Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

7 April 2016*

(Reference for a preliminary ruling — Taxation — VAT — Article 4(3) TEU — Directive 2006/112/EC — Insolvency — Procedure for an arrangement with creditors — Partial payment of VAT debts)

In Case C-546/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunale di Udine (District Court, Udine, Italy), made by decision of 30 October 2014, received at the Court on 28 November 2014, in the proceedings brought by

Degano Trasporti Sas di Ferruccio Degano & C., in liquidation,

intervening party:

Pubblico Ministero presso il Tribunale di Udine,

THE COURT (Second Chamber),

composed of M. Ilešič, President of the Chamber, C. Toader, A. Rosas, A. Prechal and E. Jarašiūnas (Rapporteur), Judges,

Advocate General: E. Sharpston,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— Degano Trasporti Sas di Ferruccio Degano & C., in liquidation, by P. Bregalanti, avvocato,

— the Italian Government, by G. Palmieri, acting as Agent, and by G. De Bellis, avvocato dello Stato,

— the Spanish Government, by A. Gavela Llopis, acting as Agent,

— the European Commission, by F. Tomat, A. Caeiros and L. Lozano Palacios, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 14 January 2016,

gives the following

* Language of the case: Italian.

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 4(3) TEU and 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').

2 The request has been made in the context of an application for an arrangement with creditors brought by Degano Trasporti Sas di Ferruccio Degano & C., in liquidation ('Degano Trasporti'), before the Tribunale di Udine (District Court, Udine, Italy).

Legal context

EU law

3 Pursuant to Article 2(1)(a), (c) and (d) of the VAT Directive, the supply of goods or services for consideration within the territory of a Member State by a taxable person acting as such and the importation of goods are subject to value added tax ('VAT').

4 Article 250(1) of the VAT Directive provides:

'Every taxable person shall submit a VAT return setting out all the information needed to calculate the tax that has become chargeable and the deductions to be made including, in so far as is necessary for the establishment of the basis of assessment, the total value of the transactions relating to such tax and deductions and the value of any exempt transactions.'

5 Under the first paragraph of Article 273 of the VAT Directive:

'Member States may impose other obligations which they deem necessary to ensure the correct collection of VAT and to prevent evasion, subject to the requirement of equal treatment as between domestic transactions and transactions carried out between Member States by taxable persons and provided that such obligations do not, in trade between Member States, give rise to formalities connected with the crossing of frontiers.'

Italian law

6 Royal Decree No 267 laying down provisions governing bankruptcy, arrangement with creditors, judicial administration and compulsory administrative liquidation (Regio Decreto n. 267, recante 'Disciplina del fallimento, del concordato preventivo, dell'amministrazione controllata e della liquidazione coatta amministrativa') of 16 March 1942 (GURI No 81 of 6 April 1942), in the version applicable to the facts at issue in the main proceedings ('the Law on bankruptcy'), governs, in Article 160 et seq., the procedure for an arrangement with creditors.

7 By that procedure, which seeks to avoid a declaration of bankruptcy, a trader in critical difficulties or a state of insolvency proposes to its creditors to make its assets available in order to pay back in full the preferential creditors and partially pay back unsecured creditors. The arrangement may however provide for a partial repayment of certain categories of preferential creditors if an independent expert states that those creditors would not receive better treatment if the trader went bankrupt.

8 The procedure for the arrangement with creditors, in which the Public Prosecutor participates, starts with the trader's application before the competent court. That court rules, first of all, on the admissibility of the application, after having determined that the legal conditions for the arrangement are satisfied. Next, the creditors to whom the debtor does not offer full repayment are called upon to

vote on the proposal, which must be approved by the creditors admitted to vote who represent the majority of the total amount of their claims. Finally, if that majority is reached, the court validates the arrangement after ruling on any opposition by dissenting creditors to the arrangement and determines again that the legal conditions are satisfied. The arrangement accordingly validated is binding on all the creditors.

9 Moreover, Article 182ter of the Law on bankruptcy, entitled 'Tax settlement', provides that, by the plan referred to in Article 160 of that law, the debtor may propose the payment, partial and/or delayed, of taxes and ancillary claims of the tax authorities, as well as contributions and ancillary claims made by the compulsory social security institutions, as regards the part of the debt which is unsecured, even if they are not entered in the register, with the exception of taxes constituting the European Union's own resources. As regards, however, VAT and tax retained but unpaid, the proposal made by the debtor may solely provide for deferred payment.

The dispute in the main proceedings and the question referred

10 On 22 May 2014, Degano Transport applied to the referring court in order to be admitted to a procedure for an arrangement with creditors. Indicating that it was in financial crisis, it seeks to liquidate its assets in order to pay certain preferential creditors in full and to pay a percentage of its debts to unsecured creditors and some lower-ranking preferential creditors which, in its view, could not, in any event, recover the entirety of their claims if a bankruptcy procedure were initiated. Included in those latter claims is a VAT debt which Degano Trasporti proposes to pay in part, without linking that proposal to the conclusion of a tax settlement.

11 The referring court, having to rule on the admissibility of Degano Transporti's application, states, in particular, that Article 182ter of the Law on bankruptcy prohibits agreeing, in the context of a tax settlement, on partial payment of State claims to VAT, considered to be privileged claims of the 19th rank, and only allows for staggered payment of such claims.

12 It states that, according to the case-law of the Corte Suprema di Cassazione (Supreme Court of Cassation, Italy), that prohibition, although set out in Article 182ter of the Law on bankruptcy which governs tax settlements, applies in all cases and cannot be derogated from, even in the context of a proposal for an arrangement with creditors. That interpretation of national law is required, according to the Corte Suprema di Cassazione, in the light of EU law, in particular Article 4(3) TEU and the VAT Directive, as interpreted in the judgments in *Commission* v *Italy* (C-132/06, EU:C:2008:412), *Commission* v *Italy* (C-174/07, EU:C:2008:704) and *Belvedere Costruzioni* (C-500/10, EU:C:2012:186).

13 The referring court questions, however, whether the obligation on Member States to take all legislative and administrative measures appropriate for the full recovery of VAT, laid down by EU law, in fact prevents the use of collective proceedings other than bankruptcy, under which the insolvent trader liquidates all of its assets to satisfy its creditors and envisages settling its VAT debt in an amount which is no less than what that trader would pay in the event of bankruptcy.

14 In those circumstances, the Tribunale di Udine (District Court, Udine) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'On a proper construction, do the principles and rules contained in Article 4(3) TEU and the VAT Directive, as already interpreted in the judgments of the Court of Justice in *Commission* v *Italy* (C-132/06, EU:C:2008:412), *Commission* v *Italy* (C-174/07, EU:C:2008:704) and *Belvedere Costruzioni* (C-500/10, EU:C:2012:186), also preclude a national rule (and, therefore, in respect of the case in the main proceedings, an interpretation of Articles 162 and 182ter of the Law on bankruptcy) under which a proposal for an arrangement with creditors with the liquidation of the debtor's assets, which provides for only partial payment of the State's claim in respect of VAT, is permissible where there is

no tax settlement and where, in respect of that claim, a larger payment in the event of bankruptcy is not foreseeable on the basis of an assessment by an independent expert and following the formal review of the court?'

The question referred for a preliminary ruling

15 As the referring court states that it is making the reference for a preliminary ruling at the stage of examining the admissibility of the application before it, whereas the strictly contentious stage of the arrangement procedure begins only after the approval of such an arrangement with creditors, when the minority creditors may raise an objection, it is necessary, first, to note that those elements do not preclude the Court's jurisdiction to hear the request for a preliminary ruling.

16 National courts may refer a question to the Court if there is a case pending before them and if they are called upon to give judgment in proceedings intended to lead to a decision of a judicial nature (judgments in *Grillo Star Fallimento*, C-443/09, EU:C:2012:213, paragraph 21, and *Torresi*, C-58/13 and C-59/13, EU:C:2014:2088, paragraph 19) and the choice of the most appropriate time to refer a question for a preliminary ruling lies within their exclusive jurisdiction (see, to that effect, judgments in *X*, C-60/02, EU:C:2004:10, paragraph 28, and *AGM-COS.MET*, C-470/03, EU:C:2007:213, paragraph 45).

17 Accordingly, the Court has jurisdiction to hear the present request for a preliminary ruling, although it has been made by the referring court at the non-contentious stage of examining the admissibility of the application before it, which seeks to open a procedure for an arrangement with creditors, which, as is apparent from the national procedural rules set out in paragraph 8 of the present judgment, is intended, if it is admissible, to result in a judicial decision, adopted in the presence of the public prosecutor, after the court has ruled on any oppositions brought by the minority creditors.

18 By its question, the referring court asks, in essence, whether Article 4(3) TEU and Articles 2, 250(1) and 273 of the VAT Directive preclude national legislation, such as that at issue in the main proceedings, interpreted as meaning that an insolvent trader may apply to a court to open a procedure for an arrangement with creditors for the purpose of settling its debts by liquidating its assets, in which that trader offers only partial payment of a VAT debt and establishes by an independent expert's report that that debt would not be repaid more fully in the event of that trader's bankruptcy.

19 In that regard, it should be borne in mind that it follows from Articles 2, 250(1) and 273 of the VAT Directive, and from Article 4(3) TEU that the Member States are required to take all legislative and administrative measures appropriate for ensuring collection of all the VAT due on their territory (judgments in *Commission* v *Italy*, C-132/06, EU:C:2008:412, paragraph 37; *Belvedere Costruzioni*, C-500/10, EU:C:2012:186, paragraph 20; *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraph 25; and *WebMindLicenses*, C-419/14, EU:C:2015:832, paragraph 41).

20 Under the common system of VAT, the Member States are required to ensure compliance with the obligations to which taxable persons are subject, and they enjoy in that respect a certain latitude, inter alia, as to how they use the means at their disposal (judgments in *Commission* v *Italy*, C-132/06, EU:C:2008:412, paragraph 38, and *Belvedere Costruzioni*, C-500/10, EU:C:2012:186, paragraph 21).

21 That latitude is nevertheless limited by the obligation to ensure effective collection of the EU's own resources and not to create significant differences in the manner in which taxable persons are treated, either within a Member State or throughout the Member States. The VAT Directive must be interpreted in accordance with the principle of fiscal neutrality inherent in the common system of VAT, according to which economic operators carrying out the same transactions must not be treated differently in relation to the levying of VAT. Any action by the Member States concerning the

collection of VAT must comply with that principle (see, to that effect, judgments in *Commission* v *Italy*, C-132/06, EU:C:2008:412, paragraph 39; *Commission* v *Germany*, C-539/09, EU:C:2011:733, paragraph 74; and *Belvedere Costruzioni*, C-500/10, EU:C:2012:186, paragraph 22).

22 The European Union's own resources include, in particular, as provided in Article 2(1) of Council Decision 2007/436/EC, Euratom of 7 June 2007 on the system of the European Communities' own resources (OJ 2007 L 163, p. 17), revenue from the application of a uniform rate to the harmonised VAT basis of assessment determined according to European Union rules. There is thus a direct link between the collection of VAT revenue in compliance with the EU law applicable and the availability to the European Union budget of the corresponding VAT resources, since any lacuna in the collection of the first potentially causes a reduction in the second (judgment in *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraph 26 and the case-law cited).

23 In view of those factors, it is appropriate to examine whether the admission of a partial payment of a VAT claim by an insolvent trader, in the context of a procedure for an arrangement with creditors such as that laid down by the national legislation at issue in the main proceedings, is contrary to the obligation on Member States to ensure collection of all of the VAT due on their territory as well as the effective collection of the European Union's own resources.

24 In that regard, it should be noted that, as the Advocate General has stated in points 38 to 42 of her Opinion, the procedure for an arrangement with creditors, as described by the referring court and set out in paragraphs 6 to 8 of the present judgment, is subject to strict conditions of application which seek to provide guarantees as regards the recovery of privileged claims and therefore VAT claims.

25 Accordingly, first of all, the procedure for an arrangement with creditors entails that the insolvent trader liquidates the entirety of its assets to settle its debts. If those assets are insufficient to settle all of the debts, the partial payment of a privileged claim can be allowed only if an independent expert states that that claim would not be paid in a higher proportion in the event of the debtor being declared bankrupt. The procedure for an arrangement with creditors therefore appears to enable it to be established that, because of the trader's insolvency, the Member State concerned is unable to recover a higher proportion of its VAT claim.

26 Next, since the proposal for an arrangement with creditors is submitted to the vote of all creditors to whom the debtor does not propose full repayment of their claim and since it must be approved by the creditors entitled to vote who represent a majority of the total claims held by those creditors, the procedure for an arrangement with creditors gives the Member State concerned the opportunity to vote against a proposal for partial payment of a VAT claim if, inter alia, it disagrees with the independent expert's conclusions.

27 Finally, even if that proposal is adopted, notwithstanding that negative vote, since the arrangement with creditors has to be validated by the court hearing the case after it has ruled on any objections of creditors disagreeing with the proposal for the arrangement, the procedure for the arrangement with creditors allows the Member State concerned, by bringing an opposition, to again dispute an arrangement with creditors providing for a partial payment of a VAT claim and allows that court to carry out a review.

28 In the light of those circumstances, the admission of a partial payment of a VAT claim by an insolvent trader in the context of an arrangement with creditors, which, unlike the measures at issue in the cases which gave rise to the judgments in *Commission* v *Italy* (C-132/06, EU:C:2008:412) and *Commission* v *Italy* (C-174/07, EU:C:2008:704) to which the referring court refers, does not constitute a general and indiscriminate waiver of collecting VAT, is not contrary to the obligation on Member States to ensure collection of all of the VAT due on their territory as well as the effective collection of the European Union's own resources.

29 Consequently, the answer to the question referred is that Article 4(3) TEU and Articles 2, 250(1) and 273 of the VAT Directive do not preclude national legislation, such as that at issue in the main proceedings, interpreted as meaning that an insolvent trader may apply to a court to open a procedure for an arrangement with creditors for the purpose of settling its debts by liquidating its assets, in which that trader offers only partial payment of a VAT debt and establishes by an independent expert's report that that debt would not be repaid more fully in the event of that trader's bankruptcy.

Costs

30 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:

Article 4(3) TEU and Articles 2, 250(1) and 273 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax do not preclude national legislation, such as that at issue in the main proceedings, interpreted as meaning that an insolvent trader may apply to a court to open a procedure for an arrangement with creditors for the purpose of settling its debts by liquidating its assets, in which that trader offers only partial payment of a value added tax debt and establishes by an independent expert's report that that debt would not be repaid more fully in the event of that trader's bankruptcy.

[Signatures]