Provisional text

JUDGMENT OF THE COURT (Seventh Chamber)

30 June 2022 (*)

(Reference for a preliminary ruling – Common system of value added tax (VAT) – Directive 2006/112/EC – Implementing Decisions 2010/583/EU and 2013/676/EU authorising Romania to derogate from Article 193 of that directive – Reverse charge mechanism – Supplies of wood products – National legislation imposing a condition of registration for VAT purposes for the application of that mechanism – Principle of fiscal neutrality)

In Case C?146/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Curtea de Apel Bucure?ti (Court of Appeal, Bucharest, Romania), made by decision of 9 December 2020, received at the Court on 3 March 2021, in the proceedings

Direc?ia General? Regional? a Finan?elor Publice Bucure?ti – Administra?ia Sector 1 a Finan?elor Publice

v

VB,

Direc?ia General? Regional? a Finan?elor Publice Bucure?ti – Serviciul Solu?ionare Contesta?ii 1,

THE COURT (Seventh Chamber),

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

Advocate General: P. Pikamäe,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– VB, by A. Arseni, C. Chiriac, C.-L. Dobrinescu and S. Ilie, avoca?i,

– the Romanian Government, by E. Gane and A. Rot?reanu, acting as Agents,

– the Czech Government, by O. Serdula, M. Smolek and J. Vlá?il, acting as Agents,

– the European Commission, by A. Armenia and L. Lozano Palacios, 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, on the one hand, the Direc?ia General? Regional? a Finan?elor Publice Bucure?ti – Administra?ia Sector 1 a Finan?elor Publice (Regional Directorate-General of Public Finances of Bucharest – Public Finance Office, Sector 1, Romania) and, on the other hand, VB and the Direc?ia General? Regional? a Finan?elor Publice Bucure?ti – Serviciul Solu?ionare Contesta?ii 1 (Regional Directorate-General of Public Finances of Bucharest – Complaints Office 1, Romania) concerning the competent tax authority's decision to require VB to make a retroactive payment of value added tax (VAT) in respect of standing timber, and refusing to apply the reverse charge mechanism.

Legal context

European Union law

The VAT Directive

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

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

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

4 Under Article 14(1) of that directive:

'"Supply of goods" shall mean the transfer of the right to dispose of tangible property as owner.'

5 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.'

6 Under Article 199(1) and (2) of that directive:

'1. Member States may provide that the person liable for payment of VAT is the taxable person to whom any of the following supplies are made:

…

2. When applying the option provided for in paragraph 1, Member States may specify the supplies of goods and services covered, and the categories of suppliers or recipients to whom these measures may apply.'

7 Article 213 of the VAT Directive provides:

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

Member States shall allow, and may require, the statement to be made by electronic means, in accordance with conditions which they lay down.

2. Without prejudice to the first subparagraph of paragraph 1, every taxable person or non-taxable legal person who makes intra-Community acquisitions of goods which are not subject to VAT pursuant to Article 3(1) must state that he makes such acquisitions if the conditions, laid down in that provision, for not making such transactions subject to VAT cease to be fulfilled.’

8 Under Article 214 of that directive:

‘1. 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;

(b) every taxable person, or non-taxable legal person, who makes intra-Community acquisitions of goods subject to VAT pursuant to Article 2(1)(b) and every taxable person, or non-taxable legal person, who exercises the option under Article 3(3) of making their intra-Community acquisitions subject to VAT;

(c) every taxable person who, within their respective territory, makes intra-Community acquisitions of goods for the purposes of transactions which relate to the activities referred to in the second subparagraph of Article 9(1) and which are carried out outside that territory.

2. Member States need not identify certain taxable persons who carry out transactions on an occasional basis, as referred to in Article 12.’

9 Article 395(1) of the directive reads as follows:

‘The Council, acting unanimously on a proposal from the Commission, may authorise any Member State to introduce special measures for derogation from the provisions of this Directive, in order to simplify the procedure for collecting VAT or to prevent certain forms of tax evasion or avoidance.

Measures intended to simplify the procedure for collecting VAT may not, except to a negligible extent, affect the overall amount of the tax revenue of the Member State collected at the stage of final consumption.’

Implementing Decision 2010/583/EU

10 Recitals 6 to 8 of Council Implementing Decision 2010/583/EU of 27 September 2010 authorising Romania to introduce a special measure derogating from Article 193 of Directive 2006/112 (OJ 2010 L 256, p. 27) stated:

‘(6) Romania also encounters problems in the timber market because of the nature of the

market and the businesses involved. The market has a large number of small enterprises which the Romanian authorities have found difficult to control. The most common form of tax evasion involves the supplier invoicing for supplies then disappearing without paying the tax to the competent authorities but leaving the customer in receipt of a valid invoice for the right of tax deduction.

(7) By designating the recipient as the person liable for the payment of the VAT in the case of supplies of wood products by taxable persons and in the case of supplies of goods and the provision of services by taxable persons, with the exception of retailers, while under an insolvency procedure, the derogation removes the difficulties encountered without affecting the amount of tax due. This has the effect of preventing certain types of evasion or avoidance.

(8) The measure is proportionate to the objectives pursued since it is not intended to apply generally, but only to specific operations and sectors which pose considerable problems in charging the tax or of tax evasion or avoidance.'

11 Article 1 of that implementing decision provided:

'By way of derogation from Article 193 of Directive 2006/112/EC, Romania is hereby authorised until 31 December 2013 to designate the taxable person to whom the supplies of goods or services referred to in Article 2 of this Decision are made as the person liable for the payment of the tax.'

12 Under Article 2 of the implementing decision:

'The derogation provided for in Article 1 shall apply to:

(a) supplies of wood products by taxable persons including standing timber, round or cleft working wood, fuel wood, timber products, as well as square edged or chipped wood and wood in the rough, processed or semi-manufactured wood;

(b) supplies of goods and the provision of services by taxable persons, with the exception of retailers, while under an insolvency procedure.'

Implementing Decision 2013/676

13 Recital 5 of Council Implementing Decision 2013/676/EU of 15 November 2013 authorising Romania to continue to apply a special measure derogating from Article 193 of Directive 2006/112 (OJ 2013 L 316, p. 31), as amended by Council Implementing Decision (EU) 2016/1206 of 18 July 2016 (OJ 2016 L 198, p. 47) ('Implementing Decision 2013/676'), states:

'Prior to the former authorisation to apply reverse charge to the supplies of wood, Romania had encountered problems in the timber market because of the nature of the market and the businesses involved. There is a large number of small enterprises in this sector which the Romanian authorities have found difficult to control. Designating the recipient as the person liable for the payment of VAT has, according to the Romanian authorities, had the effect of preventing tax evasion and avoidance in this sector and therefore remains justified.'

14 Article 1 of Implementing Decision 2013/676 provides:

'By way of derogation from Article 193 of [the VAT Directive], Romania is hereby authorised until 31 December 2019 to designate the taxable person to whom the supplies of goods or services referred to in Article 2 of this Decision are made as the person liable for the payment of the tax.'

15 Under Article 2 of the implementing decision:

‘The derogation provided for in Article 1 shall apply to supplies of wood products by taxable persons including standing timber, round or cleft working wood, fuel wood, timber products, as well as square edged or chipped wood and wood in the rough, processed or semi-manufactured wood.’

Romanian law

16 Article 127(1) of Legea nr. 571/2003 privind Codul fiscal (Law No 571/2003, establishing the Tax Code) (*Monitorul Oficial al României*, part I, No 927 of 23 December 2003), in the version applicable to the dispute in the main proceedings (‘the Tax Code’), provides:

‘“Taxable person” shall mean any person who, independently, carries out in any place an economic activity as referred to in paragraph 2, whatever the purpose or results of that activity.’

17 Article 160 of the Tax Code provides:

‘1. By way of derogation from Article 150(1), in the case of taxable transactions, the person liable for payment of the tax is the recipient in the context of the transactions referred to in paragraph 2. Registration of either the supplier or the recipient for the purpose of VAT … shall be a necessary condition for the application of reverse charging.

2. The transactions in respect of which reverse charging applies are the following:

…

(b) supply of timber and woody materials …

…’

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

18 VB is the owner of forest land in Romania.

19 Between 2011 and 2017, she operated that land on the basis of contracts for the sale of standing timber concluded with several companies specialising in forestry operations.

20 Following a tax inspection carried out between 5 December 2017 and 2 February 2018, the competent tax authority found that VB’s turnover in September 2011 had exceeded the ceiling established by the ‘special exemption scheme’ laid down by the Tax Code for small businesses. It is apparent from the documents before the Court that where a taxable person, in a calendar year, reaches or exceeds that exemption ceiling, that person is required to register for VAT within 10 days of the end of the month in which that threshold is reached or exceeded.

21 Since VB was not registered for VAT during the period subject to the tax inspection, namely between 1 October 2011 and 30 September 2017, the tax inspectors revised, retroactively, the calculation of the VAT due from 1 November 2011 by applying the ‘percent increase’ method, which consists of taking the view that the sale price also included VAT.

22 That tax inspection was concluded by drawing up a tax inspection report and a tax assessment notice dated 16 February 2018, on the basis of which VB was required to pay the sum of 196 634 Romanian lei (RON) (approximately EUR 41 300) and interest and penalties relating thereto.

23 VB lodged an objection to that notice, claiming that sales of standing timber were subject to the reverse charge mechanism, the application of which is subject only to the fact that the two traders are taxable persons, but not necessarily to the existence of a VAT registration number on the part of the supplier.

24 By decision of 12 July 2018, VB's objection was rejected on the ground that application of the reverse charge mechanism was subject, under Article 160 of the Tax Code, to the condition that both the supplier and the purchaser were registered in advance for VAT.

25 By judgment of 24 June 2019, the Tribunalul Bucure?ti (Regional Court, Bucharest, Romania) upheld the action brought by VB seeking annulment of the tax assessment notice of 16 February 2018 and of the decision of 12 July 2018.

26 That judgment is the subject of an appeal, brought before the referring court, the Curtea de Apel Bucure?ti (Court of Appeal, Bucharest, Romania) by the Regional Directorate-General of Public Finances of Bucharest – Public Finance Office, Sector 1).

27 That court notes that if VB had been registered for VAT in September 2011, she would have been subject to the reverse charge mechanism, in accordance with the derogation from the system of collecting VAT referred to in Article 193 of the VAT Directive granted to Romania on the basis of Implementing Decisions 2010/583 and 2013/676. On that basis, VB was not liable to pay VAT on sales of standing timber, that tax being payable, under that mechanism, by taxable purchasers.

28 In that context, the referring court observes that the Court held, in particular in its judgment of 7 March 2018, *Dobre* (C?159/17, EU:C:2018:161, paragraphs 32 and 33), that identification for VAT purposes is merely a formal requirement of the right to deduct VAT and cannot therefore constitute a substantive condition preventing a taxable person from exercising that right.

29 The referring court adds that the refusal to allow a person such as VB to apply the reverse charge mechanism also means that taxable persons who acquired standing timber from her cannot deduct the VAT relating to those transactions, since that tax was not correctly invoiced at the time of the chargeable event. Therefore, that court asks whether the Court's case-law precludes registration for VAT purposes from being a condition for the application of the reverse charge mechanism.

30 In those circumstances, the Curtea de Apel Bucure?ti (Bucharest Appeal Court) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'In circumstances such as those in the main proceedings, do [the VAT Directive] and the principle of neutrality preclude national legislation or a tax practice in accordance with which the reverse charge mechanism (simplification measures), which is mandatory for the sale of standing timber, is not applicable to a person who has been the subject of an inspection and who has been registered for VAT purposes following that inspection, on the grounds that the person subject to the inspection had neither applied for nor obtained registration for VAT purposes either before the transactions were carried out or by the date on which the upper limit [for exemption] was exceeded?'

Consideration of the question referred

31 By its question, the referring court asks, in essence, whether the VAT Directive and the

principle of fiscal neutrality preclude national legislation under which the reverse charge mechanism is not applicable to a taxable person who had neither applied for, nor obtained on his or her own initiative, registration for VAT purposes before carrying out the taxable transactions.

32 As a preliminary point, it should be noted that the reverse charge mechanism is an exception to the normal rules in Article 193 of the VAT Directive, according to which VAT is payable by any taxable person carrying out a taxable supply of goods or services, and that it must, for that reason, be strictly interpreted (see, to that effect, judgment of 13 February 2019, *Human Operator*, C?434/17, EU:C:2019:112, paragraph 30 and the case-law cited).

33 Accordingly, under that mechanism, no VAT payment takes place between the seller and the purchaser of the property, the purchaser being liable, in respect of the transactions carried out, for the input VAT, while being able, in principle, if the purchaser is a taxable person, to deduct that tax so that, in such circumstances, no amount is payable to the tax authorities (see, to that effect, judgment of 26 April 2017, *Farkas*, C?564/15, EU:C:2017:302, paragraph 41 and the case-law cited).

34 In that regard, it must be stated that Article 1 of Implementing Decisions 2010/583 and 2013/676, respectively, allows Romania to derogate, in accordance with Article 395 of the VAT Directive, from the taxation principle set out in Article 193 of that directive, by designating as liable for payment of VAT the taxable person to whom the supply of wood products referred to in Article 2 of each of those implementing decisions is made, since those activities are not included in the transactions referred to in Article 199(1) of the VAT Directive.

35 In the present case, the application of the reverse charge mechanism is subject, under the national legislation at issue in the main proceedings, namely Article 160(1) of the Tax Code, to the condition that the taxable persons concerned by that mechanism are registered for VAT purposes before the taxable transactions are carried out. The Romanian Government pointed out, in its written observations, that it was the difficulties encountered on the Romanian timber market concerning the fight against tax fraud that led the national legislature to impose that condition. The requirement of registration for VAT purposes also ensures effective monitoring of compliance with tax obligations and the effective collection of VAT.

36 In that regard, it should be noted, in the first place, that it is not apparent either from the VAT Directive or from Implementing Decisions 2010/583 or 2013/676 that, where a Member State is authorised to derogate from Article 193 of the VAT Directive, by designating as the person liable for payment of the VAT the taxable person who is the recipient of the supply of the goods at issue, thereby applying the reverse charge mechanism to certain taxable transactions, the national legislature of that Member State is precluded from determining, when implementing that derogation, conditions for the application of that mechanism, provided those conditions do not contravene the principle of fiscal neutrality.

37 First, such a reading is supported by Article 199(2) of the VAT Directive, which allows Member States to define the categories of suppliers or recipients to whom the reverse charge procedure may apply.

38 Secondly, since the reverse charge mechanism constitutes an exception to the principle laid down in Article 193 of the VAT Directive, it must be interpreted strictly, as is apparent from paragraph 32 above. The limitation provided for by the national legislation at issue in the main proceedings, by making the application of that mechanism subject to the condition that taxable persons must first be registered for VAT purposes, has precisely the effect of limiting the scope of that exception.

39 In the second place, contrary to what VB and the Commission have argued in their written observations, the national legislation at issue in the main proceedings is not contrary to the Court's case-law according to which the fundamental principle of VAT neutrality requires deduction of that input tax to be allowed if the substantive requirements are satisfied, even if the taxable person has failed to comply with some of the formal requirements (judgment of 18 March 2021, *A. (Exercise of the right of deduction)*, C?895/19, EU:C:2021:216, paragraph 47 and the case-law cited).

40 It is clear from that case-law that identification for VAT purposes, provided for in Article 214 of the VAT Directive, and the obligation of the taxable person to state when his or her 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 they cannot compromise, inter alia, the right to deduct VAT, in so far as the substantive conditions which give rise to that right have been satisfied (judgment of 18 November 2021, *Promexor Trade*, C?358/20, EU:C:2021:936, paragraph 35 and the case-law cited).

41 The Court therefore held that a person taxable for VAT purposes may not be prevented from exercising his or her right of deduction on the ground that he or she had not been identified as a taxable person for those purposes before using the goods purchased in the context of his or her taxed activity (judgment of 18 November 2021, *Promexor Trade*, C?358/20, EU:C:2021:936, paragraph 36 and the case-law cited).

42 It should be noted, however, that that case-law seeks to ensure compliance with the fundamental principle of fiscal neutrality by requiring that the taxable person may deduct input VAT if the substantive requirements for such a deduction are satisfied, even if that taxable person has failed to comply with some of the formal requirements.

43 The right of deduction of the recipient of the supply must, in the same way, be respected, in principle, both in the reverse charge mechanism and in the common system of VAT. That right is therefore not affected by the refusal of the service provider to make a delivery subject to the reverse charge mechanism. In that regard, it should be noted that the incorrect charging of VAT at the time of the chargeable event, in particular where, as in the present case, it excluded VAT, cannot alone suffice to deprive the taxable person of his or her right of deduction (see, by analogy, judgment of 21 March 2018, *Volkswagen*, C?533/16, EU:C:2018:204, paragraph 47).

44 Therefore, it must be held that the case-law deriving from the judgment of 18 March 2021, *A. (Exercise of the right of deduction)*, (C?895/19, EU:C:2021:216), is not applicable to a situation such as that at issue in the main proceedings, since a refusal to apply the reverse charge mechanism does not undermine either the right to deduct input VAT by the recipient of the supply concerned or, therefore, the principle of fiscal neutrality.

45 In the third and last place, it should be recalled that the principle of fiscal neutrality, which was intended by the EU legislature to reflect, in matters relating to VAT, the general principle of equal treatment, precludes in particular treating similar goods or supplies of services, which are thus in competition with each other, differently for VAT purposes (judgment of 17 December 2020, *WEG Tevesstraße*, C?449/19, EU:C:2020:1038, paragraph 48 and the case-law cited).

46 According to the Court's settled case-law, that general principle requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified. A difference in treatment is justified if it is based on an objective and reasonable criterion, that is, if the difference relates to a legally permitted aim pursued by the legislation in question, and it is proportionate to the aim pursued by the treatment concerned (judgment of 3 February 2021, *Fussl Modestraße Mayr*, C?555/19,

EU:C:2021:89, paragraph 95 and the case-law cited).

47 It should be noted that, in the present case, the criterion justifying the restriction of the application of the reverse charge mechanism is objective, since the national legislation at issue in the main proceedings requires, without distinction, all taxable persons, both sellers and buyers, involved in the supply of the wood products referred to in Article 2 of Implementing Decisions 2010/583 and 2013/676, respectively, to be registered for VAT.

48 The aim of that restriction is legal certainty and legal clarity. In circumstances such as those at issue in the main proceedings, the recipient of a supply of goods is liable to pay VAT if the transaction is subject to VAT, which depends, in particular, on the supplier's turnover, who may benefit from the special exemption scheme provided for by Romanian legislation concerning small businesses. However, that condition is difficult for the recipient of the supply to ascertain. In that regard, it must be pointed out that, in the present case, it is apparent, in particular, from recital 6 of Implementing Decision 2010/583 that the Romanian timber market consists of a large number of small businesses which the Romanian authorities have found difficult to control.

49 By imposing on taxable persons a condition of registration for VAT purposes, the beneficiary of the taxable transaction has a more accessible criterion for knowing, precisely, the extent of its tax liabilities, since Romanian law excludes from the obligation to register for VAT taxable persons benefiting from the exemption applicable to small businesses and therefore not carrying out transactions in respect of which VAT is deductible.

50 The difference in treatment therefore appears proportionate to the aim pursued by the national legislation at issue in the main proceedings, in so far as, first, registration for VAT purposes derives from EU law itself, namely Article 214 of the VAT Directive, and, secondly, the right of deduction of the taxable persons concerned is not, in principle, called into question.

51 In the light of all the foregoing considerations, the answer to the question referred is that the VAT Directive and the principle of fiscal neutrality do not preclude national legislation under which the reverse charge mechanism is not applicable to a taxable person who had neither applied for nor obtained on his or her own initiative, before carrying out the taxable transactions, his or her registration for the purposes of VAT.

Costs

52 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 (Seventh 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 do not preclude national legislation under which the reverse charge mechanism is not applicable to a taxable person who had neither applied for nor obtained on his or her own initiative, before carrying out the taxable transactions, his or her registration for the purposes of VAT.

[Signatures]

* Language of the case: Romanian.