also provided that the court-appointed liquidator was entitled to decide that the legal person concerned continues to be registered in the VAT register until the date of its removal from the companies register.

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

14 Wind Inovation is a company governed by Bulgarian law in liquidation, whose object is the production of electricity and investment in energy projects. Gräss Solartechnik GmbH & Co. KG, a company governed by German law, owns the entire capital of Wind Inovation, of which it is therefore the sole shareholder.

15 Kühling Stahl-und Metallbau GmbH, a company governed by German law, had a claim against Gräss Solartechnik. Since the latter had not settled its debt, Kühling Stahl-und Metallbau GmbH sought the dissolution of Wind Inovation, in accordance with Bulgarian law.

16 The referring court specifies that the assets of the dissolved company were to be applied to

satisfying the claim by the creditor and that should the debt owed to Gräss Solartechnik be settled, the proceedings to liquidate Wind Inovation would be terminated.

17 In accordance with the provisions of the ZDDS, Wind Inovation applied to be removed from the VAT register.

18 The tax authorities found that an entry had been made in the companies register on 7 August 2015 to the effect that Wind Inovation had ceased trading and been placed under liquidation. On 25 August 2015, those authorities issued a notice removing Wind Inovation from the VAT register, which was retroactively dated 7 August 2015.

19 The notice of removal having been notified to it, on 27 August 2015 Wind Inovation submitted a new application for registration in the VAT register, specifying that it had not ceased trading and that, even at the time of the registration of its liquidation in the companies register, its turnover exceeded by a multiple factor the threshold value for compulsory VAT registration, namely 50 000 Bulgarian leva (BGN) (approximately EUR 25 000). The company was once again entered in that register on 12 September 2015.

20 Wind Inovation calculated the VAT on its available assets on 7 August 2015 and included it, as VAT payable, in its statement relating to that month.

21 Wind Inovation subsequently submitted an objection against the notice of removal from the VAT register with the Direktor. That objection having been dismissed, Wind Inovation brought an action before the Administrativen sad Sofia-grad (Administrative Court of the City of Sofia).

22 That court is uncertain as to whether the amendment made in the national legislation on 1 January 2007, relating to the removal of the option of the court-appointed liquidator to decide whether the dissolved legal person continues to be registered in the VAT register until the date of its removal from the companies register, constitutes a breach of the second paragraph of Article 176 of the VAT Directive.

23 That court states that the removal of that option gives rise to an obligation for the dissolved company to calculate VAT on the available assets and actually to pay that VAT to the tax authorities. It adds that the company concerned must immediately re-register owing to its continued economic activity and is unsure whether the compulsory removal from the VAT register, which gives rise to the calculation of the VAT on the available assets and to the actual payment of the amount calculated to the State, constitutes an additional condition governing exercise of the right to deduct input VAT and therefore, a restriction of the right to deduct which is not provided for in the VAT Directive.

24 In those circumstances, the Administrativen sad Sofia-grad (Administrative Court of the City of Sofia) has decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Is the second paragraph of Article 176 of the VAT Directive to be interpreted as precluding compulsory removal from the VAT register, based on an amendment to the ZDDS, which entered into force on 1 January 2007, which removes the court-appointed liquidator’s right to decide that the legal person whose dissolution has been ordered by a court decision is to continue to be registered under the ZDDS until the date of its removal from the companies register, while the ZDDS provides, as a ground for compulsory removal from the VAT register, for the dissolution of a commercially active legal person, by reason of liquidation or otherwise?

(2) Is the second paragraph of Article 176 of the VAT Directive to be interpreted as precluding

compulsory removal from the VAT register, based on an amendment to the ZDDS, which entered into force on 1 January 2007, where, at the time of compulsory removal from the VAT register, the taxable person meets the conditions for compulsory re-registration in that register, the taxable person is party to current contracts and states that it has not ceased business and continues to carry on an economic activity, if that taxable person must actually pay the tax calculated and payable upon the compulsory registration in order to be entitled to deduct VAT input tax on available assets taxed upon removal from the register and available at the time of re-registration? If compulsory removal from the register under the circumstances set out is permissible, may entitlement to deduct input tax on assets taxed upon removal from the register, which are available on the re-registration in the VAT register, and with which the person effects or will effect taxable transactions, be made dependent on the actual payment of the tax to the exchequer or may the tax calculated upon removal from the register be set off against the amount of tax credit determined on re-registration for VAT for the purposes of the ZDDS, particularly as the tax is payable by a person in respect of whom entitlement to deduct input tax arises?'

Consideration of the questions referred

Preliminary observations

25 The questions referred relate to national legislation which requires compulsory removal from the VAT register of a company whose dissolution has been ordered by a court decision and which amends the law in force on the date of the accession of the Member State concerned to the European Union, by providing that that removal and the obligations to which that removal gives rise to calculate the input VAT due or paid on the available assets and to pay that input VAT to the State may no longer be deferred, by the company's liquidator, until the date of that company's removal from the companies register.

26 The referring court asks whether that amendment introduces a restriction on the right to deduct which did not exist on the date of accession of the Member State concerned to the European Union and which is, therefore, contrary to the second paragraph of Article 176 of the VAT Directive.

27 According to that provision, which provides for a derogation from the rules relating to the right to deduct VAT, Member States which acceded to the European Union after 1 January 1979 may retain all the exclusions on the right to deduct provided for under their national laws on the date of their accession to the European Union.

28 However, in the present case, there is nothing to show that the national legislation — which, it is not disputed, relates to removal from the VAT register in the event of dissolution of a legal person, whether or not by reason of liquidation — introduces an exclusion covered by that derogation.

29 Consequently, in order to determine whether a measure, such as that at issue in the main proceedings, introduces a restriction on the right to deduct which is contrary to the VAT Directive, it is necessary to examine it in the light of the mechanism of the right to deduct set up by that directive, in particular in Article 168 thereof.

30 Thus, by its questions, which should be examined together, the referring court asks in essence whether the VAT Directive, in particular Article 168 thereof, precludes national legislation, such as that at issue in the main proceedings, pursuant to which compulsory removal from the VAT register of a company whose dissolution has been ordered by a court decision results, even where the dissolved company remains party to contracts in force and states that it has not ceased its activity during the period of its liquidation, in the obligation to calculate the input VAT due or

paid on available assets on the date of that dissolution and to pay it to the State and which, therefore, makes the right to deduct subject to compliance with that obligation.

Interpretation of Article 168 of the VAT Directive

31 In order to answer the questions put by the referring court, it should be recalled that, according to the case-law, the existence of an economic activity establishes, pursuant to Article 9(1) of the VAT Directive, the status of 'taxable person', to whom that directive gives the right to deduct (see, to that effect, judgment of 3 March 2005, Fini H, C?32/03, EU:C:2005:128, paragraph 19).

32 In accordance with consistent case-law, that right to deduct laid down in Article 168 of the VAT Directive forms an integral part of the VAT mechanism and in principle cannot be limited. It is exercisable immediately in respect of all the taxes charged on input transactions (judgments of 12 January 2006, Optigen and Others, C?354/03, C?355/03 and C?484/03, EU:C:2006:16, paragraph 53, and of 29 October 2009, SKF, C?29/08, EU:C:2009:665, paragraph 55).

33 The deduction system is intended to relieve the trader entirely of the burden of the VAT payable or paid in the course of all his economic activities and ensures complete neutrality of taxation of all economic activities, whatever their purpose or results, provided that they are themselves subject in principle to VAT (judgments of 22 February 2001, Abbey National, C?408/98, EU:C:2001:110, paragraph 24, and of 3 March 2005, Fini H, C?32/03, EU:C:2005:128, paragraph 25).

34 It follows from Article 168 of the VAT Directive that, in so far as the taxable person, acting as such at the time when he acquires goods or receives services, uses those goods or services for the purposes of his taxed transactions, he is entitled to deduct the VAT paid or payable in respect of those goods or services (judgment of 14 September 2017, Iberdrola Inmobiliaria Real Estate Investments, C?132/16, EU:C:2017:683, paragraph 27).

35 In those circumstances, it must be held that the right to deduct is linked to the exercise of an economic activity.

36 When a company ceases to carry out a taxable economic activity, except in the cases of transfer to a company of a totality of assets or part thereof referred to in Article 19 of the VAT Directive, that directive provides expressly in Article 18(c) thereof that the retention of goods by a taxable person or by his successors may be treated as a supply of goods for consideration, where those goods have given rise to a deduction.

37 The Court has made clear that Article 18(c) concerns the cessation of the taxable economic activity in general, without differentiating between the causes or the circumstances of that cessation, apart from the exception mentioned in the preceding paragraph, and that that provision consequently also covers the cessation of the taxable economic activity resulting from the removal of the taxable person from the VAT register (judgment of 8 May 2013, Marinov, C?142/12, EU:C:2013:292, paragraphs 26 and 28).

38 The Court has pointed out that the main objective of that Article 18(c) is to avoid a situation where the final consumption of goods on which the VAT became deductible is untaxed following the cessation of the taxable economic activity, regardless of the causes or circumstances of that cessation (judgment of 8 May 2013, *Marinov*, C?142/12, EU:C:2013:292, paragraph 27).

39 Those considerations consequently apply to a cessation of economic activity resulting from a court decision and leading to the compulsory removal from the VAT register of the company

concerned. In accordance with Article 18(c) of the VAT Directive, the Member States may consider, in that situation, that the taxable person carries out a supply to himself resulting in the obligation the calculate the input VAT due or paid and to pay it to the State.

40 As is clear from the actual wording of Article 18(c) of the VAT Directive and from the objective pursued by that provision, that analysis applies however only in the situation where the taxable economic activity of the person concerned has ceased and where that person no longer carries out taxable transactions.

41 Where the person concerned continues his economic activity, the option provided for in that Article 18(c) is not available to the Member States.

42 In the present case, the referring court states that the main proceedings concern a company which has been dissolved and placed under liquidation, which, however, continues to effect certain economic transactions and generates a substantial turnover; this requires it, according to national law, to apply for its re-registration in the VAT register.

43 In that context, the obligation to calculate the VAT due on the assets of that company available on the date of its dissolution and to pay that tax to the State in order to be eligible for deduction of the tax calculated is not justified by the intention to avoid untaxed final consumption.

44 The Court has previously held that the question whether the VAT on an earlier or later sale of the goods concerned has or has not been paid to the public purse is irrelevant to the right of the taxable person to deduct input VAT (judgment of 12 January 2006, Optigen and Others, C?354/03, C?355/03 and C?484/03, EU:C:2006:16, paragraph 54). As the Direktor claimed, requiring the company concerned to actually pay the VAT due constitutes, for that company, an obstacle to deduction of the input VAT, since it requires that company to commit funds and obliges the tax authorities to return those funds when it re-registers, whereas other traders who hold assets may use them for their economic activities without being required to make such payment.

45 Moreover, it is apparent from paragraphs 30, 31 and 35 of the judgment of 3 March 2005, Fini H (C?32/03, EU:C:2005:128) that, as regards expenditure, such as rental expenditure, relating to a service used for a commercial activity carried out by a legal person which has ceased its activity and is in liquidation, the right to deduct the VAT payable on that expenditure must be recognised provided that that expenditure is directly and immediately linked to that activity, to the extent that the absence of any fraudulent or abusive intent has been established.

46 Consequently, in a situation such as that at issue in the main proceedings, in which the company has been the subject of a court decision ordering the cessation of the activity for which it had been created, but in which it is not disputed that that company continued, whilst being placed under liquidation, to generate a turnover by carrying out economic transactions, that company must be considered to have the status of a taxable person and, consequently, it cannot be required, in order to be able to deduct the VAT calculated on its available assets, to pay the amount of VAT thus calculated.

47 Such an obligation constitutes a restriction on the right to deduct contrary to Article 168 of the VAT Directive.

48 In the light of the foregoing considerations, the answer to the questions referred is that:

– The VAT Directive must be interpreted as not precluding national legislation pursuant to which the compulsory removal from the VAT register of a company whose dissolution has been ordered by court decision results in the obligation to calculate the input VAT due or paid on the

available assets on the date of the dissolution of that company and to pay it to the State, on condition that that company no longer carries out economic transactions as from its dissolution.

– The VAT Directive, in particular Article 168 thereof, must be interpreted as precluding national legislation, such as that at issue in the main proceedings, pursuant to which the compulsory removal from the VAT register of a company whose dissolution has been ordered by court decision results, even where that company continues to carry out economic transactions whilst being placed under liquidation, the obligation to calculate the input VAT due or paid on the available assets on the date of that dissolution and to pay it to the State and which, therefore, makes the right to deduct subject to compliance with that obligation.

Costs

49 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. **Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as not precluding national legislation pursuant to which the compulsory removal from the value added tax (VAT) register of a company whose dissolution has been ordered by court decision results in the obligation to calculate the input VAT due or paid on the available assets on the date of the dissolution of that company and to pay it to the State, on condition that that company no longer carries out economic transactions as from its dissolution.**

2. **Directive 2006/112, in particular Article 168 thereof, must be interpreted as precluding national legislation, such as that at issue in the main proceedings, pursuant to which the compulsory removal from the VAT register of a company whose dissolution has been ordered by court decision results, even where that company continues to carry out economic transactions whilst being placed under liquidation, in the obligation to calculate the input VAT due or paid on the available assets on the date of that dissolution and to pay it to the State and which, therefore, makes the right to deduct subject to compliance with that obligation.**

[Signatures]

* Language of the case: Bulgarian.