Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

20 May 2021 *

(Reference for a preliminary ruling – Taxation – Common system of value added tax (VAT) – Directive 2006/112/EC – Article 205 – Persons liable for payment of VAT to the public exchequer – Joint and several liability of the recipient of a taxable supply which has exercised its right to deduct VAT knowing that the person liable for payment of that tax would not pay it – Obligation of such a recipient to pay the VAT not paid by the person liable for payment and the default interest due on account of that person's failure to pay the VAT)

In Case C-4/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Varhoven administrativen sad (Supreme Administrative Court, Bulgaria), made by decision of 16 December 2019, received at the Court on 7 January 2020, in the proceedings

'ALTI' OOD

v

Direktor na Direktsia 'Obzhalvane i danachno-osiguritelna praktika' Plovdiv pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite,

THE COURT (First Chamber),

composed of J.-C. Bonichot, President of the Chamber, L. Bay Larsen, C. Toader, M. Safjan (Rapporteur) and N. Jääskinen, Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Direktor na Direktsia 'Obzhalvane i danachno-osiguritelna praktika' Plovdiv pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite, by G. Arnaudov,

– the Bulgarian Government, by L. Zaharieva and E. Petranova, acting as Agents,

* Language of the case: Bulgarian.

– the European Commission, by A. Armenia and Y. Marinova, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 14 January 2021,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 205 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1, and corrigendum OJ 2018 L 329, p. 53).

2 The request has been made in proceedings between 'ALTI' OOD and the Direktor na Direktsia 'Obzhalvane i danachno-osiguritelna praktika' Plovdiv pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite (Director of the 'Appeals and Tax/Social Insurance Practice' Directorate, responsible for the city of Plovdiv, within the Central Administration of the National Revenue Agency, Bulgaria) ('the director'), concerning the joint and several liability of ALTI for the payment of value added tax (VAT) together with default interest.

Legal context

EU law

3 Article 193 of Directive 2006/112 states:

'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 199b and Article 202.'

4 Articles 194 to 200 and 202 to 204 of that directive provide, in essence, that persons other than a taxable person carrying out a taxable supply of goods or services may or shall be regarded as liable for VAT.

5 Article 205 of that directive provides:

'In the situations referred to in Articles 193 to 200 and Articles 202, 203 and 204, Member States may provide that a person other than the person liable for payment of VAT is to be held jointly and severally liable for payment of VAT.'

Bulgarian law

6 Headed 'Liability in the event of abuse', Article 177 of the Zakon za danaka varhu dobavenata stoynost (Law on value added tax) (DV No 63 of 4 August 2006), in the version applicable at the material time ('the Law on VAT'), states:

'(1) A registered person who is the recipient of a taxable supply shall be liable for unpaid tax due from another registered person where he has exercised the right to deduct input tax directly or indirectly connected with the tax due but not paid.

(2) Liability under paragraph 1 shall be incurred where the registered person knew or should have known that the tax would not be paid, and this is proved by the investigating authority in accordance with Articles 117 to 120 of the Danachno – osiguritelen protsesualen kodeks (Tax and Social Security Procedure Code).

(3) Knowledge shall be imputed to a person for the purposes of paragraph 2 where both of the following conditions are satisfied:

1. the tax due, within the meaning of paragraph 1, for a particular tax period has in fact not been paid by any upstream supplier in respect of a taxable supply of the same goods or services, whether or not in the same, a changed or a processed form;

2. the taxable supply is fictitious, circumvents legislation or is made at a price that differs significantly from the market price.

(4) Liability under paragraph 1 shall not be dependent on obtaining a specific advantage on account of the non-payment of the tax due.

(5) In the circumstances envisaged in paragraphs 2 and 3, the upstream supplier of the taxable person who owes the unpaid tax shall also be liable.

(6) In the cases referred to in paragraphs 1 and 2, liability shall be enforced against the taxable person who is the direct recipient of the supply in respect of which the tax due has not been paid, and, where recovery fails, liability may be enforced against any downstream recipient in the chain of supply.

(7) Paragraph 6 shall also apply *mutatis mutandis* to upstream suppliers.'

7 Article 14 of the Tax and Social Security Procedure Code (DV No 105 of 29 December 2005) provides:

'Persons liable for payment shall be any natural or legal person who:

1. is liable for taxes or compulsory social security contributions;

2. is required to levy and pay taxes or compulsory social security contributions;

3. is liable for the debt of the persons referred to in paragraphs 1 and 2.'

8 Article 16 of that code provides:

‘(1) A person shall be liable under Article 14(3) if, in the circumstances provided for by law, he is obliged to pay the [VAT] or compulsory social security contribution of the person liable for that tax or contribution or of a person required to levy and pay taxes or compulsory social security contributions that have not been paid within the period prescribed.

(2) Persons liable under Article 14(3) shall be subject to the rules determining the rights and obligations of a person in proceedings in accordance with this code.

(3) The liability of persons liable under Article 14(3) shall include taxes and compulsory social security contributions, interest and recovery costs.’

9 Article 121 of the Zakon za zadalzheniata i dogovorite (Law on obligations and contracts) (DV No 275 of 22 November 1950) is worded as follows:

‘Except as provided for by law, joint and several liability of two or more debtors shall arise only where it has been agreed.’

10 Article 122 of that law states:

‘The creditor may demand enforcement of the entire debt from the joint and several debtor of his choice.

Proceedings brought against one of the joint and several debtors shall not affect the creditor’s right against the other debtors.’

11 Article 126 of that law provides:

‘If the failure to perform is attributable to only one of the debtors, the creditor may claim full compensation for damage from that debtor.

The other debtors shall be jointly and severally liable only for the amount originally payable.

Default by one joint and several debtor shall produce no effects in respect of the other debtors.’

12 Article 1 of the Zakon za lihvite varhu danatsi, taksi i drugi podobni darzhavni vzemania (Law on interest on taxes, charges and other similar debts owed to the State) (DV No 91 of 12 November 1957) provides:

‘The recovery of taxes, charges, deductions from profits, contributions to the budget and other similar debts owed to the State, whether or not subject to a levy, which have not been paid within the period prescribed for voluntary payment shall be subject to interest at the statutory rate.

The recovery of compulsory insurance contributions [which have not been paid] within the period prescribed for voluntary payment shall also be subject to interest at the statutory rate.

Interest on interest and on fines shall not be payable.’

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

13 ALTI is a limited liability company governed by Bulgarian law. In 2014, it acquired from 'FOTOMAG' EOOD, a single-member private limited company governed by Bulgarian law, a combine harvester, a tractor and a cart ('the agricultural equipment'), which had been the subject of an intra-Community acquisition by FOTOMAG from a company established in the United Kingdom. The supplies of the agricultural equipment to ALTI led to FOTOMAG issuing three invoices, each showing VAT. After it settled those invoices, ALTI exercised its right to deduct VAT and declared the relevant deductions in its tax returns for the April 2014 and June 2014 tax periods.

14 FOTOMAG was the subject of a tax adjustment procedure following which the Bulgarian tax authorities determined, in a tax assessment notice of 27 June 2016, that FOTOMAG had failed to pay almost all of the VAT declared in respect of the intra-Community acquisitions and calculated on the invoices issued to ALTI.

15 In a tax adjustment procedure initiated in respect of ALTI, the Bulgarian tax authorities found that ALTI and FOTOMAG had entrusted one and the same person with their accounting, the management of their bank accounts and the submission of their VAT returns, that FOTOMAG's acquisition of the agricultural equipment had been financed through a third-party company whose members were the managers of FOTOMAG and ALTI and that the transport of the combine harvester from the United Kingdom had been organised by a manager and representative of ALTI through another company. Those findings led the tax authorities to conclude that ALTI had itself organised the acquisition of the agricultural equipment by FOTOMAG through an intra-Community acquisition in order for VAT to be charged improperly and that ALTI knew that FOTOMAG would not pay the VAT on the three invoices in question. The tax authorities also took the view that, since the transaction between FOTOMAG and ALTI was intended to circumvent legislation, within the meaning of Article 177(3)(2) of the Law on VAT, ALTI should have known that the VAT would not be paid by FOTOMAG, for the purpose of that provision.

16 In those circumstances, the Bulgarian tax authorities, in a tax assessment notice of 23 February 2018 issued to ALTI and corrected by a tax assessment notice of 6 March 2018, found ALTI to be jointly and severally liable pursuant to Article 177(3)(2) of the Law on VAT for the VAT not paid by FOTOMAG.

17 ALTI lodged an administrative appeal with the director, claiming, inter alia, that the subjective element required by Article 177(3)(2) of the Law on VAT, namely that ALTI should have known that the VAT would not be paid by FOTOMAG, was lacking.

18 That administrative appeal was dismissed by the director and ALTI brought an action before the Administrativen sad – Plovdiv (Administrative Court, Plovdiv, Bulgaria). By judgment of 22 March 2019, that court dismissed ALTI's action against the tax assessment notice as unfounded.

19 The Administrativen sad – Plovdiv (Administrative Court, Plovdiv) considered that it was apparent from the information gathered during the procedure that ALTI should have known that FOTOMAG would not perform its obligation to pay the VAT. In that regard, that court found, inter alia, that (i) in reality the relationship between ALTI and FOTOMAG went beyond a normal business relationship; (ii) FOTOMAG had never carried on business in connection with

the sale of agricultural equipment and had no experience at all in that field; (iii) the managing director and shareholder of the third-party company that lent funds to FOTOMAG for the purchase of the agricultural equipment were the managers of ALTI and FOTOMAG, respectively; and (iv) one and the same person had carried out the bank transfers between ALTI, FOTOMAG and that third-party company, kept the accounts of ALTI, FOTOMAG and the company that negotiated the transport of the agricultural equipment from the United Kingdom, and submitted ALTI's and FOTOMAG's tax returns. That court concluded that the purpose of the relationship between ALTI and FOTOMAG was to circumvent legislation and that, pursuant to Article 177(3)(2) of the Law on VAT in conjunction with Article 16(3) of the Tax and Social Security Procedure Code, ALTI was obliged to pay not only the tax itself but also default interest due on account of the failure to pay that tax by the person liable for payment.

20 ALTI is contesting the judgment of the Administrativen sad – Plovdiv (Administrative Court, Plovdiv) before the Varhoven administrativen sad (Supreme Administrative Court, Bulgaria).

21 In its appeal, ALTI claims, inter alia, that while, in accordance with the case-law of the Bulgarian courts, the recipient of a taxable supply may incur liability, on the basis of Article 177(3)(2) of the Law on VAT, where it has exercised its right of deduction in respect of the tax due but not paid by its supplier, that liability does not include default interest due on account of the failure to pay that tax by the person liable for payment.

22 The referring court states that, under Article 177(3)(2) of the Law on VAT, the recipient of a taxable supply is liable for the tax due but not paid by another person where the recipient has exercised the right to deduct the input VAT linked directly or indirectly to the VAT due and not paid and that that joint and several liability is incurred where the recipient knew or should have known that that tax would not be paid. That provision is consistent with Article 205 of Directive 2006/112, as is apparent, inter alia, from the judgment of 11 May 2006, *Federation of Technological Industries and Others* (C-384/04, EU:C:2006:309).

23 However, in determining the scope of that joint and several liability, the Bulgarian legislature did not expressly state in Article 177 of the Law on VAT that the recipient of the supply is liable not only for the unpaid tax but also for default interest due from the date on which that tax became chargeable. The referring court states that such an obligation might nevertheless be inferred from Article 16(3) of the Tax and Social Security Procedure Code, even though contradictory judgments have been delivered by the Bulgarian Supreme Administrative Court on this point. In that context, the referring court explains that it is unsure whether Article 205 of Directive 2006/112 and the principle of proportionality preclude the inclusion, in the system of joint and several liability in question, of default interest due on account of the non-payment of the tax by the person liable for payment and, consequently, preclude national legislation such as Article 16(3) of that code.

24 In those circumstances, the Varhoven administrativen sad (Supreme Administrative Court) decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Are Article 205 of [Directive 2006/112] and the principle of proportionality to be interpreted as meaning that the joint and several liability of a registered person, which is the recipient of a taxable supply, for the value added tax not paid by its supplier also includes, in addition to the supplier's principal debt (the value added tax debt), the accessory obligation to pay

compensation for late payment in the amount of the statutory interest on the principal debt from the beginning of the debtor's default until the issuance of the tax assessment notice by which the joint and several liability is established or until the discharge of the debt?

(2) Are Article 205 of [Directive 2006/112] and the principle of proportionality to be interpreted as precluding a national provision such as Article 16(3) of the [Tax and Social Security Procedure Code], according to which a third party's liability for unpaid taxes of a taxable person includes the taxes and the interest?'

Consideration of the questions referred

25 By its two questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 205 of Directive 2006/112, read in the light of the principle of proportionality, must be interpreted as precluding national legislation pursuant to which the person designated as being jointly and severally liable, for the purpose of that article, is required to pay, in addition to the VAT not paid by the person liable for payment of that tax, the default interest on that amount, due from the person liable for payment.

26 In that regard, it should be noted that, as set out in Article 205 of Directive 2006/112, in the situations referred to in Articles 193 to 200 and 202 to 204 of that directive, Member States may provide that a person other than the person liable for payment of VAT is to be held jointly and severally liable for payment of VAT.

27 Articles 193 to 200 and 202 to 204 of Directive 2006/112 determine the persons liable for payment of VAT, in accordance with the purpose of Section 1 of Chapter 1 of Title XI of that directive, headed 'Persons liable for payment of VAT to the tax authorities'. Although Article 193 of that directive provides, as the basic rule, that VAT is payable by any taxable person carrying out a taxable supply of goods or services, the wording of that article states that other persons may or shall be liable for payment of VAT in the situations referred to in Articles 194 to 199b and 202 of that directive.

28 It is apparent from the context formed by Articles 193 to 205 of Directive 2006/112 that Article 205 of that directive is part of a set of provisions aimed at identifying the person liable for payment of VAT in various situations. Those provisions thereby seek to ensure for the public exchequer the efficient collection of VAT from the most appropriate person in the light of the specific situation, particularly where the parties to the contract are not in the same Member State or where the transaction subject to VAT relates to supplies the specific nature of which makes it necessary to identify a person other than that referred to in Article 193 of that directive.

29 In principle, therefore, Article 205 of Directive 2006/112 allows Member States to adopt, for the efficient collection of VAT, measures pursuant to which a person other than the person normally liable for that tax under Articles 193 to 200 and 202 to 204 of that directive is jointly and severally liable for payment of that tax.

30 That interpretation is also supported by the judgment of 21 December 2011, *Vlaamse Oliemaatschappij* (C-499/10, EU:C:2011:871, paragraph 19 and the case-law cited), relating to the interpretation of Article 21(3) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of

value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1), as amended by Council Directive 2001/115/EC of 20 December 2001 (OJ 2002 L 15, p. 24), which was equivalent to Article 205 of Directive 2006/112.

31 However, since Article 205 of Directive 2006/112 specifies neither the persons that Member States may designate as joint and several debtors nor the situations in which such designation may be made, it is for the Member States to determine the conditions and arrangements under which the joint and several liability provided for in that article will be incurred.

32 In that regard, it should be borne in mind that, in the exercise of that power, Member States must observe the general principles of law that form part of the EU legal order, which include, in particular, the principles of legal certainty and of proportionality (judgment of 21 December 2011, *Vlaamse Oliemaatschappij*, C-499/10, EU:C:2011:871, paragraph 20 and the case-law cited).

33 As regards specifically the principle of proportionality, the Court has held that, in accordance with that principle, Member States must employ means which, whilst enabling them effectively to attain the objectives pursued by their domestic laws, cause the least possible detriment to the objectives and principles laid down by the relevant EU legislation. Therefore, while it is legitimate for the measures adopted by the Member States to seek to preserve the rights of the public exchequer as effectively as possible, they must not go further than is necessary for that purpose (judgment of 21 December 2011, *Vlaamse Oliemaatschappij*, C-499/10, EU:C:2011:871, paragraphs 21 and 22 and the case-law cited).

34 Accordingly, exercise of the Member States' power to designate a joint and several debtor other than the person liable for payment of the tax in order to ensure efficient collection of that tax must be justified by the factual and/or legal relationship between the two persons concerned in the light of the principles of legal certainty and of proportionality. In particular, it is for Member States to specify the particular circumstances in which a person such as the recipient of a taxable supply is to be held jointly and severally liable for payment of the tax owed by the other party to the contract even though that person has paid that tax by paying the transaction price.

35 In that context, it should be recalled that preventing possible tax evasion, avoidance and abuse is an objective recognised and encouraged by EU legislation on the common system of VAT and that the effect of the principle that the abuse of rights is prohibited is to bar wholly artificial arrangements which do not reflect economic reality and are set up with the sole aim of obtaining a tax advantage (see, to that effect, judgment of 20 June 2013, *Newey*, C-653/11, EU:C:2013:409, paragraph 46).

36 The Court has thus ruled that Article 205 of Directive 2006/112 allows a Member State to hold a person jointly and severally liable for payment of VAT where, at the time of the supply to it, that person knew or ought to have known that the tax payable in respect of that supply, or of any previous or subsequent supply, would go unpaid, and to rely on presumptions in that regard, provided that such presumptions are not formulated in such a way as to make it practically impossible or excessively difficult for the taxable person to rebut them with evidence to the contrary, thereby creating a system of strict liability going beyond what is necessary to preserve the public exchequer's rights. Traders who take every precaution which could reasonably be required of them to ensure that their transactions do not form part of a chain that is fraudulent or amounts to an abuse must be able to rely on the legality of those transactions without the risk

of being made jointly and severally liable to pay the VAT due from another taxable person (see, to that effect, judgment of 11 May 2006, *Federation of Technological Industries and Others*, C-384/04, EU:C:2006:309, paragraphs 32 and 33 and the case-law cited).

37 The Court has also held that the fact that a person other than the person liable to pay the tax acted in good faith, exhibiting all the due diligence of a circumspect trader, that he took every reasonable measure in his power and that his participation in abuse or fraud is excluded are points to be taken into account in deciding whether that person can be obliged to account for the VAT owed (see, to that effect, judgment of 21 December 2011, *Vlaamse Oliemaatschappij*, C-499/10, EU:C:2011:871, paragraph 26 and the case-law cited).

38 In the present case, it is apparent from the order for reference that Article 177 of the Law on VAT, headed 'Liability in the event of abuse', provides, in paragraph 2, that a person is to be held jointly and severally liable for payment of the tax due where that person has exercised its right of deduction even though it knew or should have known that the person liable for payment did not intend to pay the tax, and it is for the investigating authority to prove that those conditions have been met. It is also apparent from the order for reference that Article 177(3)(2) of that law provides that, in order to be able to presume that the person concerned should have known that the person liable for payment did not intend to pay the tax due, not only must that tax not actually have been paid by any upstream supplier, but the taxable supply must also be fictitious, circumvent legislation or be made at a price that differs significantly from the market price.

39 It is apparent from both the order for reference and the written observations of the Bulgarian Government that such a presumption is rebuttable. Moreover, it is not apparent from the documents before the Court that it would be practically impossible or excessively difficult to rebut such a presumption. Nevertheless, it is for the referring court to ascertain whether the person concerned has the opportunity to prove, for that purpose, that it acted in good faith.

40 In those circumstances, it must be held that, as the referring court states, a provision such as Article 177 of the Law on VAT meets the requirements for the application of Article 205 of Directive 2006/112, as set out in paragraphs 36 and 37 above.

41 However, the referring court states that, while, under Article 177 of the Law on VAT, the persons referred to in that article can be held jointly and severally liable only for the payment of VAT, those persons may also be required, under Article 16(3) of the Tax and Social Security Procedure Code, to pay the default interest due on account of the failure to pay the VAT by the person liable for payment.

42 In that regard, it should be noted that although, according to the wording of Article 205 of Directive 2006/112, the joint and several liability provided for in that article relates only to the payment of VAT, that wording does not preclude Member States from being able to impose on the joint and several debtor all the elements relating to that tax, such as default interest due on account of the failure to pay the tax by the person liable for payment. Nevertheless, it should be pointed out that Member States may extend the system of joint and several liability so that it encompasses such elements only if such an extension is justified in the light of the objectives pursued by Article 205 of Directive 2006/112 and, as stated in paragraph 32 above, is consistent with the principles of legal certainty and of proportionality.

43 In that regard, it should be held that, where a rule of national law requiring a joint and several debtor to pay default interest relating to the principal debt serves to combat VAT abuse, it contributes to achieving the objective of ensuring the efficient collection of VAT for the public exchequer, pursued by Article 205 of Directive 2006/112. Furthermore, since the application of such a rule presupposes that it is proved that, in exercising its right of deduction, the other party to the contract with the person liable for payment of the tax due knew or should have known that the latter would not pay it, the obligation on that other party – which is deemed, as a result of its voluntary participation in VAT abuse, to have subscribed from the outset to the unlawful intention not to pay the tax on the part of the person liable for payment – to remedy the effects of the late payment of that tax, for which it is also answerable in part, appears to be proportionate and consistent with the principle of legal certainty.

44 Such an approach is also in accordance with the objective underlying Article 205 of Directive 2006/112, as described in paragraphs 28 and 29 above, which is to enable Member States to ensure for the public exchequer the efficient collection of VAT from the most appropriate persons in the light of the specific situation. In the case of VAT abuse such as that envisaged by the national legislation at issue in the main proceedings, the public exchequer must have the opportunity to recover, in the interests of efficiency, the tax due and all the elements relating thereto from each of the contracting parties which participated in that abuse.

45 In the light of all the foregoing, the answer to the questions referred is that Article 205 of Directive 2006/112, read in the light of the principle of proportionality, must be interpreted as not precluding national legislation pursuant to which the person held jointly and severally liable, for the purpose of that article, must pay, in addition to the VAT not paid by the person liable for payment of that tax, the default interest on that amount, due from the person liable for payment, where it is proved that, in exercising its right of deduction, it knew or should have known that the person liable for payment would not pay that VAT.

Costs

46 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

Article 205 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, read in the light of the principle of proportionality, must be interpreted as not precluding national legislation pursuant to which the person held jointly and severally liable, for the purpose of that article, must pay, in addition to the value added tax (VAT) not paid by the person liable for payment of that tax, the default interest on that amount, due from the person liable for payment, where it is proved that, in exercising its right of deduction, it knew or should have known that the person liable for payment would not pay that VAT.

[Signatures]