62018CJ0185
JUDGMENT OF THE COURT (Sixth Chamber)

12 June 2019 (*1)

(Reference for a preliminary ruling — Value added tax (VAT) — Directive 2006/112/EC — Article 401 — Principle of fiscal neutrality — Acquisition by an undertaking, from private individuals, of objects with a high gold or other precious metal content with a view to resale — Duty on transfers of assets)

In Case C?185/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunal Supremo (Supreme Court, Spain), made by decision of 7 February 2018, received at the Court on 9 March 2018, in the proceedings

Oro Efectivo SL

v

Diputación Foral de Bizkaia,

THE COURT (Sixth Chamber),

composed of C. Toader, President of the Chamber, L. Bay Larsen (Rapporteur) and M. Safjan, Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

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Oro Efectivo SL, by K. Caminos García and A. Landeta Calvo, abogados, and by A. Rodríguez Muñoz,

–

the Diputación Foral de Bizkaia, by M.F. Ortiz de Apodaca García, procurador, and by M. Barrena Ezcurra, abogada,

–

the Spanish Government, by S. Jiménez García, acting as Agent,

–

the European Commission, by L. Lozano Palacios and J. Jokubauskait?, acting as Agents,

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

gives the following

Judgment

1

This request for a preliminary ruling concerns the interpretation of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1; ‘the VAT Directive’) and the principle of fiscal neutrality.

2

The request has been made in proceedings between Oro Efectivo SL and the Diputación Foral de Bizkaia (Provincial Council of Biscay, Spain) regarding a refusal to allow the deduction of duty on transfers of assets and documented legal transactions.

Legal context

EU law

The Sixth Directive

3

Article 33(1) 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), as amended by Council Directive 91/680/EEC of 16 December 1991 (OJ 1991 L 376, p. 1) (‘the Sixth Directive’), provides:

‘Without prejudice to other Community provisions, in particular those laid down in the Community provisions in force relating to the general arrangements for the holding, movement and monitoring of products subject to excise duty, this Directive shall not prevent a Member State from maintaining or introducing taxes on insurance contracts, taxes on betting and gambling, excise duties, stamp duties and, more generally, any taxes, duties or charges which cannot be characterised as turnover taxes, provided however that those taxes, duties or charges do not, in trade between Member States, give rise to formalities connected with the crossing of frontiers.’

The VAT Directive

4

The Sixth Directive was repealed and replaced, from 1 January 2007, by the VAT Directive. Recitals 4 and 7 of the VAT Directive state:

‘(4)

The attainment of the objective of establishing an internal market presupposes the application in Member States of legislation on turnover taxes that does not distort conditions of competition or hinder the free movement of goods and services. It is therefore necessary to achieve such harmonisation of legislation on turnover taxes by means of a system of value added tax (VAT),

such as will eliminate, as far as possible, factors which may distort conditions of competition, whether at national or Community level.

…

(7)

The common system of VAT should, even if rates and exemptions are not fully harmonised, result in neutrality in competition, such that within the territory of each Member State similar goods and services bear the same tax burden, whatever the length of the production and distribution chain.’

5

Article 401 of that directive is worded as follows:

‘Without prejudice to other provisions of Community law, this Directive shall not prevent a Member State from maintaining or introducing taxes on insurance contracts, taxes on betting and gambling, excise duties, stamp duties or, more generally, any taxes, duties or charges which cannot be characterised as turnover taxes, provided that the collecting of those taxes, duties or charges does not give rise, in trade between Member States, to formalities connected with the crossing of frontiers.’

Spanish law

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It is apparent from the order for reference that the relevant national provisions are those in Articles 7 and 8 of the Norma foral 3/1989 del Territorio Histórico de Bizkaia, del Impuesto sobre Transmisiones Patrimoniales y Actos Jurídicos Documentados (Provincial Law 3/1989 of the Province of Biscay on duty on transfers of assets and documented legal transactions) of 21 March 1989 (for the 2010 financial year), and Articles 9 and 10 of the Norma foral 1/2011 del Territorio Histórico de Bizkaia, del Impuesto sobre Transmisiones Patrimoniales y Actos Jurídicos Documentados (Provincial Law 1/2011 of the Province of Biscay on duty on transfers of assets and documented legal transactions) of 24 March 2011 (for the 2011 and 2012 financial years). Those provisions are identical to those in Articles 7 and 8 of the Real Decreto Legislativo 1/1993 por el que se aprueba el Texto Refundido de la Ley del Impuesto sobre Transmisiones Patrimoniales y Actos Jurídicos Documentados (Royal Legislative Decree 1/1993 approving the consolidated version of the Law on duty on transfers of assets and documented legal transactions) of 24 September 1993 (BOE No 251 of 20 October 1993). In the order for reference, the relevant extracts of those provisions are summarised as follows:

‘…

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asset transfer duty shall apply to transfers inter vivos for valuable consideration of all manner of assets and rights owned by natural or legal persons;

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the above transactions shall not be classified as transfers of assets for valuable consideration “where they are performed by business persons or professionals in the course of their business or professional activities and, in any case, where they constitute supplies of goods or services that are subject to [VAT]”;

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in transfers of assets and rights of any kind, “the acquirer” shall be liable for payment of the duty, as the taxable person, regardless of any provision by the parties to the contrary.’

7

Under Article 4 of the Ley 37/1992 del Impuesto sobre el Valor Añadido (Law 37/1992 on value added tax) of 28 November 1992 (BOE No 312 of 29 December 1992), transactions subject to VAT are not subject to duty on transfers of assets and documented legal transactions as transfers of assets for valuable consideration.

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

8

As part of its business, Oro Efectivo, whose objects are the purchase, sale, import and export of raw materials, precious stones and precious metals, purchases from private individuals objects with a high gold or other precious metal content and resells them, with a view to their being processed and, thereafter, placed back on the market, to undertakings specialising in the manufacture of ingots or a variety of items made from precious metals.

9

The Hacienda Foral de Bizkaia (Regional Treasury of Biscay, Spain) considered that the purchases of objects made from gold and other metals made by the applicant in the main proceedings from private individuals in the years 2010 to 2012 were subject to duty on transfers of assets and documented legal transactions.

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Oro Efectivo challenged the decision of that tax authority before the Tribunal Económico-Administrativo Foral de Bizkaia (Provincial Tax Tribunal of Biscay, Spain), maintaining that a number of national courts had delivered decisions from which it was apparent that those purchase transactions should not be subject to duty on transfers of assets and documented legal transactions. In addition, it argued that the acquisitions at issue in the main proceedings had been carried out as part of its business activities. It also maintained that the levying of that duty would lead to double taxation, in breach of the principle of fiscal neutrality, as those acquisitions had already been subject to VAT.

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By judgment of 18 June 2015, the Tribunal Económico-Administrativo Foral de Bizkaia (Provincial Tax Tribunal of Biscay) dismissed that action.

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Oro Efectivo appealed against that court’s decision before the Tribunal Superior de Justicia del

País Vasco (High Court of Justice of the Basque Country, Spain). That appeal was dismissed by judgment of 13 September 2016.

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Oro Efectivo then brought an appeal on a point of law against that judgment before the Tribunal Supremo (Supreme Court, Spain).

14

That court states that the solution to the dispute pending before it depends, in particular, on the scope of the principle of fiscal neutrality, as interpreted by the Court.

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It questions, more precisely, whether a rule which requires an undertaking to pay an indirect tax other than VAT, in the form of duty on transfers of assets and documented legal transactions, in respect of the acquisition by that undertaking, from natural persons, of movable assets, such as gold, silver or jewellery, where those assets are intended for use in the economic activities of that undertaking, which, moreover, carries out transactions subject to VAT when those assets are placed back on the market, without the possibility of deducting, in those transactions, the amount paid by way of that duty on the initial acquisition of those assets, is compatible with the VAT Directive and the principle of fiscal neutrality.

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In those circumstances, the Tribunal Supremo (Supreme Court) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

‘Do [the VAT] Directive, the principle of fiscal neutrality arising from that directive, and the case-law of the [Court] interpreting the directive, preclude a national rule of law under which a Member State may require payment of an indirect tax other than VAT from a business person or professional in respect of the purchase of movable property (specifically, gold, silver or jewellery) from a private individual where:

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the purchased object is going to be processed and subsequently sold on in the course of that business person’s economic activities;

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transactions subject to VAT will occur when the purchased property is placed back on the market; and

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in such transactions, the applicable legislation in that same Member State does not permit the business person or professional to deduct the amount paid by way of that tax in respect of the initial purchase?’

Procedure before the Court

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In its request for a preliminary ruling, the referring court requested that the case be determined pursuant to the expedited procedure provided for in Article 105(1) of the Rules of Procedure of the Court.

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That request was rejected by order of the President of the Court of 30 April 2018, Oro Efectivo (C?185/18, not published, EU:C:2018:298).

Consideration of the question referred

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By its question, the referring court asks, in essence, whether the VAT Directive and the principle of fiscal neutrality preclude a national rule of law, such as that at issue in the main proceedings, which subjects to an indirect tax on asset transfers, other than VAT, the acquisition by an undertaking, from private individuals, of objects with a high gold or other precious metal content, where those assets are intended for use in the economic activities of that undertaking, which, with a view to their being processed and placed back on the market thereafter, resells them to undertakings specialising in the manufacture of ingots or a variety of items made from precious metals.

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It should be noted, in that regard, that, under Article 401 of the VAT Directive, that directive is not to prevent a Member State from maintaining or introducing taxes on insurance contracts, taxes on betting and gambling, excise duties, stamp duties or, more generally, any taxes, duties or charges which cannot be characterised as turnover taxes, provided that the collecting of those taxes, duties or charges does not give rise, in trade between Member States, to formalities connected with the crossing of frontiers. Since EU law permits concurrent systems of taxation, it thus allows such taxes to be levied even where the charging of such taxes on a transaction which is already subject to value added tax may result in the double taxation of that transaction (see, to that effect, judgments of 20 March 2014, Caixa d’Estalvis i Pensions de Barcelona, C?139/12, EU:C:2014:174, paragraph 28, and of 7 August 2018, Viking Motors and Others, C?475/17, EU:C:2018:636, paragraph 26).

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A literal interpretation of that provision leads to the conclusion that, in view of the negative condition in the expression ‘cannot be characterised as turnover taxes’, the maintenance or introduction by a Member State of taxes, duties or charges is authorised only on condition that they cannot be assimilated to a turnover tax (judgment of 7 August 2018, Viking Motors and Others, C?475/17, EU:C:2018:636, paragraph 27).

22

Although the term ‘turnover tax’ is not defined in either Article 401 of the VAT Directive or any other provision of that directive, it must be pointed out that that article is, in essence, identical to Article 33 of the Sixth Directive (judgment of 7 August 2018, Viking Motors and Others, C?475/17, EU:C:2018:636, paragraph 28).

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In the cases which gave rise to the order of 27 November 2008, Renta (C?151/08, not published, EU:C:2008:662), and the judgment of 20 March 2014, Caixa d'Estalvis i Pensions de Barcelona (C?139/12, EU:C:2014:174), the Court ruled on the compatibility with Article 33(1) of the Sixth Directive of a national rule of law relating to a tax on transfers of assets for valuable consideration with similar characteristics to those of the duty at issue in the main proceedings. The Court, having recalled the essential characteristics of VAT established in its case-law, of which there are four, namely that VAT applies generally to transactions relating to goods or services, it is proportional to the price charged by the taxable person in return for the goods and services which he has supplied, it is charged at each stage of the production and distribution process, including that of retail sale, irrespective of the number of transactions which have previously taken place, and the amounts paid during the preceding stages of the production and distribution process are deducted from the VAT payable by a taxable person, with the result that that tax applies, at any given stage, only to the value added at that stage and the final burden of that tax rests ultimately with the consumer, considered that such a tax differs from VAT in such a way that it cannot be characterised as a turnover tax within the meaning of Article 33(1) of the Sixth Directive (order of 27 November 2008, Renta, C?151/08, not published, EU:C:2008:662, paragraphs 32 and 45, and judgment of 20 March 2014, Caixa d'Estalvis i Pensions de Barcelona, C?139/12, EU:C:2014:174, paragraph 29).

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In that regard, the Court found, in particular, that such a tax does not apply generally to all transactions relating to goods or services and that it is not charged as part of a production and distribution process in terms of which, at each stage of that process, the amounts paid during the preceding stages of that process may be deducted from the tax (see, to that effect, order of 27 November 2008, Renta, C?151/08, not published, EU:C:2008:662, paragraphs 41 and 43).

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In that regard, there is nothing in the case file available to the Court to support a finding that that question should be analysed differently in the present reference for a preliminary ruling. Thus, the considerations set out by the Court in the decisions referred to in paragraphs 23 and 24 above with regard to Article 33(1) of the Sixth Directive must be regarded as capable of being applied to Article 401 of the VAT Directive in the present case.

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It follows that a duty such as that at issue in the main proceedings cannot be characterised as a turnover tax within the meaning of Article 401 of the VAT Directive.

27

The referring court takes the view, moreover, that the application of both the duty at issue in the main proceedings and the common system of VAT may infringe the principle of fiscal neutrality as regards VAT.

28

With regard to that principle, set out in recitals 4 and 7 of the VAT Directive, it should be pointed out that, in order to prevent outcomes which are inconsistent with the objective of ensuring that the same transactions are subject to the same conditions of taxation, irrespective of the Member State in which the transaction is carried out, pursued by the common system of VAT, any comparison of

the characteristics of a tax, such as the duty at issue in the main proceedings, with those of VAT must be made in the light of that objective. In that connection, particular attention must be paid to the need to safeguard the neutrality of the common system of VAT at all times (see, to that effect, judgment of 7 August 2018, Viking Motors and Others, C?475/17, EU:C:2018:636, paragraph 41).

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However, as the European Commission rightly pointed out, the principle of fiscal neutrality in the field of VAT does not require such neutrality outside the framework of the harmonised system established by the VAT Directive. As the duty, in this case, is not harmonised under that directive, the neutrality of the common system of VAT cannot be undermined (see, to that effect, judgment of 24 October 2013, Metropol Spielstätten, C?440/12, EU:C:2013:687, paragraph 57).

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In view of all the foregoing considerations, the answer to the question referred is that the VAT Directive and the principle of fiscal neutrality must be interpreted as not precluding a national rule of law, such as that at issue in the main proceedings, which subjects to an indirect tax on asset transfers, other than VAT, the acquisition by an undertaking, from private individuals, of objects with a high gold or other precious metal content, where those assets are intended for use in the economic activities of that undertaking, which, with a view to their being processed and placed back on the market, resells them to undertakings specialising in the manufacture of ingots or a variety of items made from precious metals.

Costs

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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:

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax and the principle of fiscal neutrality must be interpreted as not precluding a national rule of law, such as that at issue in the main proceedings, which subjects to an indirect tax on asset transfers, other than value added tax, the acquisition by an undertaking, from private individuals, of objects with a high gold or other precious metal content, where those assets are intended for use in the economic activities of that undertaking, which, with a view to their being processed and placed back on the market, resells them to undertakings specialising in the manufacture of ingots or a variety of items made from precious metals.

[Signatures]

(*1) Language of the case: Spanish.