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Provisional text

JUDGMENT OF THE COURT (Second Chamber)

30 June 2022 (*)

(Reference for a preliminary ruling – Taxation – Common system of value added tax (VAT) – Directive 2006/112/EC – Article 137 – Optional tax liability scheme – Conditions – National legislation which makes the right of a taxable person to opt to charge VAT on the sale of immovable property conditional on the transfer of that property to a taxable person already registered for VAT purposes – Obligation to adjust VAT deductions where that condition is not satisfied – Principles of fiscal neutrality, of effectiveness and of proportionality)

In Case C-56/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Mokestinių komisija prie Lietuvos Respublikos vyriausybės (Tax Disputes Commission under the Government of the Republic of Lithuania), made by decision of 16 October 2020, received at the Court on 29 January 2021, in the proceedings

UAB 'ARVI' ir ko

v

Valstybinė mokesčių inspekcija prie Lietuvos Respublikos finansų ministerijos,

THE COURT (Second Chamber),

composed of A. Prechal, President of the Chamber, J. Passer, F. Biltgen (Rapporteur), N. Wahl and M.L. Arastey Sahún, Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- UAB 'ARVI' ir ko, by L. Augustinavičienė and A. Paulauskas, advokatai,
- the Lithuanian Government, by K. Dieninis and V. Kazlauskaitė-Švenčionienė, acting as Agents,
- the European Commission, by J. Jokubauskaitė and L. Lozano Palacios, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 24 March 2022,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 135 and 137 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'), as well as the principles of fiscal neutrality, of effectiveness and of proportionality.

2 The request has been made in proceedings between UAB 'ARVI' ir ko ('Arvi') and the Valstybinė mokesčių inspekcija prie Lietuvos Respublikos finansų ministerijos (State Tax Inspectorate under the Ministry of Finance of the Republic of Lithuania; 'the State Tax Inspectorate') concerning the exercise of the right of option for taxation in respect of immovable property sold to a taxable person not registered for value added tax (VAT) purposes at the time of the sale and the detailed rules for the implementation of the right to deduct input VAT.

Legal context

European Union law

3 Article 135(1) of the VAT Directive provides:

'Member States shall exempt the following transactions:

...

(j) the supply of a building or parts thereof, and of the land on which the building stands, other than the supply [before first occupation of a building];

...'

4 Article 137 of that directive states:

'1. Member States may allow taxable persons a right of option for taxation in respect of the following transactions:

...

(b) the supply of a building or parts thereof, and of the land on which the building stands, other than the supply [before first occupation of a building];

...

2. Member States shall lay down the detailed rules governing exercise of the option under paragraph 1.

Member States may restrict the scope of that right of option.'

5 According to Article 168 of that directive:

'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 213(1) of that directive provides:

'Every taxable person shall state when his activity as a taxable person commences, changes or ceases.'

7 Article 214(1) of the VAT Directive provides:

'Member States shall take the measures necessary to ensure that the following persons are identified by means of an individual number:

(a) every taxable person, with the exception of those referred to in Article 9(2), who within their respective territory carries out supplies of goods or services in respect of which VAT is deductible, other than supplies of goods or services in respect of which VAT is payable solely by the customer or the person for whom the goods or services are intended, in accordance with Articles 194 to 197 and Article 199;

...'

Lithuanian law

8 Article 32(3) of the Lietuvos Respublikos pridėtinės vertės mokesčio įstatymas Nr. IX-751 (Law of the Republic of Lithuania No IX-751 on value added tax) of 5 March 2002 (Žin., 2002, No 35-1271), in the version applicable to the facts in the main proceedings ('the Law on VAT'), provides:

'A taxable person shall have the right to opt to charge VAT in the manner prescribed by this Law on property immovable by nature which is exempt from VAT under paragraph 1 or 2 of this Article, if the property is sold or otherwise transferred to a taxable person who is a registered VAT payer ... and this option shall be effective, for not less than 24 months from the day of declaring the option, in respect of all relevant transactions concluded by that person. The taxable person shall declare his option in the manner prescribed by the central tax authority. ...'

9 Article 58(1) of that law provides:

'A VAT payer shall have the right to deduct input and/or import VAT in respect of goods and/or services acquired and/or imported, if those goods and/or services are intended to be used for the following activities of that VAT payer:

(1) the supply of goods and/or services on which VAT is chargeable;

...'

10 Article 67(2) of that law is worded as follows:

'VAT deductions must be adjusted in the manner laid down in this Article: in respect of property immovable by nature, for 10 years ... starting from the tax period in which input and/or import VAT on that property was wholly or partly deducted (in the case of material improvement of a building/structure, the deduction of the input VAT on the tangible capital assets thus produced shall be adjusted for 10 years from the tax period in which improvement works were completed).

...'

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

11 Following checks regarding the correctness of the charging, declaration and payment of VAT by Arvi, the Kauno apskrities valstybinė mokesčių inspekcija (Kaunas District State Tax Inspectorate, Lithuania; ‘the District Tax Inspectorate’) drew up, on 15 April 2020, a tax audit report in which it was found that that company had wrongly charged output VAT in connection with the sale, on 8 May 2015, of immovable property to UAB ‘Investicijų ir inovacijų fondas’ (‘Fondas’). In that report, the District Tax Inspectorate considered that, since Fondas was not yet registered for VAT purposes at the time of that sale, Arvi could not opt for taxation in respect of that transaction or, consequently, invoice the corresponding output VAT, so that Arvi should have adjusted the amount of input VAT deducted in its VAT return.

12 By decision of 22 May 2020, the District Tax Inspectorate confirmed that audit report and ordered Arvi to pay the corresponding amount of VAT, plus penalties and default interest.

13 The complaint lodged against that decision was rejected by the State Tax Inspectorate by decision of 23 July 2020, following which Arvi referred the matter to the Mokestininių ginčų komisija prie Lietuvos Respublikos vyriausybės (Tax Disputes Commission under the Government of the Republic of Lithuania).

14 The Tax Disputes Commission questions, first, whether the choice made by the Lithuanian legislature in the exercise of its discretion, establishing that the right to opt to charge VAT is tied to the condition that the purchaser be exclusively a taxable person registered as a VAT payer, complies with the VAT Directive, having regard to the aims and spirit thereof. Next, it asks whether the taxpayer’s choice to charge VAT for the supply of an old immovable property, when such a choice does not satisfy the condition laid down in Article 32 of the Law on VAT that a purchaser be registered in the VAT-payer register, enables such a transaction to be regarded as a taxable supply of capital goods in respect of which no obligation to adjust the VAT deduction arises for the supplier of the property. Lastly, it seeks to ascertain whether the requirement of the State Tax Inspectorate that the supplier adjust the input VAT deduction, where the purchaser of the property was registered as a VAT payer one month following the conclusion of the transaction, is consistent with the spirit of the VAT Directive and the principles set out by the Court in its case-law.

15 In those circumstances, the Mokestininių ginčų komisija prie Lietuvos Respublikos vyriausybės (Tax Disputes Commission under the Government of the Republic of Lithuania) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Is national legislation under which a VAT payer can have the right to opt to charge VAT in respect of [the supply of] VAT-exempt immovable property only if the property is transferred to a taxable person who has registered as a VAT payer as at the time of conclusion of the transaction compatible with the interpretation of Article 135 and Article 137 of the [VAT] Directive and the principles of fiscal neutrality and effectiveness?’

(2) If the answer to the first question is in the affirmative, is an interpretation of the provisions of national law that the supplier of immovable property must adjust the deduction of the VAT borne on the acquisition of the immovable property transferred, when he has opted to charge VAT in respect of the supply of the immovable property and such option is impossible under the national requirements owing to a single condition, that is to say, owing to the purchaser not having the status of registered VAT payer, consistent with the provisions of the [VAT] Directive governing the supplier's right to deduct VAT and adjustment of the deduction and with the principles of neutrality of VAT and effectiveness?

(3) Is an administrative practice under which, in circumstances such as those in the main proceedings, the supplier of immovable property is required to adjust the deduction of input tax on the acquisition/production of the immovable property, since the transaction for the sale of that property is regarded as a VAT-exempt supply of immovable property owing to the absence of a right to opt to charge VAT (the purchaser not having a VAT identification number at the time of conclusion of the transaction), although at the time of conclusion of the transaction the purchaser of the immovable property had applied for registration as a VAT payer, and was registered as a VAT payer one month after the conclusion of the transaction, consistent with the provisions of the [VAT] Directive governing the supplier's right to deduct VAT and adjustment of the deduction and with the principle of neutrality of VAT? In such a case is it important to determine whether the purchaser of the immovable property who registered as a VAT payer after the transaction really used the acquired property in activities subject to VAT and there is no evidence of fraud or abuse?

Consideration of the questions referred

The first question

16 By its first question, the referring court asks, in essence, whether Articles 135 and 137 of the VAT Directive and the principles of fiscal neutrality and effectiveness must be interpreted as precluding national legislation which makes the right of a taxable person to opt to charge VAT on the sale of immovable property conditional on the transfer of that property to a taxable person who, at the time of conclusion of the transaction, is already registered for VAT purposes.

17 In that regard, it should be noted, first, that Article 137(1) of the VAT Directive provides that Member States may allow taxable persons a right of option for taxation, inter alia, in respect of 'the supply of a building or parts thereof, and of the land on which the building stands, other than the supply [before first occupation of a building]', and states, in paragraph 2, that the Member States 'shall lay down the detailed rules governing exercise of the option under paragraph 1' and 'may restrict the scope of that right of option'.

18 Second, it is apparent from the case-law of the Court concerning Article 13(C) 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), albeit transposable by analogy to Article 137 of the VAT Directive, the terms of which are substantially identical, that the Member States may, by virtue of the power referred to in that article, allow persons benefiting from the exemptions provided for by that directive to waive the exemption in all cases or within certain limits or subject to certain detailed rules (see, by analogy, judgment of 12 January 2006, *Turn- und Sportunion Waldburg*, C?246/04, EU:C:2006:22, paragraph 27 and the case-law cited).

19 Thus, Article 137 of the VAT Directive allows the Member States not only to grant taxable persons the right to opt for taxation of transactions covered by that provision, but also allows them to restrict the scope of that right or withdraw it. Accordingly, the Member States have a wide

discretion under that article, since it is for them to assess whether they should or should not introduce the right of option, depending on what they consider to be expedient in the situation existing in their country at a given time (see, to that effect, judgment of 12 January 2006, *Turn- und Sportunion Waldburg*, C?246/04, EU:C:2006:22, paragraphs 28 and 29 and the case-law cited).

20 The Member States may also, in exercising their discretion, exclude certain transactions or certain categories of taxable persons from the scope of application of that right (see, by analogy, judgment of 12 January 2006, *Turn- und Sportunion Waldburg*, C?246/04, EU:C:2006:22, paragraph 30).

21 Nevertheless, when the Member States use their ability to restrict the scope of the right of option and to determine the arrangements for its exercise, they are to observe the general objectives and principles of the VAT Directive, in particular the principle of fiscal neutrality and the requirement for correct, straightforward and uniform application of the exemptions provided for (see, by analogy, judgment of 12 January 2006, *Turn- und Sportunion Waldburg*, C?246/04, EU:C:2006:22, paragraph 31).

22 In the present case, in so far as it lays down the detailed rules for waiving the exemption referred to in Article 135(1)(j) of the VAT Directive, the national legislation at issue in the main proceedings merely establishes the conditions under which the taxable person may exercise the right of option for taxation in respect of the supply of immovable property which will give that person the right of deduction.

23 The national legislation at issue in the main proceedings is, in that regard, similar to that at issue in the case which gave rise to the judgment of 9 September 2004, *Vermietungsgesellschaft Objekt Kirchberg* (C?269/03, EU:C:2004:512), which, adopted by a Member State which had exercised the power to allow taxpayers a right of option for taxation on leasing or letting transactions of immovable property, made full deduction of the input VAT paid conditional upon non-retroactive, prior approval of the tax authorities. In that judgment, the Court held, first, that where a Member State makes the right of option for taxation subject to certain statutory conditions, a process of prior approval enables the fulfilment of those conditions to be established and, second, that an approval process such as that introduced by that Member State is not intended adversely to affect the right to deduct, but, on the contrary, enables that right to be fully exercised, subject to compliance with certain requirements (see, to that effect, judgment of 9 September 2004, *Vermietungsgesellschaft Objekt Kirchberg*, C?269/03, EU:C:2004:512, paragraphs 26 and 28).

24 The same conclusion must be drawn for legislation such as that at issue in the main proceedings, since that legislation merely lays down the detailed rules for the exercise by taxable persons of the right of option for taxation in respect of transactions which are, in principle, exempt. Such legislation does not adversely affect the right to deduct but, on the contrary, allows, where that option is exercised in accordance with the detailed rules laid down for that purpose, the exercise of that right which, in the absence of such an option, would be precluded. Moreover, the condition that the seller of immovable property may opt for taxation in respect of the sale transaction only if the purchaser is a taxable person already registered for VAT purposes at the time of the sale helps to ensure that the right of option is exercised in a manner consistent with legal certainty.

25 That conclusion is not called into question by the argument, put forward in particular by the Commission, that that condition is contrary to the case-law of the Court established, inter alia, in paragraph 32 of the judgment of 7 March 2018, *Dobre* (C?159/17, EU:C:2018:161), according to which identification for VAT purposes, provided for in Article 214 of the VAT Directive, and the

obligation of the taxable person to state when his activity as a taxable person commences, changes or ceases, provided for in Article 213 of that directive, are only formal requirements for the purposes of control and, accordingly, cannot compromise, inter alia, the right to deduct VAT, where the substantive conditions which give rise to that right have been satisfied. As the Advocate General noted in point 56 of her Opinion, that case-law is irrelevant in the present case, since the case in the main proceedings does not concern the right of deduction of the purchaser who has not yet been registered at the time of acquisition of the immovable property at issue, but the detailed rules for the exercise, by the seller, of the right of option for taxation in respect of the supply of the immovable property.

26 In the light of those considerations, the answer to the first question is that Articles 135 and 137 of the VAT Directive must be interpreted as not precluding national legislation which makes the right of a taxable person to opt to charge VAT on the sale of immovable property conditional on the transfer of that property to a taxable person who, at the time of conclusion of the transaction, is already registered for VAT purposes.

The second and third questions

27 By its second and third questions, which it is appropriate to examine together, the referring court asks, in essence, whether the provisions of the VAT Directive and the principles of fiscal neutrality, of effectiveness and of proportionality must be interpreted as precluding national legislation and practice under which the seller of immovable property is required to adjust the deduction of input VAT on that property following the refusal to recognise the seller's right of option for taxation in respect of that sale on the ground that, at the time of the sale, the purchaser did not satisfy the conditions laid down in order for the seller to exercise that right.

28 In order to answer that question, it must first be noted that the obligation to adjust at issue in the main proceedings stems from the fact that, in the present case, there was no valid waiver of the exemption of that transaction.

29 Second, as regards the principle of fiscal neutrality, the Court has held that that principle precludes, in particular, treating similar supplies of services, which are thus in competition with each other, differently for VAT purposes (see, to that effect, judgment of 12 January 2006, *Turn- und Sportunion Waldburg*, C-246/04, EU:C:2006:22, paragraph 33 and the case-law cited).

30 In the present case, it is not apparent either from the request for a preliminary ruling or from the observations submitted to the Court that the national legislation or practice at issue in the main proceedings establishes a difference in treatment between similar transactions that are in competition with each other. For the reasons set out in greater detail by the Advocate General in points 30 to 35 and 46 of her Opinion, the purpose of the right of option for taxation in respect of the supply of immovable property is to prevent the taxable person who makes the supply from being placed at a competitive disadvantage, which is intended precisely to implement the principle of fiscal neutrality, and the conditions governing the exercise of the right of option for taxation laid down by the national legislation at issue in the main proceedings are the same for all taxable persons, irrespective of their capacity or legal form, since that exercise depends solely on the registration of the purchaser for VAT purposes at the time of supply of the property.

31 Third, as regards the principle of effectiveness, which precludes a national procedural provision from making the application of EU law, in the present case the exercise of the right of deduction, impossible in practice or excessively difficult, it should be recalled that, as is apparent from paragraph 24 above, legislation such as that at issue in the main proceedings merely lays down the detailed rules for the exercise by taxable persons of the right of option for taxation in respect of transactions which are, in principle, exempt and does not adversely affect the right of

deduction. Furthermore, it does not follow either from the request for a preliminary ruling or from the observations submitted to the Court that the national legislation at issue in the main proceedings or the application thereof by the authorities would in any way be liable to make the exercise of the right of deduction impossible in practice or excessively difficult.

32 On the contrary, the conditions for exercising the right of option are known in advance and, as the Advocate General observed in point 53 of her Opinion, a taxable person such as Arvi has several means at its disposal to be able to comply with the conditions laid down at national level and thus actually to exercise its right of deduction.

33 Accordingly, the principle of effectiveness does not preclude national legislation or practice such as that at issue in the main proceedings.

34 Fourth, as regards whether the national legislation at issue in the main proceedings or the application thereof by the tax authorities complies with the principle of proportionality, also referred to by the referring court, it must be borne in mind that, according to the case-law of the Court, in order to comply with that principle, a national measure must be appropriate for securing the attainment of the objective it pursues and must not go beyond what is necessary to attain it (see, to that effect, judgment of 26 October 2010, *Schmelz*, C-97/09, EU:C:2010:632, paragraph 58).

35 In the present case, the requirement for the purchaser to be a taxable person already registered for VAT purposes at the time of the sale in order for the seller to be able to opt for taxation in respect of the transaction helps to protect the supplier's legal certainty by allowing the supplier to make sure that it can validly exercise the right of option for taxation and helps to ensure that VAT is levied correctly. That requirement is therefore appropriate for attaining the objective pursued.

36 Furthermore, that requirement does not go beyond what is necessary to attain the objective pursued, since it ensures that, before carrying out the transaction which the taxable person would like to see taxed once it has exercised its right of option, that taxable person is in a position to know whether it can validly exercise that right of option, without it being necessary for the taxable person or the tax authorities to carry out lengthy checks on or research into the purchaser's status as a taxable person.

37 In the light of the explanations provided by the referring court in its request for a preliminary ruling, it should be added that the competent authorities cannot take account, beyond the fact that the transaction is or is not exempt, of other circumstances such as the purchaser's use of the immovable property. The relevant factor for the purposes of the right to deduct and the possible obligation to adjust is the nature of the activity for which the taxable person who made the sale used the immovable property in question. To take account, in addition, of the purchaser's subsequent use of the immovable property for the purposes of determining whether or not there is a transaction subject to VAT would undermine the principle of legal certainty. That is all the more true since it would be for the purchaser to adjust the input VAT deducted if the immovable property in question were to be used for exempt transactions or transactions falling outside the scope of VAT. Such a change in use cannot, however, lead to the situation whereby the adjustment of a VAT deduction in respect of a supply of goods or of services is imposed on a taxable person other than the person who applied that deduction (see, to that effect, judgment of 26 November 2020, *Sögård Fastigheter*, C-787/18, EU:C:2020:964, paragraphs 46 and 47).

38 In the present case, the use made by Fondas of the immovable property acquired from Arvi cannot therefore affect the right to deduct the input VAT paid by Arvi upon the acquisition of that property. Those are two separate transactions involving separate taxable persons each pursuing their own economic activity.

39 As to the remainder, as regards whether it is for the referring court to ascertain that there has been no fraud or abuse, it is sufficient to recall, first, that if the tax authorities were to conclude that the right to deduct has been exercised fraudulently or abusively, they would be entitled to demand, with retrospective effect, repayment of the amounts deducted (judgment of 28 February 2018, *Imofloresmira – Investimentos Imobiliários*, C-672/16, EU:C:2018:134, paragraph 52). Second, taxable persons are generally free to choose the organisational structures and the form of transactions which they consider to be most appropriate for their economic activities and for the purposes of limiting their tax burdens, since the principle that abusive practices are prohibited bars only wholly artificial arrangements which do not reflect economic reality and are set up with the sole aim of obtaining a tax advantage the grant of which would be contrary to the purposes of the VAT Directive (see, to that effect, order of 3 September 2020, *Vikingo F?vállalkozó*, C-610/19, EU:C:2020:673, paragraph 62 and the case-law cited).

40 In the light of the foregoing considerations, the answer to the second and third questions is that the provisions of the VAT Directive and the principles of fiscal neutrality, of effectiveness and of proportionality must be interpreted as not precluding national legislation and practice under which the seller of immovable property is required to adjust the deduction of input VAT on that property following the refusal to recognise the seller's right of option for taxation in respect of that sale on the ground that, at the time of the sale, the purchaser did not satisfy the conditions laid down in order for the seller to exercise that right. Although the actual use of the immovable property in question by the purchaser in connection with activities subject to VAT is irrelevant in that regard, the competent authorities are nevertheless required to ascertain whether there has been fraud or abuse on the part of the taxable person who intended to exercise the right of option for taxation in respect of the transaction in question.

Costs

41 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 (Second Chamber) hereby rules:

- 1. Articles 135 and 137 of 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 which makes the right of a taxable person to opt to charge value added tax (VAT) on the sale of immovable property conditional on the transfer of that property to a taxable person who, at the time of conclusion of the transaction, is already registered for VAT purposes.**
- 2. The provisions of Directive 2006/112 and the principles of fiscal neutrality, of effectiveness and of proportionality must be interpreted as not precluding national legislation and practice under which the seller of immovable property is required to adjust the deduction of input VAT on that property following the refusal to recognise the seller's right of option for taxation in respect of that sale on the ground that, at the time of the sale, the purchaser did not satisfy the conditions laid down in order for the seller to exercise that right. Although the actual use of the immovable property in question by the purchaser in connection with activities subject to VAT is irrelevant in that regard, the competent authorities are nevertheless required to ascertain whether there has been fraud or abuse on**

the part of the taxable person who intended to exercise the right of option for taxation in respect of the transaction in question.

[Signatures]

* Language of the case: Lithuanian.