62016CC0246
OPINION OF ADVOCATE GENERAL

KOKOTT

delivered on 8 June 2017 (1)

Case C?246/16

Enzo Di Maura

v

Agenzia delle Entrate — Direzione Provinciale di Siracusa

(Request for a preliminary rulingfrom the Commissione tributaria provinciale di Siracusa (Provincial Finance Court, Syracuse (Italy))

(Reference for a preliminary ruling — VAT legislation — Restriction of the right to reduce the taxable amount in the event of non-payment by the other party to the contract (second sentence of Article 11 Part C(1) of the Sixth VAT Directive 77/388/EEC and Article 90(2) of Directive 2006/112/EC) — Scope for implementation by the Member States — Proportionality of the period of pre-financing by the trader)

I. Introduction

1.

In business dealings, it happens every so often that a customer does not settle its invoices on time or at all. This in itself is unpleasant for a trader, particularly if the outstanding accounts reach a certain volume. It is particularly unpleasant if, despite the non-payment of these invoices, taxes are owed that are based on the amount of the invoice that the customer was supposed to bear.

2.

The background to this situation is the fact that, under VAT law, the State has already receives ‘its’ taxes from the trader, even though the ultimate taxpayer (the customer) has not yet paid it to the trader. As a consequence, the trader is required to pre-finance the VAT until it is paid, thereby extending an interest-free loan to the State. The present case relates to an unpaid invoice from 2004.

3.

All Member States accordingly provide for a corresponding correction of the VAT liability previously incurred by the trader. In Italy, up to now, this has only been possible after the conclusion of insolvency proceedings in respect of the recipient of the supply. In other States, it is possible on the basis of the opening of insolvency proceedings. Both of these can be influenced by the trader itself only to a limited extent. In this respect, it is entirely possible for several years to pass until the pre-financing can be ended.

4.

In these proceedings — the second set — from Italy, (2) the Court of Justice is therefore dealing with one of the most important questions of the indirect charging of VAT in accordance with the rule of law. Consequently, the Court of Justice must decide for the first time (3) how long a private trader can reasonably be compelled by the Member States to pre-finance, at its own expense, a tax that it is not economically obliged to pay. Is a trader really required to wait 2, 10, or even more years until it receives reimbursement of the VAT accrued and already paid? Is a trader obliged to bring a court case, which may be completely pointless from an economic point of view, in order to be able to prove that an outstanding payment of the agreed consideration definitively has not been paid?

II. Legal framework

A. EU law

5.

The EU legal framework in this case is provided by Article 11(C)(1) of the 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 (4) (‘the Sixth VAT Directive’). This provision is identical to Article 90 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (5) (‘the VAT Directive’).

6.

Article 90 of the VAT Directive (previously Article 11(C)(1) of the Sixth VAT Directive) regulates changes to the taxable amount:

‘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.’

B. Italian law

7.

Article 26(2) (in the version applicable at the material time) of the Decreto del presidente della Repubblica 26 ottobre 1972, n. 633, ‘Istituzione e disciplina dell’imposta sul valore aggiunto’ (Decree No 633 of the President of the Republic of 26 October 1972, ‘Introduction and Regulation of the value added tax’, ‘Decree No 633/72’) provides as follows:

‘If, following the registration provided for in Articles 23 and 24, a transaction for which an invoice has been issued is cancelled in whole or in part or is reduced to the taxable amount as a result of a declaration of invalidity, annulment, rescission, liquidation, termination or the like or due to partial or total non-payment due to unsuccessful insolvency proceedings or enforcement proceedings or as a result of the application of contractually agreed discounts or rebates, the supplier of the goods or service is entitled to deduct the tax corresponding to the change in accordance with Article 19 by registering it in accordance with Article 25. The purchaser or recipient who previously registered the event in accordance with Article 25 must, in such cases, register the change in accordance with Article 23 or Article 24, irrespective of their right to reimbursement of the sum paid to the

supplier or service provider as compensation.’

8.

By contrast, Article 101(5) of Testo Unico delle Imposte sui Redditi (Consolidated Text on income tax, ‘TUIR’) provides as follows:

‘Loss of items in accordance with subsection 1 … and default on other debts as those deductible in accordance with … are deductible if they arise from sure and particular factors and, in respect of bad debts, in any case if the debtor is subject to insolvency proceedings or has entered into an agreement on the restructuring of debts confirmed by a court … For the purposes of this subsection, a debtor is regarded as subject to insolvency proceedings as of the order opening insolvency proceedings or of the decision directing compulsory liquidation, or …’

9.

In addition, the referring court has stated that Article 26(2) of Decree No 633/72 was amended by Law No 208 of 28 November 2015 to the effect that the deduction of value added tax where the price has not been paid is expressly permitted as of the opening of insolvency proceedings. However, this provision only applies to insolvency proceedings opened after 31 December 2016.

III. The main proceedings

10.

In 2004, Mr Di Maura (‘the applicant’) — evidently after providing a corresponding supply of goods or services in 2004 — issued an invoice in the sum of EUR 35000, which the recipient of the invoice — Sertenko srl — did not pay, as it was declared insolvent by judgment dated 30 November 2004. On the basis of that decision, on 31 December 2004, the applicant reduced the taxable amount in respect of that sum, altering the original invoice and subtracting the amounts corresponding to the taxes.

11.

The Agenzia delle Entrate (Revenue Agency, Italy) nonetheless ordered for the tax year 2004 the recovery of income tax, regional trade tax and VAT plus penalties. Under Article 26(2) of Decree No 633/72, where a debtor is insolvent, affected persons may demand repayment of tax paid in advance to the tax authorities only if it is clearly established that there are no sums available and their claim is therefore uncollectible.

12.

The applicant brought an action for annulment of the tax assessment before the Commissione Tributaria Provinciale di Siracusa (Provincial Tax Court, Syracuse, Italy). The applicant claims that Article 26 of Decree No 633/72 must be interpreted as meaning that, in the event of failure to pay for supplies, the taxable amount may be reduced already upon a declaration of insolvency, given that the usual periods for resolving insolvency proceedings are very long. Furthermore, it claims, Article 101(5) TUIR exempts the creditor from the burden of proving that the loss is definitive, and expressly allows the debts claimed from traders subject to insolvency proceedings to be deducted as from the date that proceedings are opened.

13.

In the proceedings before the Regional Tax Court, the tax authorities confirmed the objections of

the applicant in relation to income tax and regional trade tax in accordance with Article 101(5) TUIR, but not in relation to VAT. In their view, non-reduction of VAT follows from the legislative background to Article 26 of Decree No 633/72. It follows that the precondition of lack of success refers to the insolvency proceedings.

14.

They submit that the proof that insolvency proceedings have been unsuccessful is furnished only after the assets have been distributed and the period for comments on the distribution plan has expired or, if there is no distribution plan, when the period for appeal against the decision to close the insolvency proceedings has expired. This interpretation of Article 26 of Decree 633/72 is in line with the practice of the tax authorities and with national case-law.

15.

The Regional Tax Court decided to suspend the proceedings and to make a reference for a preliminary ruling.

IV. Proceedings before the Court of Justice

16.

The Regional Tax Court, Syracuse, before which proceedings were brought, has referred the following questions to the Court:

‘1.

Having regard to Article 11(C)(1) and the second sentence of Article 20(1)(b) of the Sixth VAT Directive in relation to the downward correction of the taxable amount and the correction of the VAT charged on taxable transactions in cases where the consideration agreed by the parties remains totally or partially unpaid, is it compatible with the principles of proportionality and effectiveness guaranteed by the TFEU, and the principle of neutrality that governs the application of VAT, to impose limits that make it impossible or excessively costly — including in terms of the time associated with the unforeseeable duration of an insolvency procedure — for the taxable person to recover the tax on the consideration which remains totally or partially unpaid?

2.

If the first question is to be answered in the affirmative: is it compatible with the principles set out above that a provision — such as Article 26(2) of Decree No 633/1972, in the version in force before the amendments introduced by Article 1(126) and (127) of Law No 208 of 28 December 2015 — makes the right to recover the tax contingent on proof that insolvency procedures have previously been unsuccessful, that is to say, in accordance with case-law and the practice of the tax authority of the EU Member State, following definitive failure to distribute the assets, or, failing that, a final decision closing the insolvency procedure, even where such procedures may reasonably be deemed to be uneconomic because of the amount of the claim, the prospects of recovery and the costs of the insolvency procedures, and given that, in any event, the specified conditions could only be met years after the date of opening of the insolvency proceedings?’

17.

The Italian Republic, the United Kingdom and the European Commission have presented written observations on these questions.

V. Legal assessment

A. The two questions referred for a preliminary ruling

1. General

18.

With both of the questions referred — which should be examined together — the referring court is ultimately asking under what conditions the Member States can use the option provided for in the second sentence of Article 11(C)(1) of the Sixth VAT Directive (now Article 90(2) of the VAT Directive) to derogate from the first sentence of Article 11(C)(1) of the Sixth VAT Directive (now Article 90(1) of the VAT Directive). (6) Specifically, it would like to know whether EU law allows the Italian legislature to make the correction of the taxable amount depend on proof that unsuccessful insolvency proceedings had previously been brought, even if this may, in certain circumstances, take more than a decade.

19.

Article 90(2) of the VAT Directive gives no guidance as to the preconditions under which Article 90(1) of the VAT Directive can be restricted. The answer to the above question can therefore only be derived from the basic principles of VAT law.

20.

Therefore, the meaning of Article 90(1) of the VAT Directive (point 21 et seq.) will first be outlined. Thereafter I will turn to the exception in Article 90(2) of the VAT Directive (point 32 et seq.). This will demonstrate why the wording must be interpreted narrowly. For the restriction of the option to correct, the principle of neutrality (see point 40 et seq.), the position of the trader in VAT law and its fundamental rights (see point 45 et seq.) are of particular significance. I will then set out the criteria for a proportionate application of Article 90(2) of the VAT Directive (see point 53 et seq.).

2. Meaning of Article 90(1) of the VAT Directive

21.

Despite the comments of the United Kingdom and the Italian Republic, there should be agreement on the starting point. VAT must indeed be paid in any event by the trader as the tax debtor. However it is settled case-law of the Court of Justice that VAT is an indirect tax on consumption to be borne by the consumer. (7) The taxable trader is ‘simply’ acting as tax collector on behalf of the State. (8)

22.

The aim of VAT as a general tax on the consumption of goods is to impose a tax on consumer capacity, which is demonstrated by consumers’ expenditure of assets to procure a consumable benefit. (9) This is clear from the provisions of Article 2(1) of the VAT Directive (‘for consideration’), in the provisions of Article 65 of the VAT Directive (VAT becomes chargeable on the amounts previously received) and in particular the provisions of Article 73 of the VAT Directive. According to the latter, the taxable amount consists of everything constituting consideration which is obtained by the supplier.

23.

Consequently, the Court of Justice (10) has explicitly ruled on several occasions that ‘the taxable amount serving as a basis for the VAT to be collected by the tax authorities cannot exceed the consideration actually paid by the final consumer which is the basis for calculating the VAT ultimately borne by him.’ If the final consumer does not pay the trader, the trader therefore does not substantively owe any VAT. The basis for charging VAT is not applicable because the trader has not ultimately provided any goods or services for consideration within the meaning of Article 2 of the VAT Directive.

24.

Pursuant to Article 63 of the VAT Directive, however, the VAT claim arises when the goods or the services are supplied. It is not decisive that the recipient has also paid the consideration (‘debit principle’). This method of charging for VAT is clearly based on the assumption that the agreed consideration generally will be paid promptly after a supply of goods or services.

25.

If, however, as a matter of substantive law only the actual price for goods or services paid by the recipient is taxed, but the method of taxation is based on the agreed price, the two systems must be reconciled at some point. This is ensured by Article 90(1) of the VAT Directive, according to which the initial tax debt of the supplier must be corrected accordingly.

26.

Thus, to that extent it corresponds to the consistent case-law of the Court of Justice that Article 90(1) of the VAT Directive is an expression of a fundamental principle of the VAT Directive, according to which the taxable amount is the payment actually received and the corollary of which is that the tax authorities may not charge an amount of VAT exceeding the tax paid by the taxable person. (11)

27.

Article 90(1) of the VAT Directive consequently represents the necessary counterpart to the method of taxation in Article 63 of the VAT Directive (‘debit principle’). (12) It obliges the Member State to reduce the taxable amount accordingly. (13)

28.

The Court of Justice in its judgment in Goldsmiths therefore decided that a deviation from this fundamental principle in Article 90(1) of the VAT Directive must be justified, so that measures adopted by the Member States on the basis of Article 90(2) of the VAT Directive do not undermine the objective of tax harmonisation. (14)

29.

However, the Court of Justice, in the judgment in Almos Agrárkülkereskedelmi, also stated that, in the event of non-payment of the price, taxable persons could not rely on a right to reduction of their taxable amount for VAT under Article 90(1) of the VAT Directive if the Member State concerned intended to apply the derogation provided for in Article 90(2) of that Directive. (15)

30.

The observations of the United Kingdom and the Italian Republic are essentially based on this point. If it is actually the case that a correction could be ruled out in its entirety, then a correction would a fortiori only be permitted following the conclusion of insolvency proceedings lasting several years, as submitted by the United Kingdom. However it is not apparent that the Court of Justice in its decision in Almos Agrárkülkereskedelmi actually wanted to abandon its — in my view correct — decision in Goldsmiths.

31.

It is therefore necessary to decide whether Article 90(2) of the VAT Directive in fact leaves Member States completely free to derogate without restriction from Article 90(1) of the VAT Directive, or whether derogations are required to be justified.

3. The derogation in Article 90(2) of the VAT Directive

(a) General

32.

According to the wording of Article 90(2) of the VAT Directive, Member States are entitled to derogate from Article 90(1) in the event of total or partial non-payment. Consequently the Member States can provide for an exception to the principle of correction. According to the settled case-law of the Court, exceptions must however be strictly interpreted. (16)

33.

Even if the wording of Article 90(2) of the VAT Directive allows Member States to derogate from the reduction of the taxable amount provided for in Article 90(1) in the event of total or partial non-payment, this formulation does not — contrary to the assertions of the United Kingdom and the Italian Republic — thereby allow a complete exclusion of the possibility of correction.

34.

A complete exclusion of the possibility of correction is different from a derogation from an immediate possibility of correction and would contradict the consumption tax principle mentioned above that is implemented by Article 90(1) of the VAT Directive. A complete exclusion is also not a strict interpretation of the term ‘derogate’.

(b) Aim and purpose of the exception in Article 90(2)

35.

The aim and purpose of the exception in Article 90(2) also militate against allowing an exclusion of the possibility of correction in the event of total or partial non-payment. From the wording of Article 90(2), it is only possible to guess what was the background to this possibility of an exception. In contrast to the cases not covered by Article 90(2) in the event of annulment, rescission, liquidation or a price reduction after the sale, complete or partial non-payment is merely more uncertain. (17)

36.

In particular, an entitlement to payment (i.e. a claim) still exists, so that later payments are not ruled out. It therefore makes sense that the Member States can counteract this uncertainty by

means of provisions that derogate from Article 90(1). Based on this understanding, the right of the Member States to derogate only extends to this uncertainty, but not to the question of whether a correction must be made. As a result — contrary to the assertion of the Italian Republic — this also prevents an exclusion by a Member State of the possibility of correction.

37.

I cannot agree with the Commission’s argument that derogations under Article 90(2) could be justified in order to prevent misuse. First, the legislature provided for such a possibility in Article 273 and not in Article 90(2) of the VAT Directive. Secondly, the measures that Member States are permitted to enact in accordance with Article 273 of the VAT Directive to ensure the correct collection of the tax and to prevent tax evasion may not go beyond what is necessary to achieve these aims or undermine the neutrality of VAT. (18) Strict liability for the person providing the supply, until a specific deadline (here, the conclusion of the insolvency proceedings), would, however, go beyond what is necessary to protect the claims of the treasury. (19)

38.

In particular, it is not apparent how a restriction on the correction of a tax debt until the occurrence of a specific event is appropriate to combat VAT abuse. If the correction is in fact the expression of a fundamental principle of the VAT Directive, according to which the taxable amount is the consideration actually received and the corollary of which is that the tax authorities may not charge an amount of VAT exceeding the tax paid by the taxable person, (20) then the deciding factor is solely the non-payment of the consideration.

39.

If what is at issue is not non-payment, but actually a free supply of goods or services, this is equated to a transaction for consideration under VAT law in accordance with Article 16 or Article 26 of the VAT Directive. The tax authorities can and must make this distinction in any case. Consequently, abuse at the level of the trader performing the service is not actually possible. Therefore, abuse at the level of the non-paying recipient of the supply would be conceivable only if the recipient were to claim the deduction of input tax despite not having paid it. But abuse of this kind is prevented by Article 185(2) of the VAT Directive. This logically permits a correction of the input tax deduction for the trader which is not charged VAT because payment has not been made.

(c) The principle of neutrality in VAT law

40.

Furthermore, the principle of the neutrality of tax law must also be taken into account in the interpretation of Article 90(2) of the VAT Directive. The principle of neutrality represents a fundamental principle of VAT derived from its nature as a tax on consumption (21) and comprises two main elements.

41.

First, it requires that economic operators who effect the same transactions must not be treated differently in respect of the levying of VAT. (22) This becomes significant in connection with the derogations from taxation by reference to the agreed consideration, as provided for in the VAT Directive itself (see points 56 and 57 below).

42.

Secondly, the principle of neutrality also provides that the trader, as tax collector on behalf of the State, is fundamentally to be relieved of the final VAT burden, (23) inasmuch as the purpose of the economic activity itself is to achieve sales revenue that is (in principle) subject to tax. (24)

43.

If however the supplier is required by the method of taxation to be liable for several years for VAT that it cannot collect, then this pre-financing represents a considerable burden on the supplier. It is then no longer possible to maintain that there is complete (25) neutrality in relation to VAT.

44.

The principle of neutrality too therefore demands in principle that correction be possible in the event of non-payment of the consideration. Having regard to the principle of neutrality too, the optional restriction provided for in Article 90(2) of the VAT Directive is therefore to be interpreted narrowly and — as the Court of Justice stated in the judgment in Goldsmiths (26) — requires justification.

(d) Fundamental rights of the trader under VAT law

45.

It should also be noted that persons governed by private law (who make up the majority of taxable persons under VAT law) have fundamental rights even when they owe taxes. The obligation of such persons to collect a tax from third parties (the recipients of the supply) for the State, rather than its tax authorities, represents an interference with his fundamental rights as now set out in the Charter of Fundamental Rights.

46.

The pre-financing of VAT affects the freedom to choose an occupation, to conduct a trade, and the basic right to property (Articles 15, 16 and 17 of the Charter). Even before the Charter came into effect, the Court of Justice protected the freedom to choose an occupation and the freedom to pursue a trade alike as general legal principles. (27) In addition, in accordance with Article 20 of the Charter, there is possible discrimination against a trader for whom VAT only becomes chargeable in accordance with Article 66(b) of the VAT Directive when payment is received (‘money received basis’).

47.

Any restriction of these recognised rights and freedoms must — and this applies also to the period before the enactment of Article 52(1) of the Charter — be proportionate. Consequently, it is necessary to first examine how long the interference in the form of pre-financing (collection and payment of third-party taxes without receipt of the cash sum by the taxpayer) is proportionate. The Commission correctly raises doubts in so far as there is uncertainty regarding the length it takes to conclude insolvency proceedings in Italy.

48.

The principle of proportionality, which is one of the fundamental principles of EU law, requires that State action must be limited to what is ‘appropriate, necessary and proportionate to the objective it pursues’. (28) (29)

49.

The collection of taxes from the trader before the receipt of consideration is not in any event necessary to achieve the aim of the directive. The aim of the directive is that consumers be taxed when they receive a supply of goods or services for consideration (Article 2(1) of the VAT Directive). The less severe and simpler, equally effective method to achieve this is by taxing the actual consideration received.

50.

The principle of proportionality also prohibits a trader being charged more ‘as tax collector on behalf of the State’ than it can afford to pay. Its (financial) ability to pay is — in the case of an indirect tax on the consumption of goods — in principle limited to that which it can gather from the ultimate taxpayer. Anything that it cannot collect must be temporarily financed by it from its own assets. However, the aim of VAT is not to tax the assets of the taxable person.

51.

In this respect, I view it as imperative that the tax burden for an indirect tax be based on receipt of this payment by the supplier, as only then is the supplier objectively in a position to meet its tax obligation and pay this (collected) VAT. Taxation based solely on the agreed consideration (debit principle) deviates from this and would be disproportionate if it were not for the rule in Article 90(1) of the VAT Directive.

52.

For this reason too, Article 90(2) of the VAT Directive must be interpreted narrowly. The Member States may indeed derogate from an immediate correction as provided in Article 90(1) of the VAT Directive in the event of total or partial non-payment. However in line with the judgment in Goldsmiths, (30) they may only do so in a proportionate manner that takes into account the nature of VAT as a tax on consumption, the principle of neutrality and the fundamental rights of the trader.

4. Justification for a derogation within the meaning of Article 90(2)

(a) Independent interpretation of the situation

53.

The critical question, therefore, is not whether a Member State can exclude correction in the event of non-payment. Having regard to the above arguments, it cannot do so. Instead, what is critical is how long a derogation from a correction under Article 90(1) of the VAT Directive is justified or, conversely, from which point onwards the taxable person, in the event of total or partial non-payment, is entitled at the latest to a correction in accordance with Article 90(1) of the VAT Directive.

54.

The nub of the present case is whether the Italian legislature can prevent a correction until the loss of the claim is determined (definitively) by the conclusion of the insolvency proceedings (which in certain cases can take more than 10 years), or whether a correction must be provided for if it is highly unlikely that payment will be made in the near future.

55.

This question is a genuine VAT question, which must be determined separately from other types of tax or indeed accounting considerations. There is no need for an analogous application of Italian income tax law. The different rule in Italian income tax law is therefore irrelevant. However, both the tax authorities and the taxable person must be able to assess with legal certainty the point from which a correction of the VAT liability incurred is to take place in accordance with Article 90(1) of the VAT Directive.

(b) Equal treatment of all traders

56.

In the interpretation of Article 90(2) of the VAT Directive, it is also necessary to take account of Article 66(b) and Article 194 et seq. in conjunction with the principle of equal treatment (now also enshrined in Article 20 of the Charter of Fundamental Rights). This calls for a possibility of prompt correction.

57.

According to Article 66(b) of the VAT Directive, the Member States may provide that VAT becomes chargeable in respect of a certain category of taxable person ‘at the time the payment is received’ (‘money received basis’). The Member States have, at least in some cases, made use of this possibility. It is necessary to bear in mind other supplies for which the VAT Directive provides or permits a reverse charge onto the customer (cf. Article 194 et seq. of the VAT Directive). Traders that carry out such transactions — e.g., provide services to overseas traders — are not required to pre-finance VAT.

58.

A trader that is required to advance taxes over a lengthy period of time upon the debit principle — i.e. the tax becomes chargeable irrespective of receipt of payment — is at a clear competitive disadvantage compared to a trader operating on a money received basis, which is only required to pay the tax out of the payments received. The same would apply for a trader that only carried out transactions for which the customer is liable under the reverse charge principle. A competitive disadvantage of this kind can be justified only if the pre-financing period is not too long.

(c) A comparison: correction in the event of non-performance

59.

A comparison with the possibility of correction of the tax liability where there is no performance or consideration at all also militates in favour of a prompt correction in the event of non-payment of the consideration. The case-law (31) here states that even a tax liability from an incorrect invoice (Article 203 of the VAT Directive) can be corrected, such as when the invoice lists a supply in return for payment that was not actually made.

60.

The tax liability of the issuer of the invoice, on the basis of a mere risk of loss of tax revenue through the issuance of an incorrect invoice, is viewed by the Court as compatible with the VAT system only if, and because, it is still possible to correct this strict liability. (32) This even applies to the benefit of a person who issues an invoice in bad faith, provided that the risk of the loss of tax

revenue is eliminated. (33)

61.

The same should apply, a fortiori, if an accurate invoice has been issued but the service provided has not been paid for and there is likewise no risk of a loss of tax revenue. A risk here is ruled out, first, as long as the actual taxpayer has not yet paid, meaning that no substantive VAT has actually accrued (see paragraph 23). Secondly, the risk posed by an unjustified deduction of input tax by the non-paying recipient of the supply is excluded because, according to the second sentence of Article 185(2) of the VAT Directive, the Member States may demand that they correct the deduction made.

(d) Derogations in accordance with Article 90(2) of the VAT Directive

62.

Therefore the ‘only’ matters to be clarified are the specific preconditions for derogations that are permitted in accordance with Article 90(2) of the VAT Directive. In the Goldsmiths (34) judgment, the Court of Justice did in fact call for a justification, but did not set out any specific requirements.

63.

Article 90(2) of the VAT Directive provides for derogations from the reduction of the taxable amount in accordance with Article 90(1) only in order to take account of the uncertainty of ‘definitive’ non-payment (see point 35 et seq.). This uncertainty in cases of total or partial non-payment can, however, be accounted for also by a subsequent increase in the basis of assessment if a payment is actually made.

64.

If a payment in favour of the trader is in fact made at a later point (e.g., during or after the conclusion of insolvency proceedings), then the tax liability must be increased accordingly at this point. This follows already from Article 73 of the VAT Directive, according to which the taxable amount is to include everything which constitutes consideration paid by the customer for the transactions. The same applies for a corresponding correction of the deduction of the recipient in accordance with Article 185 of the VAT Directive.

65.

A reduction of the taxable amount, subject to an increase if payment is actually made, is an equally suitable, less severe method in terms of the correct taxation of the end consumer than an obligation on the person collecting the tax (35) to pre-finance it for years until the opening or even conclusion of insolvency proceedings.

66.

Neither the wording nor the aim and purpose of Article 90(2) of the VAT Directive permit an interpretation according to which a correction could be prohibited until the probability that a payment will not be made is a near certainty — in other words, until the opening or conclusion of insolvency proceedings. Contrary to what the Commission and probably the United Kingdom believe, there is no relevant differentiation in VAT law between debts whose non-payment has been definitively determined and debts for which this is not the case.

67.

This is bound up with the fact that there can be no ‘definitive’ non-payment within the meaning of VAT law. This is already ruled out by the wording of Article 73 of the VAT Directive. According to this, the taxable amount also includes payments from a third party, and is consequently separate from the solvency or existence of a debtor. (36) In addition, VAT law is not based on the presence of an enforceable debt, as shown by the taxation of the payment of a gratuity, (37) unintentional overpayment, or payment of a debt of honour. (38)

68.

Even after the conclusion of insolvency proceedings — this appears to be regarded by the Commission as a case of a definitive bad debt — it is still possible that a third party (either consciously or in error) will go on to pay the supplier. This would then lead to a corresponding VAT liability. This too confirms that, from a VAT perspective, there can be no definitive certainty that a payment will not be made. There is always only a certain probability, which increases especially in relation to the duration of non-payment.

69.

With regard to the fundamental rights of the trader, the principle of proportionality and the principle of neutrality, in my view, pre-financing of VAT over periods of several years is out of the question. The essential point is whether a debt is unenforceable for an extended period. Non-enforceability may also occur where there is a serious and definitive refusal to pay on the part of the debtor. If the debtor, for example, emphatically disputes the existence of the debt itself or its amount, then there is already a high probability that the debt will not be enforceable for a long period of time or in full.

70.

On the other hand, in the case of indirect tax collection the State is reliant on ‘recovery’ of the VAT by the trader. To a certain extent, the latter is in a position to influence the risk of non-payment through its selection of contracting partner or by agreeing payment in advance. Nor can the tax liability of the trader to the State depend on the (subjectively evaluated) quality of the debtor’s grounds for challenge, but only on objective criteria. Ultimately such criteria only include measures that are under the control of the taxable person and can reasonably be expected of him.

71.

What measures can reasonably be demanded of a trader in each Member State before it can correct its tax liability due to non-payment of the consideration depends on the local circumstances and cannot be predicted in the abstract by the Court of Justice. Instead, the referring court must assess the derogation from the fundamental duty to adjust provided for in national law in each individual case as part of an overall evaluation and apply it in conformity with the directive. However, the Court of Justice can offer the referring court some pointers in this regard.

72.

Accordingly, it is proportionate if the Member State demands certain evidence for a probable extended period of non-payment. The opening of insolvency proceedings would represent such evidence. However, a non-payment that is to be taken into consideration under Article 90(1) of the VAT Directive may occur at a much earlier stage, for example if the debtor disputes the debt in the course of enforcement proceedings. It would also be proportionate to implement a reasonable

period of non-payment (e.g., six months after issuance of the invoice), after which non-payment within the meaning of Article 90(1) of the VAT Directive may be assumed.

73.

Whether it may be demanded that the taxable person bring enforcement proceedings depends particularly on the financial burden entailed. An obligation to pursue judicial enforcement of the collection of a possibly worthless debt for the benefit of the State that results in significant costs is fundamentally incompatible with the principle of neutrality and the principle of proportionality. In line with the view of the Commission, this applies in particular (but not only) to debts of a small value. Here, the option to assign this debt to the State in lieu of payment would probably be the more proportionate method.

74.

Conversely, the use of simplified and inexpensive official enforcement proceedings in the form of proceedings for a payment order before a correction of the taxable amount appears to be generally proportionate. This applies at least, in principle, where there are no indications that the proceedings will in any case fail or be uneconomical. The requirement to conclude insolvency proceedings, however, owing to their duration and the fact that the taxable person has little influence on them, is disproportionate.

B. Conclusion

75.

In conclusion, Article 90(2) of the VAT Directive permits Member States to take into account the specific nature of the uncertainties surrounding non-payment, in which they may assume that non-payment is sufficiently certain in the longer term only in certain circumstances (such as the expiry of a time limit, or certain unsuccessful measures by the taxable person). It is, however, not possible to exclude correction of the taxable amount.

76.

The fundamental rights of the taxable person, the principle of proportionality, the nature of VAT, and in particular the principle of neutrality, preclude the correction of the taxable amount being linked to events — such as the conclusion or opening of insolvency proceedings — that cannot be independently influenced by the taxable person.

VI. Proposal

77.

I therefore propose that the two questions referred by the Regional Tax Court, Syracuse (Italy) be answered as follows:

The second sentence of Article 11(C)(1) of the Sixth VAT Directive does not permit a disproportionate restriction of the possibility of correcting the taxable amount. It does, however, permit the Member States to take into account the uncertainties surrounding non-payment by requiring the taxable person to take certain reasonable measures. However, the requirement that insolvency proceedings be concluded in relation to the customer represents a disproportionate restriction.

(1) Original language: German.

(2) The other proceedings originating from Italy, Case C?202/15 (H3g), are currently informally suspended, as the referring court there is evidently weighing whether to withdraw the question due to the change in the legal framework. The Court of Justice is also dealing with a similar question in Case C?404/16.

(3) Unlike in the judgments of 3 July 1997, Goldsmiths (C?330/95, EU:C:1997:339); of 26 January 2012, Kraft Foods Polska (C?588/10, EU:C:2012:40); of 15 May 2014, Almos Agrárkülkereskedelmi (C?337/13, EU:C:2014:328); of 3 September 2014, GMAC UK (C?589/12, EU:C:2014:2131); of 26 March 2015, Macikowski (C?499/13, EU:C:2015:201); and of 2 July 2015, NLB Leasing (C?209/14, EU:C:2015:440).

(4) OJ 1977 L 145, p. 1.

(5) OJ 2006 L 347, p. 1.

(6) As the provisions of Article 11(C)(1) of the Sixth VAT Directive and Article 90 of the VAT Directive and also the other relevant provisions here are identical in content, the latter being more easily cited, for reasons of simplicity I will refer to the current provisions in what follows.

(7) Judgments of 24 October 1996, Elida Gibbs (C?317/94, EU:C:1996:400, paragraph 19), and of 7 November 2013, Tulic? and Plavo?in (C?249/12 and C?250/12, EU:C:2013:722, paragraph 34), as well as the decision of 9 December 2011, Connoisseur Belgium (C?69/11, not published, EU:C:2011:825, paragraph 21).

(8) Judgments of 20 October 1993, Balocchi (C?10/92, EU:C:1993:846, paragraph 25), and of 21 February 2008, Netto Supermarkt (C?271/06, EU:C:2008:105, paragraph 21).

(9) See for example: judgment of 18 December 1997, Landboden-Agrardienste (C?384/95, EU:C:1997:627, paragraph 20 and 23), and of 11 October 2007, Tulic? and Plavo?in (C?283/06 and C?312/06, EU:C:2007:598, paragraph 37 — ‘it is proportional to the price charged by the taxable person in return for the goods and services which he has supplied’).

(10) Judgments of 24 October 1996, Elida Gibbs (C?317/94, EU:C:1996:400, paragraph 19); similarly the judgments of 15 October 2002, Commission v Germany, C?427/98, EU:C:2002:581, paragraph 30); and of 16 January 2003, Yorkshire Co-operatives (C?398/99, EU:C:2003:20, paragraph 19), likewise the opinion of Advocate General Léger in the MyTravel case (C?291/03, EU:C:2005:283, paragraph 69).

(11) Judgments of 3 July 1997, Goldsmiths (C?330/95, EU:C:1997:339, paragraph 15); of 26 January 2012, Kraft Foods Polska (C?588/10, EU:C:2012:40, paragraph 27); of 15 May 2014, Almos Agrárkülkereskedelmi (C?337/13, EU:C:2014:328, paragraph 22); of 3 September 2014, GMAC UK (C?589/12, EU:C:2014:2131, paragraph 37); and of 2 July 2015, NLB Leasing (C?209/14, EU:C:2015:440, paragraph 35).

(12) The same function is contained in Articles 184 and 185 of the VAT Directive, which represents the counterpart to the deduction on a debit principle under Articles 168 and 178 of the VAT Directive and corrects a deduction which was initially too high. Article 185(2) of the VAT Directive in particular allows deductions to be adjusted to ensure that they correspond to the actual VAT charged. The customer, who pays no VAT in the absence of his payment of the consideration, is also not required to be relieved of a (notional) charge by means of a deduction.

(13) Also expressly stated in the judgments of 3 September 2014, GMAC UK (C?589/12, EU:C:2014:2131, paragraph 31), and of 26 January 2012, Kraft Foods Polska (C?588/10, EU:C:2012:40, paragraph 26).

(14) Judgment of 3 July 1997, Goldsmiths (C?330/95, EU:C:1997:339, paragraph 18).

(15) Judgment of 15 May 2014, Almos Agrárkülkereskedelmi (C?337/13, EU:C:2014:328, paragraph 23).

(16) But only insofar as the purpose of the exception is thereby preserved: to this effect, see what is now settled case-law of the Court of Justice on VAT law — see: judgments of 21 March 2013, PFC Clinic (C?91/12, EU:C:2013:198, paragraph 23); of 14 June 2007, Horizon College (C?434/05, EU:C:2007:343, paragraph 16); of 20 June 2002, Commission v Germany (C?287/00, EU:C:2002:388, paragraph 47), and my Opinion in Brockenhurst College (C?699/15, EU:C:2016:991, paragraph 41). In essence, by these formulations, the Court of Justice is not calling for a narrow interpretation, but rather for a precise interpretation of the facts of an exception.

(17) In this respect, the judgment of 15 May 2014, Almos Agrárkülkereskedelmi (C?337/13, EU:C:2014:328, paragraph 25) is correct.

(18) Cf. only judgment of 9 July 2015, Salomie and Oltean (C?183/14, EU:C:2015:454, paragraph 62 and the case-law cited.

(19) Judgments of 6 December 2012, Bonik (C?285/11, EU:C:2012:774, paragraph 42), and of 21 June 2012, Mahagében (C?80/11 and C?142/11, EU:C:2012:373, paragraph 48).

(20) Judgments of 3 July 1997, Goldsmiths (C?330/95, EU:C:1997:339, paragraph 15); of 26 January 2012, Kraft Foods Polska (C?588/10, EU:C:2012:40, paragraph 27); of 15 May 2014, Almos Agrárkülkereskedelmi (C?337/13, EU:C:2014:328, paragraph 22); of 3 September 2014, GMAC UK (C?589/12, EU:C:2014:2131, paragraph 37); and of 2 July 2015, NLB Leasing (C?209/14, EU:C:2015:440, paragraph 35).

(21) The Court of Justice mentions a principle of interpretation in the judgment of 13 March 2014, Malburg (C?204/13, EU:C:2014:147, paragraph 43).

(22) Judgments of 7 September 1999, Gregg (C?216/97, EU:C:1999:390, paragraph 20); of 16 October 2008, Canterbury Hockey Club and Canterbury Ladies Hockey Club (C?253/07, EU:C:2008:571, paragraph 30); and of 11 June 1998, Fischer (C?283/95, EU:C:1998:276, paragraph 22).

(23) Judgments of 13 March 2008, Securenta (C?437/06, EU:C:2008:166, paragraph 25), and of 1 April 2004, Bockemühl (C?90/02, EU:C:2004:206, paragraph 39).

(24) Judgments of 13 March 2014, Malburg (C?204/13, EU:C:2014:147, paragraph 41); of 21 April 2005, HE (C?25/03, EU:C:2005:241, paragraph 57); of 15 December 2005, Centralan Property (C?63/04, EU:C:2005:773, paragraph 51); and my opinion in Centralan Property (C?63/04, EU:C:2005:185, point 25).

(25) According to the judgment of 24 October 1996, Elida Gibbs (C?317/94, EU:C:1996:400, paragraph 23).

(26) Judgment of 3 July 1997, Goldsmiths (C?330/95, EU:C:1997:339, paragraph 18).

(27) Judgment of 14 May 1974, Nold v Commission (4/73, EU:C:1974:51, paragraph 14).

(28) For this formulation, see my opinion in G4S Secure Solutions (C?157/15, EU:C:2016:382, paragraph 98), based on the Conseil constitutionnel (Constitutional Council, France), decisions No 2015-527 QPC of 22 December 2015 (FR:CC:2015:2015.527.QPC, paragraphs 4 and 12), and No 2016-536 QPC of 19 February 2016 (FR:CC:2016:2016.536.QPC, paragraphs 3 and 10); similarly the French Conseil d'État (Council of State), judgment No 317827 of 26 October 2011 (FR:CEASS:2011:317827.20111026); see also the Bundesverfassungsgericht (Federal Constitutional Court, Germany), BVerfGE 120, 274, 318 and 319 (DE:BVerfG:2008:rs20080227.1bvr037007, paragraph 218).

(29) See e.g., judgment of 4 May 2016, Pillbox 38 (C?477/14, EU:C:2016:324, paragraph 48 and the case-law cited); similarly in VAT law: judgments of 2 September 2015, CGIL and INCA (C?309/14, EU:C:2015:523, paragraph 24); of 26 April 2012, Commission v Netherlands (C?508/10, EU:C:2012:243, paragraph 75); and of 26 March 2015, Macikowski (C?499/13, EU:C:2015:201, paragraph 48 et seq.).

(30) Judgment of 3 July 1997, Goldsmiths (C?330/95, EU:C:1997:339).

(31) Judgment of 19 September 2000, Schmeink & Cofreth and Strobel (C?454/98, EU:C:2000:469, paragraph 58 et seq.).

(32) Judgment of 19 September 2000, Schmeink & Cofreth and Strobel (C?454/98, EU:C:2000:469, paragraph 57 et seq.).

(33) Judgment of 19 September 2000, Schmeink & Cofreth and Strobel (C?454/98, EU:C:2000:469, paragraphs 60 and 63), confirmed by judgments of 27 September 2007, Collée (C?146/05, EU:C:2007:549, paragraph 35), and of 6 November 2003, Karageorgou (C?78/02 and C?80/02, EU:C:2003:604, paragraph 50).

(34) Judgment of 3 July 1997, Goldsmiths (C?330/95, EU:C:1997:339, paragraph 18).

(35) Nobody would expect an employee of the tax authority to pre-finance from their own private resources the tax liability of the taxable persons they assess.

(36) It has already happened that a bank settled the debts of tradesmen whose contractor had become insolvent in order to prevent further damage to its image — see Bundesfinanzhof (Federal Finance Court, Germany), judgment of 19 October 2001 — V R 75/98, UR 2002, 217.

(37) Judgment of 29 March 2001, Commission v France (C?404/99, EU:C:2001:192, paragraph 40 et seq.).

(38) Judgment of 17 September 2002, Town & County Factors (C?498/99, EU:C:2002:494, paragraph 21 et seq.).