62020CJ0182
JUDGMENT OF THE COURT (Eighth Chamber)

3 June 2021 (*1)

(Reference for a preliminary ruling – Value added tax (VAT) – Directive 2006/112/EC – Right to deduct – Adjustment of deductions – Insolvency proceedings – National legislation providing for automatic refusal to allow deduction of VAT in respect of taxable transactions that occurred prior to the initiation of those proceedings)

In Case C?182/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Curtea de Apel Suceava (Court of Appeal, Suceava, Romania), made by decision of 30 March 2020, received at the Court on 23 April 2020, in the proceedings

BE,

DT

v

Administra?ia Jude?ean? a Finan?elor Publice Suceava,

Direc?ia General? Regional? a Finan?elor Publice Ia?i,

Accer Ipurl Suceava, acting as court-appointed liquidator of BE,

EP,

THE COURT (Eighth Chamber),

composed of N. Wahl, President of the Chamber, A. Prechal (Rapporteur), President of the Third Chamber, and F. Biltgen, Judge,

Advocate General: E. Tanchev,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

–

the Romanian Government, by E. Gane, R.I. Ha?ieganu and A. Wellman, acting as Agents,

–

the European Commission, by A. Armenia and P. Carlin, 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 in particular Articles 184 to 186 of that directive.

2

The request has been made in proceedings between BE, a company which has been declared insolvent, and DT, a partner and administrator of that company, on the one hand, and the Administra?ia Jude?ean? a Finan?elor Publice Suceava (District Directorate of Public Finances, Suceava, Romania), and the Direc?ia General? Regional? a Finan?elor Publice Ia?i (Regional Directorate-General of Public Finances, Ia?i, Romania) (together, ‘the tax authorities’), as well as Accer Ipurl Suceava, acting as court-appointed liquidator of BE, and EP, on the other, concerning the tax authorities’ decision, adopted after BE was declared insolvent, to adjust certain value added tax (VAT) deductions made by BE before it was declared insolvent.

Legal context

European Union law

3

Article 2(1)(a) of the VAT Directive includes, among the transactions subject to VAT, the supply of goods for consideration within the territory of a Member State by a taxable person acting as such.

4

Article 9(1) of that 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.’

5

Article 167 of that directive provides that a right of deduction arises at the time the deductible tax becomes chargeable.

6

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;

(b)

the VAT due in respect of transactions treated as supplies of goods or services pursuant to Article 18(a) and Article 27;

(c)

the VAT due in respect of intra-Community acquisitions of goods pursuant to Article 2(1)(b)(i);

(d)

the VAT due on transactions treated as intra-Community acquisitions in accordance with Articles 21 and 22;

(e)

the VAT due or paid in respect of the importation of goods into that Member State.'

7

Article 184 of the VAT Directive provides:

'The initial deduction shall be adjusted where it is higher or lower than that to which the taxable person was entitled.'

8

Under Article 185 of that directive:

'1. Adjustment shall, in particular, be made where, after the VAT return is made, some change occurs in the factors used to determine the amount to be deducted, for example where purchases are cancelled or price reductions are obtained.

2. By way of derogation from paragraph 1, no adjustment shall be made in the case of transactions remaining totally or partially unpaid or in the case of destruction, loss or theft of property duly proved or confirmed, or in the case of goods reserved for the purpose of making gifts of small value or of giving samples, as referred to in Article 16.

However, in the case of transactions remaining totally or partially unpaid or in the case of theft, Member States may require adjustment to be made.'

9

Article 186 of the VAT Directive provides:

'Member States shall lay down the detailed rules for applying Articles 184 and 185.'

Romanian law

10

Article 11 of Legea nr. 571/2003 privind Codul fiscal (Law No 571/2003 establishing the Tax Code) ('the Tax Code') provides:

'1. In determining the amount of a tax or a duty within the meaning of this Code, the tax authorities may disregard a transaction which has no economic purpose or may reclassify a transaction in such a way as to reflect its economic content.

…'

11

Article 148 of the Tax Code, entitled 'Adjustment of deductible tax in the case of acquisition of services or goods other than capital goods', states:

'1. In so far as the rules relating to self-supply of goods or services do not apply, the initial deduction shall be adjusted in the following cases:

(a)

the deduction was higher or lower than that to which the taxable person was entitled;

(b)

changes in the factors used to determine the deductible amount occur after the VAT return has been submitted, …

(c)

the taxable person loses his right to deduct the tax on undelivered movable property and unused services in case of events such as changes to legislation or the objects of the company, the assignment of goods or services to transactions in respect of which VAT is deductible and subsequently to carry out transactions in respect of which VAT is not deductible, or goods declared missing.

…'

12

Under Article 149 of the Tax Code, entitled 'Adjustment of the deductible tax in respect of capital goods':

'…

2. Where the rules on self-supply of goods or services do not apply, the deductible tax relating to capital goods shall be adjusted in the cases referred to in paragraph 4(a) to (d) …

…

4. The adjustment of the deductible tax provided for in paragraph (1)(d) shall be carried out:

(a)

in cases where the capital goods are used by the taxable person:

(1)

in whole or in part, for purposes other than economic activities, with the exception of goods the acquisition of which is subject to a restriction of the right of deduction to 50% …

(2)

in order to carry out transactions that do not give rise to a deduction of VAT;

(3)

in order to carry out transactions that give rise to a deduction of VAT to the extent that it differs from the initial deduction;

(b)

where changes are made to the factors used to calculate the tax deducted;

(c)

where capital goods in respect of which the right to deduct has been wholly or partially limited are the subject of any transaction in respect of which the tax is deductible. In the case of a supply of goods, the additional amount of tax to be deducted shall be limited to the amount of tax collected for the supply of the goods in question;

(d)

where the capital goods cease to exist …

…’

13

Article 3 of Legea nr. 85/2006 privind procedura insolven?ei (Law No 85/2006 on insolvency procedure) (‘the Law on insolvency’) provides:

‘…

23. “insolvency proceedings” shall mean collective and equal insolvency proceedings which apply to a debtor with a view to the liquidation of his assets to cover his liabilities, followed by the removal of the debtor from the register in which he is registered;

…’

14

Under Article 47 of the Law on insolvency:

‘…

7. From the moment insolvency is declared, the debtor may carry out only the activities

necessary for the conduct of the liquidation operations.’

15

Article 116 of the Law on insolvency states:

‘1. The liquidation of the assets forming part of the debtor’s assets shall be carried out by the liquidator under the supervision of the insolvency judge. In order to maximise the value of the debtor’s assets, the liquidator shall take all steps to place them on the market in appropriate form, the advertising costs being borne by the debtor’s assets.

2. The liquidation shall begin immediately after the inventory has been completed by the liquidator and the valuation report has been submitted. Assets may be sold as a whole, as a functioning whole, or individually. The method of sale of assets, namely a sale by public auction, direct negotiation or a combination of the two, shall be approved by the meeting of creditors, on a proposal from the liquidator. The liquidator shall also submit to the general meeting of creditors the sales rules corresponding to the selling arrangements which he has chosen.

…’

16

Article 123 of the Law on insolvency provides:

‘In the event of insolvency, claims shall be paid in the following order:

(1)

taxes, stamps and other expenditure relating to the procedure established by this Law, …

…’

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

17

BE, of which DT is a partner and administrator, is a company which has carried out an economic activity for the purposes of the VAT Directive. By judgment of 10 February 2015, the Tribunalul Suceava (Regional Court, Suceava, Romania) ordered that insolvency proceedings be initiated in respect of BE.

18

After it was declared insolvent, BE was the subject of a tax audit which culminated in the adoption of a tax assessment notice of 26 November 2015. That notice imposes on BE, inter alia, the obligation to pay the sum of 646259 Romanian lei (RON) (approximately EUR 132000) in respect of the adjustment of the VAT deductions which it had made for the period from 20 May 2013 to 13 February 2014, during which it carried out an economic activity and was registered as a taxable person for VAT purposes. That amount consists of RON 535409 (approximately EUR 109000) in respect of deductions relating to goods and consumables, RON 55134 (approximately EUR 11400) in respect of deductions relating to capital equipment and RON 55716 (approximately EUR 11600) in respect of deductions relating to a contract for the letting of immovable property.

19

By decision of 22 January 2018, the appeal lodged by BE and DT against that tax assessment notice was rejected, the tax authorities taking the view that BE had ceased to carry out an economic activity when it was declared insolvent. Those authorities noted, in that regard, that such a declaration of insolvency entails a procedure for the liquidation and sale of assets with a view to the repayment of debts, and that the transactions carried out in the context of that procedure do not, in themselves, have any economic purpose. Further, according to those authorities, the fact that the sale of assets in the context of the insolvency proceedings was subject to VAT is irrelevant.

20

The Tribunalul Suceava (Regional Court, Suceava) upheld the action brought by the applicants in the main proceedings against the tax assessment notice of 26 November 2015 and against the decision on the appeal of 22 January 2018. By its judgment of 18 June 2019, the referring court upheld the appeal brought by the tax authorities against the judgment of that court, such that BE remains liable for the sum of RON 646259 (approximately EUR 132000) set in that tax assessment notice. The referring court confirmed, in that context, the interpretation of national law adopted by the tax authorities, according to which the initiation of insolvency proceedings must be regarded in itself as a ground for the cessation of the right to deduct, in that the transactions carried out during those proceedings have no economic purpose.

21

The applicants in the main proceedings brought an application for revision of that judgment before the referring court, alleging infringement of the VAT Directive.

22

In that regard, the applicants in the main proceedings submit, in particular, that, both before BE was declared insolvent and during the insolvency proceedings, that undertaking was validly registered as a taxable person for VAT purposes, so that the activities connected with the insolvency proceedings, namely the sale of goods and immovable property and the letting of immovable property, remained within the scope of VAT, which continued to be levied.

23

Thus, according to the referring court, the question arises as to whether EU law permits transactions carried out during insolvency proceedings automatically to be regarded as having no economic purpose, which would mean that the initiation of those proceedings requires the economic operator automatically to adjust in favour of the State the VAT levied on economic transactions that occurred prior to the initiation of those proceedings, despite the fact that that operator remained a taxable person for VAT purposes during the insolvency proceedings initiated in respect of it, except for a brief period of three weeks, and that the sale of assets in the context of the insolvency was subject to VAT.

24

Furthermore, if the Court were to consider that such automatic adjustment is legitimate and compatible with EU law, the referring court also considers it necessary to clarify whether such a method of proceeding is proportionate to the aim pursued.

25

That court also states that, in the present case, the liquidation of the assets has been completed

and that no deduction was ultimately granted in respect of the transactions carried out during that procedure.

26

In those circumstances, the Curtea de Apel Suceava (Court of Appeal, Suceava, Romania) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Do [the VAT Directive] and the principles of fiscal neutrality, the right to deduct VAT and fiscal certainty preclude, in circumstances such as those in the main proceedings, national legislation which requires, once insolvency proceedings in respect of an economic operator have been initiated, automatically and without further checks, adjustment of VAT, by refusing to allow the economic operator to deduct VAT on taxable transactions that occurred prior to the declaration of insolvency and ordering the operator to pay the deductible VAT? Does the principle of proportionality preclude, in circumstances such as those in the main proceedings, such provisions of national law, given the economic consequences for the economic operator and the definitive nature of such an adjustment?’

Consideration of the question referred

27

By its question, the referring court asks, in essence, whether Articles 184 to 186 of the VAT Directive must be interpreted as precluding national legislation or practice whereby the initiation of insolvency proceedings in respect of an economic operator, entailing the liquidation of its assets for the benefit of its creditors, automatically places an obligation on that operator to adjust the VAT deductions which it has made in respect of goods and services acquired before it was declared insolvent.

28

It must be borne in mind that the right to deduct set out in Article 168 of the VAT Directive is an integral part of the VAT scheme and in principle may not be limited (see, to that effect, judgment of 18 March 2021, A. (Exercise of the right of deduction), C?895/19, EU:C:2021:216, paragraph 32).

29

The adjustment mechanism for deductions provided for in Articles 184 to 186 of the VAT Directive is, for its part, an integral part of the VAT deduction scheme established by that directive. It is intended to enhance the precision of deductions so as to ensure the neutrality of VAT, so that transactions effected at an earlier stage continue to give rise to the right to deduct only to the extent that they are used to make supplies subject to VAT. That mechanism thus aims to establish a close and direct relationship between the right to deduct input VAT and the use of the goods or services concerned for taxed output transactions (see, to that effect, judgment of 27 March 2019, Mydibel, C?201/18, EU:C:2019:254, paragraph 27).

30

Under the common system of VAT, only the input taxes on goods or services used by a taxable person for his taxed transactions may be deducted. The deduction of input taxes is linked to the collection of output taxes. Where goods or services acquired by a taxable person are used for the purposes of transactions that are exempt or do not fall within the scope of VAT, no output tax can be collected or input tax deducted (judgment of 9 July 2020, Finanzamt Bad Neuenahr-Ahrweiler,

C?374/19, EU:C:2020:546, paragraph 21).

31

In the present case, it is apparent from the order for reference that the tax authorities adjusted the VAT deductions made by BE concerning goods and services acquired during the period from 20 May 2013 to 13 February 2014 on the basis of the premiss that the declaration of insolvency of an undertaking such as BE necessarily puts an end to its economic activities. They argued, in that regard, that the transactions carried out following such a declaration of insolvency serve only to liquidate the undertaking’s assets for the benefit of its creditors, so that they have no economic purpose.

32

In that regard, the Court has held that, although the VAT Directive gives a very wide scope to VAT, only activities of an economic nature are covered by that tax. According to Article 2(1)(a) of that directive, relating to taxable transactions, the supply of goods for consideration within the territory of a Member State by a taxable person acting as such, inter alia, is subject to VAT (judgment of 17 December 2020, WEG Tevesstraße, C?449/19, EU:C:2020:1038, paragraphs 24 and 25 and the case-law cited).

33

It follows that, if it should prove to be the case that, as from the initiation of insolvency proceedings, no economic activity can be carried out, there can be, from that initiation, no taxed transactions that would allow the right to deduct to be exercised (see, to that effect, judgment of 9 November 2017, Wind Inovation 1, C?552/16, EU:C:2017:849, paragraph 35), which would make it necessary to adjust deductions in accordance with the national law transposing Articles 184 to 186 of the VAT Directive.

34

However, the referring court expresses doubts as to the premiss referred to in paragraph 31 above, according to which the declaration of insolvency of an economic operator necessarily puts an end to its economic activities.

35

It is therefore necessary to examine whether economic activity may be deemed to have ceased as a result of the declaration of insolvency of the economic operator concerned, in so far as the consequence of that declaration of insolvency, in accordance with the rules laid down by national law, is that the transactions carried out after it may serve only to liquidate the assets of that operator for the benefit of its creditors.

36

The first subparagraph of Article 9(1) of the VAT Directive states that ‘taxable person’ means any person who, independently, carries out any economic activity, whatever the purpose or results of that activity. In addition, the concept of ‘economic activity’ is defined in the second subparagraph of Article 9(1) of that directive as covering all activities of producers, traders and persons supplying services, including the exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis.

37

According to settled case-law, an analysis of those definitions shows that the scope of the term ‘economic activity’ is very wide and that the term is objective in character, in the sense that the activity is considered per se and without regard to its purpose or results. Accordingly, an activity is, as a general rule, categorised as ‘economic’ where it is permanent and is carried out in return for remuneration which is received by the person carrying out the activity (judgment of 5 July 2018, Marle Participations, C?320/17, EU:C:2018:537, paragraph 22 and the case-law cited).

38

Consequently, since the activity must be considered per se and without regard to its purpose or results, the mere fact that the initiation of insolvency proceedings in respect of a taxable person changes, in accordance with the rules laid down in national law, the purposes of that taxable person’s transactions, in the sense that those purposes no longer include the long-term operation of its business, but relate solely to its liquidation for the purposes of extinguishing debts followed by its dissolution, cannot, in itself, affect the economic nature of the transactions carried out in the course of that business.

39

Furthermore, as the European Commission has pointed out, that interpretation is also required in the light of the principle of fiscal neutrality, which precludes in particular two transactions which are identical or similar from the point of view of the consumer, which are therefore in competition with one another, from being treated differently with regard to VAT (see, to that effect, judgment of 4 March 2021, Frenetikexito, C?581/19, EU:C:2021:167, paragraph 32).

40

Even if the initiation of insolvency proceedings, such as those at issue in the main proceedings, normally entails the disappearance of the undertaking concerned, the fact remains that, as long as that undertaking continues its activities during the insolvency proceedings, it is in competition with other taxable persons carrying out services similar to its own, so that the services concerned must, in principle, be treated in the same way for VAT purposes.

41

It is also apparent, subject to verification by the referring court, that, in the present case, BE continued, during the insolvency proceedings, to be registered as a taxable person and that the tax authorities made subject to VAT the transactions carried out in the course of those proceedings, which tends to confirm that BE did in fact continue its economic activity and carried out taxed transactions despite being declared insolvent.

42

In such circumstances, it cannot be assumed that the initiation of insolvency proceedings has broken the close and direct relationship between the right to deduct input VAT and the use of the goods or services concerned for taxable output transactions and that the taxable person concerned is required to pay the amount of VAT deducted (see, by analogy, judgment of 9 November 2017, Wind Inovation 1, C?552/16, EU:C:2017:849, paragraph 46).

43

Lastly, contrary to what the Romanian Government has, in essence, put forward, the possibility for the taxable person concerned, in a situation in which it was required, initially, to adjust the input VAT deductions made on account of it being declared insolvent, despite the continuation of its economic activity, of requesting, subsequently, that the sums concerned be repaid to it precisely because it continued, during the insolvency proceedings, its economic activity, is not such as to compensate for the limitation of its right to deduct resulting from that obligation to adjust imposed by national law.

44

As the Commission has also pointed out, requiring the undertaking concerned, following an adjustment decision, to actually pay the VAT allegedly due constitutes, for that undertaking, an obstacle to the deduction of input VAT, since it requires that undertaking to commit funds until the tax authorities refund it overpaid VAT, whereas other operators who have not been declared insolvent may use those funds for their economic activities without being required to make such a payment (see, by analogy, judgment of 9 November 2017, Wind Inovation 1, C?552/16, EU:C:2017:849, paragraph 44).

45

In the light of the foregoing, the answer to the question referred is that Articles 184 to 186 of the VAT Directive must be interpreted as precluding national legislation or practice whereby the initiation of insolvency proceedings in respect of an economic operator, entailing the liquidation of its assets for the benefit of its creditors, automatically places an obligation on that operator to adjust the VAT deductions which it has made in respect of goods and services acquired before it was declared insolvent, where the initiation of those proceedings is not such as to prevent that operator’s economic activity, within the meaning of Article 9 of that directive, from being continued, in particular for the purposes of the liquidation of the undertaking concerned.

Costs

46

Since these proceedings are, for the parties to the main proceedings, a step in the actions pending before the referring 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 (Eighth Chamber) hereby rules:

Articles 184 to 186 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as precluding national legislation or practice whereby the initiation of insolvency proceedings in respect of an economic operator, entailing the liquidation of its assets for the benefit of its creditors, automatically places an obligation on that operator to adjust the value added tax deductions which it has made in respect of goods and services acquired before it was declared insolvent, where the initiation of those proceedings is not such as to prevent that operator’s economic activity, within the meaning of Article 9 of that directive, from being continued, in particular for the purposes of the liquidation of the undertaking concerned.

[Signatures]

(*1) Language of the case: Romanian.