Provisional text

JUDGMENT OF THE COURT (First Chamber)

28 October 2021 (*)

(Reference for a preliminary ruling – Directive 2006/112/EC – Value added tax (VAT) – Supply of services – Articles 63 – Chargeability of VAT – Articles 64(1) – Concept of ‘supplies which give rise to successive payments’ – One-time supply remunerated by means of payment in instalments – Articles 90(1) – Reduction of the taxable amount – Concept of ‘non-payment of the price’)

In Case C?324/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesfinanzhof (Federal Finance Court, Germany), made by decision of 7 May 2020, received at the Court on 22 July 2020, in the proceedings

Finanzamt B

v

X-Beteiligungsgesellschaft mbH,

THE COURT (First Chamber),

composed of L. Bay Larsen, Vice-President, acting as President of the First Chamber, J.-C. Bonichot (Rapporteur) and M Safjan, Judge,

Advocate General: M. Szpunar,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– X-Beteiligungsgesellschaft mbH, by O. Pantle, Rechtsanwalt,

– the German Government, by J. Möller and S. Heimerl, acting as Agents,

– the European Commission, by J. Jokubauskait? and L. Mantl, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 1 July 2021,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 64(1) and Article 90(1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1).

2 The request has been made in proceedings between Finanzamt B (Tax Office B, Germany) and X-Beteiligungsgesellschaft mbH concerning the chargeability of value added tax (VAT) on a supply of services paid for in several instalments.

Legal context

EU law

3 Recital 24 of Directive 2006/112 reads as follows:

‘The concepts of chargeable event and of the chargeability of VAT should be harmonised if the introduction of the common system of VAT and of any subsequent amendments thereto are to take effect at the same time in all Member States.’

4 Under Article 14(2) of that directive:

‘In addition to the transaction referred to in paragraph 1, each of the following shall be regarded as a supply of goods:

…

(b) the actual handing over of goods pursuant to a contract for the hire of goods for a certain period, or for the sale of goods on deferred terms, which provides that in the normal course of events ownership is to pass at the latest upon payment of the final instalment;

…’

5 Within Title VI of Directive 2006/112 concerning the chargeable event and chargeability of VAT, Chapter 2, under the heading ‘Supply of goods or services’, is comprised of Articles 63 to 67 of the directive.

6 Under Article 63 of the directive:

‘The chargeable event shall occur and VAT shall become chargeable when the goods or the services are supplied.’

7 Article 64 of Directive 2006/112 provides:

‘1. Where it gives rise to successive statements of account or successive payments, the supply of goods, other than that consisting in the hire of goods for a certain period or the sale of goods on deferred terms, as referred to in point (b) of Article 14(2), or the supply of services shall be regarded as being completed on expiry of the periods to which such statements of account or payments relate.

2. Member States may provide that, in certain cases, the continuous supply of goods or services over a period of time is to be regarded as being completed at least at intervals of one year.’

8 Under Article 66 of that directive:

‘By way of derogation from Articles 63, 64 and 65, Member States may provide that VAT is to become chargeable, in respect of certain transactions or certain categories of taxable person at one of the following times:

(a) no later than the time the invoice is issued;

(b) no later than the time the payment is received;

(c) where an invoice is not issued, or is issued late, within a specified period from the date of the chargeable event.'

9 Within Title VII of Directive 2006/112, under the heading 'Taxable amount', Article 90 thereof reads 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.'

10 Article 193 of that directive provides:

'VAT shall be payable by any taxable person carrying out a taxable supply of goods or services, except where it is payable by another person in the cases referred to in Articles 194 to 199 and Article 202.'

11 Article 226 of the directive provides:

'Without prejudice to the particular provisions laid down in this Directive, only the following details are required for VAT purposes on invoices issued pursuant to Articles 220 and 221:

…

(6) the quantity and nature of the goods supplied or the extent and nature of the services rendered;

(7) the date on which the supply of goods or services was made or completed or the date on which the payment on account referred to in points (4) and (5) of Article 220 was made, in so far as that date can be determined and differs from the date of issue of the invoice;

…'

German law

12 Paragraph 13(1)(1) of the Umsatzsteuergesetz (Law on Turnover Tax) of 21 February 2005 (BGB1. 2005 I, p. 386), in the version applicable to the main proceedings ('the UStG'), provides:

'Tax shall become chargeable

1. on supplies of goods and other services

(a) in cases where tax is calculated on the basis of the remuneration agreed (Paragraph 16(1), first sentence), upon expiry of the prepayment period in which the supplies of goods or services were made. This shall also apply to part supplies. Supplies are part supplies where it is agreed that certain parts of an economically divisible supply are to be paid for separately. Where the remuneration or part remuneration is received before the supply or part supply has been made, tax shall become chargeable thereon upon expiry of that prepayment period in which the remuneration or part remuneration was received,

(b) in cases where tax is calculated on the basis of the remuneration collected (Paragraph 20), upon expiry of the tax period in which the remuneration was received,

…'

13 Paragraph 17 of the UStG provides:

'(1) If the taxable amount of a taxable transaction for the purposes of Paragraph 1(1)(1) has changed, the trader who made the supply shall adjust the amount of tax payable accordingly. …

(2) Subparagraph 1 shall apply *mutatis mutandis* where

1. the remuneration agreed for a taxable supply of goods or other services or a taxable intra-Community acquisition has become unrecoverable. If the remuneration is received retroactively, the amount of the tax and the [input tax] deduction shall be readjusted;

…'

14 Under the first sentence of Paragraph 20 of the UStG, a trader may be allowed to calculate VAT on the basis of the remuneration received rather than on the basis of the remuneration agreed, where, inter alia, his turnover did not exceed a certain threshold in the preceding calendar year.

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

15 In 2012, X supplied mediation services to T-GmbH for the purposes of the latter's sale of a plot of land to another. It is clear from the fee agreement which X and T entered into on 7 November 2012 that X had already complied with its contractual obligations by that date.

16 As regards the remuneration for the services in question, a fee of EUR 1 000 000 plus VAT was agreed and it was specified that that fee was to be paid in five instalments of EUR 200 000 plus VAT. The instalments were due at yearly intervals and the first instalment was payable on 30 June 2013. At the time of the respective due dates, X issued an invoice for each instalment and paid tax corresponding to the sum received.

17 Following a tax audit, Tax Office B took the view in a decision of 22 December 2016 that the services had been supplied in 2012 and that therefore X should have paid, in respect of that year, VAT on the entire fee.

18 Since the objection lodged against that decision was unsuccessful, X brought an action before the Finanzgericht (Finance Court, Germany), which was largely upheld. In essence, that court found that X had supplied the services at issue in the main proceedings in 2012. However, it took the view that, aside from the first instalment fee, which was received in 2013, the remuneration agreed should be regarded as unrecoverable according to Paragraph 17(2)(1) and the first sentence of Paragraph 17(1) of the UStG. As appears from the order for reference, the

Finanzgericht (Finance Court) proceeded from the premiss that the application of Article 90(1) of Directive 2006/112 allows the taxable amount to be reduced in order to prevent the taxable person from being obliged to pre-finance, over a period of several years, the VAT due on the basis of the period in which the services were supplied where payment in full of that supply has not yet been received during that period.

19 Tax Office B brought an appeal on a point of law (*Revision*) before the Bundesfinanzhof (Federal Finance Court, Germany) against the decision of the Finanzgericht (Finance Court).

20 The Bundesfinanzhof (Federal Finance Court) asks whether Article 64(1) of Directive 2006/112 applies to services supplied on a single occasion. Although that provision excludes from its scope supplies of goods on deferred terms, it does not contain a comparable exclusion for supplies of services paid in instalments. However, a literal interpretation of the application of that provision could give rise to an unjustified distinction of supplies of goods and services. Furthermore, such an interpretation could unduly limit the general rule of Article 63 of Directive 2006/112 that, in principle, VAT is to become chargeable when services are supplied.

21 That court also notes that the present case may be distinguished from that which gave rise to the judgment of 29 November 2018, *baumgarten sports & more* (C?548/17, EU:C:2018:970), which concerned supplies of the services of a sports agent, namely the placement of a player with a football club in so far as the agent's remuneration was tied to the player's placement within the club in question being continued. The case in the main proceedings concerns a situation in which the payment of the agreed remuneration in instalments is merely subject to certain timeframes rather than conditional on the long-term success of the agency service, which may be uncertain.

22 The Bundesfinanzhof (Federal Finance Court) considers that the fact that, in the judgment of 29 November 2018, *baumgarten sports & more* (C?548/17, EU:C:2018:970), the Court cited the judgment of 3 September 2015, *Asparuhovo Lake Investment Company* (C?463/14, EU:C:2015:542), which concerned a service supplied on a permanent basis over a long period, supports the interpretation that there can be 'successive statements of account or successive payments' within the meaning of Article 64(1) of Directive 2006/112 only if the supplies in question are related to the instalment payments.

23 That court considers that such an approach corresponds to the second and third sentences of Paragraph 13(1)(1)(a) of the UstG, according to which the economic divisibility of a service is conclusive.

24 If Article 64(1) of Directive 2006/112 is not to be applied in the case at issue in the main proceedings, the referring court asks the Court whether Article 90(1) of that directive may be applied.

25 That court states that, in respect of the services supplied in 2012, X was remunerated, as of June 2013, in several instalments, each time plus VAT. If it were the case that the VAT for a one-time service is chargeable in the year in which it is supplied, a taxable person who accepted to be paid in several instalments would be required to pre-finance the VAT. However, the referring court harbours doubts as to whether the obligation to pre-finance the VAT is compatible with the role of taxable persons which, as follows from the case-law of the Court, inter alia, in the judgments of 20 October 1993, *Balocchi* (C?10/92, EU:C:1993:846), and of 21 February 2008, *Netto Supermarkt* (C?271/06, EU:C:2008:105), is to act as tax collectors for the State.

26 The referring court states that such an obligation could be avoided by reducing the taxable amount pursuant to Article 90(1) of Directive 2006/112, followed by its subsequent readjustment when the remuneration is actually paid.

27 In those circumstances, the Bundesfinanzhof (Federal Finance Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Does a service provided on a single occasion and therefore not in relation to a certain period of time give rise to successive statements of account or successive payments within the meaning of Article 64(1) of Directive [2006/112] merely on the basis of an agreement to pay in instalments?

(2) Alternatively, if the first question is answered in the negative: is non-payment within the meaning of Article 90(1) of Directive [2006/112] to be assumed if the taxable person, when providing his service, agrees that the service is to be paid for in five annual instalments and the national law relating to cases of subsequent payment provides for an adjustment by which the previous reduction in the taxable amount is cancelled again in accordance with that article?’

Consideration of the questions referred

Admissibility of the questions referred

28 As is clear from the facts, as set out by the referring court, the case in the main proceedings concerns a supply of services executed in full by the end of 2012 and for which the consideration was paid, pursuant to the contract, in annual instalments during the following five years.

29 In its observations before the Court, the defendant in the main proceedings disputes that statement of the facts. In support of its objection, it relies on a document which supports provisional findings made by a German court in a case other than that in the main proceedings.

30 However, such a document cannot call into question the statement of the facts as set out in the order for reference.

31 It is sufficient to recall that, according to settled case-law, the national court alone has jurisdiction to find and assess the facts in the case before it and to interpret and apply national law. The Court must take account, under the division of jurisdiction between the Court and the national courts, of the factual and legislative context, as described in the order for reference, in which the questions put to it are set (judgment of 27 January 2021, *Dexia Nederland*, C?229/19 and C?289/19, EU:C:2021:68, paragraph 44 and the case-law cited).

32 It follows that the questions referred for a preliminary ruling are admissible.

The first question

33 By its first question, the referring court seeks to ascertain whether Article 64(1) of Directive 2006/112 must be interpreted as meaning that a service supplied on a single occasion remunerated by way of instalment payments falls within the scope of that provision.

34 First of all, it is important to note that Article 64(1) of Directive 2006/112 must be read in the light of Article 63 of that directive, since the former is intrinsically related to the latter.

35 Article 63 of Directive 2006/112 provides that the chargeable event for VAT occurs and VAT becomes chargeable when the goods or services are supplied. Moreover, according to Article

64(1) of that directive, where the supply of services gives rise, inter alia, to successive payments, it is to be regarded as being completed, for the purposes of Article 63, on expiry of the periods to which such payments relate.

36 It follows from the combined application of those two provisions that, in respect of the supply of services giving rise to successive payments, the chargeable event for VAT occurs and VAT becomes chargeable on expiry of the periods to which those payments relate (judgment of 29 November 2018, *baumgarten sports & more*, C?548/17, EU:C:2018:970, paragraph 28 and the case-law cited).

37 As for its interpretation, the wording ‘supplies which give rise to successive payments’ could be construed either as including one-time supplies for an agreed consideration paid in several instalments, or as concerning only supplies the nature of which justify payment in instalments, namely those which are not performed on a single occasion, but repeated or continuous over a certain period.

38 The second interpretation is borne out by the wording and purpose of Article 64(1) of Directive 2006/112. Under that provision, the liability to tax arises on expiry of the periods to which the successive payments relate. Since those payments necessarily constitute the consideration for supplies, it follows that that provision implicitly requires that the supply be completed during those periods. In those circumstances, the application of Article 64(1) of Directive 2006/112 cannot be governed solely by the successive nature of the payment for the supply.

39 Accordingly, the application of Article 64(1) is premissed on there being a relationship between the nature of the services in question and the payment in instalments, so that that provision cannot concern a one-time supply, even if paid for in instalments.

40 That literal interpretation of Article 64(1) of Directive 2006/112 is supported by its purpose and by the scheme of the directive.

41 In that regard, it should be made clear that Article 64(1) of the directive, read in conjunction with Article 63 thereof, is intended to facilitate the collection of VAT and, in particular, the ascertaining of when the liability to tax arises.

42 In order to ascertain when the chargeable event occurs and the tax becomes chargeable, Article 63 of Directive 2006/112 requires that the actual supply of a service be determined. As the Advocate General stated in point 41 of his Opinion, Article 63 does not specify which event is to be regarded as the time of supply, so that it is for the competent national authorities and courts to ascertain the time at which it actually took place.

43 By contrast, under Article 64(1) of Directive 2006/112, the chargeable event and chargeability of VAT are tied to the expiry of the periods to which the payments for the services supplied relate. Article 64(1) therefore sets out a legal rule from which the precise time of the chargeable event may be ascertained on the basis of a legal fiction, without needing to make the findings necessary for ascertaining when a service was actually supplied.

44 More particularly, as the Court has previously held, where Article 64(1) of Directive 2006/112 applies, it is sufficient that the periods of the supply of services to which the successive payments relate be mentioned in the invoices for the taxable person to satisfy the requirements of Article 226(7) of that directive, according to which the invoice must show the date on which the supply of services was made or completed (see, to that effect, judgment of 15 September 2016, *Barlis 06 – Investimentos Imobiliários e Turísticos*, C?516/14, EU:C:2016:690, paragraphs 29 to 31).

45 However, as a legal rule for determining the time from which a liability to tax arises, Article 64(1) of the directive applies only to the extent that the date or dates of the actual completion of services are unambiguous and potentially give rise to different interpretations, which is the case where they are, on account of their continuous or recurrent nature, supplied during one or several specific periods.

46 By contrast, as the Advocate General observed, in essence, in point 44 of his Opinion, where the time at which the supply of services is completed is unambiguous, in particular, in the event of a one-time supply and of a precise point in time from which its completion can be ascertained on the basis of the contractual relationship between the parties to the transaction, Article 64(1) of Directive 2006/112 cannot apply without disregarding the clear wording of Article 63 of that directive.

47 In addition, in accordance with the latter provision, read in the light of recital 24 of Directive 2006/112, the chargeable event and chargeability of VAT are not governed freely by the parties to the contract. On the contrary, the EU legislature thereby intended maximum harmonisation of the date on which liability to pay VAT arises in all the Member States in order to ensure the uniform collection of that tax (judgment of 2 May 2019, *Budimex*, C?224/18, EU:C:2019:347, paragraph 22 and the case-law cited).

48 It would therefore be contrary to Article 63 of Directive 2006/112 to allow taxable persons, who have supplied a one-time service in conjunction with the conclusion of an agreement on payment of the price for that service in instalments, to opt for the application of Article 64(1) of the directive and thereby determine themselves the chargeable event and chargeability of VAT.

49 Such an interpretation of Article 64(1) of Directive 2006/112 would also prove difficult to reconcile with Article 66(a) and (b) of the directive. Under those provisions, Member States may provide, by way of derogation from Articles 63 to 65 of the directive, that VAT is to become chargeable in respect of certain transactions or certain categories of taxable person no later than the time the invoice is issued or than the time the payment is received. If taxable persons were, according to their contractual arrangements for payment of the price, able themselves, in place of the Member States, to adapt the time of the chargeable event and chargeability of VAT, Article 66(a) and (b) of Directive 2006/112 would largely be deprived of its substance.

50 Furthermore, it cannot be inferred from the case-law of the Court that Article 64(1) of Directive 2006/112 may apply even to a one-time supply of services. The cases in which the Court upheld the applicability of that provision concerned services supplied during specified periods on the basis of contracts which provided for obligations of a continuous nature, whether it be the lease of a vehicle (judgment of 16 February 2012, *Eon Aset Menidjmunt*, C?118/11, EU:C:2012:97), consulting services of a legal, commercial or financial nature (judgments of 3 September 2015, *Asparuhovo Lake Investment Company*, C?463/14, EU:C:2015:542, and of 15 September 2016, *Barlis 06 – Investimentos Imobiliários e Turísticos*, C?516/14, EU:C:2016:690), or agency services for the placement of a player to and in a football club (judgment of 29 November 2018, *baumgarten sports & more*, C?548/17, EU:C:2018:970).

51 The fact that taxable persons may ultimately pre-finance the VAT which they are required pay to the State when supplying one-time services for which the price is paid in instalments also cannot affect the conclusions in paragraphs 39 and 48 above.

52 It is the case that the Court has consistently held, in accordance with the principle of the neutrality of VAT, that the trader, as tax collector on behalf of the State, is entirely to be relieved of the burden of tax due or paid in the course of his or her economic activities, themselves subject to VAT (judgment of 15 October 2020, *E. (VAT – Reduction of the taxable amount)*, C?335/19, EU:C:2020:829, paragraph 31 and the case-law cited).

53 However, as the Advocate General stated in point 62 of his Opinion, the role of taxable persons is not limited to that of tax collectors of VAT. In accordance with Article 193 of Directive 2006/112, the obligation to pay VAT – or, at least, output VAT – is, in principle, addressed to them when carrying out a taxable supply of goods or services, and that obligation is not subject to the prior receipt of the consideration for the supply.

54 Under Article 63 of Directive 2006/112, VAT is to become chargeable when the goods or services are supplied, that is, when the transaction in question takes place, regardless of whether the consideration due for that transaction has already been paid. Accordingly, VAT is due to the tax authorities by the supplier of goods or services, even where he or she has not yet received from his or her client the payment relating to the transaction carried out (judgment of 28 July 2011, *Commission* v *Hungary*, C?274/10, EU:C:2011:530, paragraph 46).

55 In the light of the foregoing considerations, the answer to the first question is that Article 64(1) of Directive 2006/112 must be interpreted as meaning that a service supplied on a single occasion remunerated by way of instalment payments does not fall within the scope of that provision.

The second question

56 By its second question, the referring court seeks to ascertain whether Article 90(1) of Directive 2006/112 must be interpreted as meaning that, in the case of an agreement on payment in instalments, the fact that an instalment of the remuneration has not been paid before its term must be regarded as non-payment of the price, within the meaning of that provision, and, as a result, lead to a reduction of the taxable amount.

57 It must be borne in mind that Article 90(1) of Directive 2006/112 provides for the reduction of the taxable amount in the case of cancellation, refusal or total or partial non-payment, or where the price is reduced after the supply takes place.

58 According to the case-law of the Court, in the situations covered by Article 90(1) of Directive

2006/112, that provision 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. Article 90(1) of Directive 2006/112 embodies one of the fundamental principles of that 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 (judgment of 12 October 2017, *Lombard Ingatlan Lízing*, C?404/16, EU:C:2017:759, paragraph 26 and the case-law cited).

59 As regards the total or partial non-payment of consideration, such non-payment cannot, contrary to rescission or annulment of the contract, return the parties to the position they were in prior to the conclusion of the contract. If there is non-payment without there being rescission or annulment of the contract, the purchaser of goods or services remains liable for the agreed price and the supplier of the goods or services in principle continues to have the right to receive payment, which he or she can rely on in court. It cannot be excluded, however, that such a debt will become definitively irrecoverable, since non-payment is characterised by the inherent uncertainty that stems from its non-definitive nature (see, to that effect, judgment of 12 October 2017, *Lombard Ingatlan Lízing*, C?404/16, EU:C:2017:759, paragraphs 29 and 30).

60 Thus, non-payment of the consideration, within the meaning of Article 90(1) of Directive 2006/112, applies only to those situations in which the purchaser of goods or services fails to pay, or only pays in part, a debt which it nonetheless owes under a contract for the supply of goods or services (see, to that effect, judgment of 2 July 2015, *NLB Leasing*, C?209/14, EU:C:2015:440, paragraph 36 and the case-law cited).

61 In the light of that case-law, the fact remains that the payment of the price for a supply of services in instalments, pursuant to the contract between the parties, does not fall within the definition of non-payment of the consideration for the purposes of Article 90(1) of Directive 2006/112.

62 First, such a payment plan does not change the amount of remuneration that the taxable person is supposed to receive or actually receives. In those circumstances, the taxable amount remains unchanged and the tax authorities do not receive VAT in a greater amount than that corresponding to the taxable person’s remuneration. Second, the fact that an instalment of a fee is not due before its term cannot be regarded as a situation in which purchasers of services pay only part of the price which they owe.

63 Furthermore, as is already clear from the considerations set out in paragraphs 51 to 54 above, for the purposes of interpreting Article 90(1) of Directive 2006/112, it is irrelevant whether, in certain cases, a taxable person is required to pre-finance the VAT which he must pay to the tax authorities.

64 In the light of the foregoing considerations, the answer to the second question referred is that Article 90(1) of Directive 2006/112 must be interpreted as meaning that, in the case of an agreement on payment in instalments, the fact that an instalment of the remuneration has not been paid before its term cannot be regarded as non-payment of the price, within the meaning of that provision, and, as a result, cannot lead to a reduction of the taxable amount.

Costs

65 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 (First Chamber) hereby rules:

1. **Article 64(1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning that a service supplied on a single occasion remunerated by way of instalment payments does not fall within the scope of that provision.**

2. **Article 90(1) of Directive 2006/112 must be interpreted as meaning that, in the case of an agreement on payment in instalments, the fact that an instalment of the remuneration has not been paid before its term cannot be regarded as non-payment of the price, within the meaning of that provision, and, as a result, cannot lead to a reduction of the taxable amount.**

[Signatures]

* Language of the case: German.