Reports of Cases

JUDGMENT OF THE COURT (Eighth Chamber)

8 May 2013 *

(Value added tax — Directive 2006/112/EC — Articles 18(c), 74 and 80 — Cessation of the taxable economic activity — Removal of the taxable person from the VAT register by the tax authorities — Retention of goods on which the VAT became deductible — Taxable amount — Open market value or purchase value — Determination at the time of the transaction — Direct effect of Article 74)

In Case C-142/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Administrativen sad — Varna (Bulgaria), made by decision of 9 March 2012, received at the Court on 21 March 2012, in the proceedings

Hristomir Marinov, acting on behalf of Lampatov — H — Hristomir Marinov,

v

Direktor na Direktsia 'Obzhalvane i upravlenie na izpalnenieto' – grad Varna pri Tsentralno upravlenie na Natsionalna agentsia za prihodite,

THE COURT (Eighth Chamber),

composed of E. Jarašiūnas (Rapporteur), President of the Chamber, A. Ó Caoimh and C. Toader, Judges,

Advocate General: N. Wahl,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— the Direktor na Direktsia 'Obzhalvane i upravlenie na izpalnenieto' – grad Varna pri Tsentralno upravlenie na Natsionalna agentsia za prihodite, by S. Zlateva, acting as Agent,

— the Bulgarian Government, by Y. Atanasov and T. Ivanov, acting as Agents,

— the European Commission, by D. Roussanov and C. Soulay, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

* Language of the case: Bulgarian.

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 18(c), 74 and 80 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 proceedings between Mr Marinov, acting on behalf of Lampatov — H — Hristomir Marinov ('Marinov'), and the Direktor na Direktsia 'Obzhalvane i upravlenie na izpalnenieto' — grad Varna pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite (Director of the Varna 'Appeals and Administration of Enforcement' Directorate of the Central Office of the National Revenue Agency; 'the Direktor'), concerning an amended tax assessment notice in relation to value added tax ('VAT').

Legal context

European Union law

3 Article 18 of the VAT Directive provides:

'Member States may treat each of the following transactions as a supply of goods for consideration:

(a) the application by a taxable person for the purposes of his business of goods produced, constructed, extracted, processed, purchased or imported in the course of such business, where the VAT on such goods, had they been acquired from another taxable person, would not be wholly deductible;

(b) the application of goods by a taxable person for the purposes of a non-taxable area of activity, where the VAT on such goods became wholly or partly deductible upon their acquisition or upon their application in accordance with point (a);

(c) with the exception of the cases referred to in Article 19, the retention of goods by a taxable person, or by his successors, when he ceases to carry out a taxable economic activity, where the VAT on such goods became wholly or partly deductible upon their acquisition or upon their application in accordance with point (a).'

4 The first paragraph of Article 19 of that directive reads:

'In the event of a transfer, whether for consideration or not or as a contribution to a company, of a totality of assets or part thereof, Member States may consider that no supply of goods has taken place and that the person to whom the goods are transferred is to be treated as the successor to the transferor.'

5 Article 72 of the VAT Directive provides:

'For the purposes of this Directive, "open market value" shall mean the full amount that, in order to obtain the goods or services in question at that time, a customer at the same marketing stage at which the supply of goods or services takes place, would have to pay, under conditions of fair competition, to a supplier at arm's length within the territory of the Member State in which the supply is subject to tax.

Where no comparable supply of goods or services can be ascertained, "open market value" shall mean the following:

(1) in respect of goods, an amount that is not less than the purchase price of the goods or of similar goods or, in the absence of a purchase price, the cost price, determined at the time of supply;

…'

6 Under Article 73 of the VAT Directive:

'In respect of the supply of goods or services, other than as referred to in Articles 74 to 77, the taxable amount shall include everything which constitutes consideration obtained or to be obtained by the supplier, in return for the supply, from the customer …'

7 Article 74 of the VAT Directive provides:

'Where a taxable person applies or disposes of goods forming part of his business assets, or where goods are retained by a taxable person, or by his successors, when his taxable economic activity ceases, as referred to in Articles 16 and 18, the taxable amount shall be the purchase price of the goods or of similar goods or, in the absence of a purchase price, the cost price, determined at the time when the application, disposal or retention takes place.'

8 Article 80 of the VAT Directive is worded as follows:

'1. In order to prevent tax evasion or avoidance, Member States may in any of the following cases take measures to ensure that, in respect of the supply of goods or services involving family or other close personal ties, management, ownership, membership, financial or legal ties as defined by the Member State, the taxable amount is to be the open market value:

(a) where the consideration is lower than the open market value and the recipient of the supply does not have a full right of deduction under Articles 167 to 171 and Articles 173 to 177;

(b) where the consideration is lower than the open market value and the supplier does not have a full right of deduction under Articles 167 to 171 and Articles 173 to 177 and the supply is subject to an exemption under Articles 132, 135, 136, 371, 375, 376, 377, 378(2), 379(2) or Articles 380 to 390;

(c) where the consideration is higher than the open market value and the supplier does not have a full right of deduction under Articles 167 to 171 and Articles 173 to 177.

For the purposes of the first subparagraph, legal ties may include the relationship between an employer and employee or the employee's family, or any other closely connected persons.

…'

Bulgarian law

9 In the version applicable to the main proceedings, the Bulgarian Law on value added tax (Zakon za danak varhu dobavenata stoynost, DV No 63 of 4 August 2006; 'the ZDDS') provides in Article 27:

'…

(3) In the case of the following transactions, the taxable amount shall be the open market value:

…

2. a supply of goods and/or of services as provided for under Article 111;

…’

10 Under Article 106 of the ZDDS:

‘(1) For the purposes of this Law, termination of registration (removal from the register) is a procedure under which, after being removed from the register, a person is no longer entitled to charge or to deduct VAT, save where this Law provides otherwise.

(2) Registration shall be terminated:

1. at the instigation of the registered person, provided that there is a reason for the — mandatory or voluntary — removal from the register;

2. at the instigation of the tax authority:

   (a) where it has found there to be a reason for the mandatory removal from the register;

   (b) in the situation referred to Article 176.’

11 Article 111 of the ZDDS provides as follows:

‘(1) At the time of removal from the register, the person shall be deemed to carry out transactions within the meaning of this Law through the medium of all the existing goods and/or services in respect of which he has deducted input tax in full or in part and which are:

1. assets within the meaning of the Law on Accounting [(Zakon za schetovodstvoto)]; or

2. assets within the meaning of the Law on Corporation Tax [(Zakon za korporativnoto podohodno oblagane)] which are distinct from those referred to in point 1.

…’

12 Paragraph 1(16) of the Supplement to the Law on Value Added Tax states that:

‘“Open market value” shall be the value, within the meaning of Paragraph 1(8) of the Supplement to the Code of Procedure for Taxation and Social Security [(Danachno-osiguritelnia protsesualen kodeks, DV No 105, 29 December 2005)], as determined in accordance with the methods set out in Paragraph 1(10) of the Supplement to the Code of Procedure for Taxation and Social Security.’

13 Paragraph 1(8) of the Supplement to the Code of Procedure for Taxation and Social Security provides:

‘“Open market value” shall be the amount, exclusive of VAT and excise duty, that would be payable under the same conditions on the same or similar goods or services in an arm’s length transaction.’

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

14 It emerges from the order for reference that Marinov was removed from the VAT register with effect from 4 November 2009 for non-compliance with the obligations laid down in the ZDDS and, more specifically, for non-payment of the VAT owed on the basis of the VAT declarations for the period from April to July 2009.

15 In 2010, Marinov was the subject of a tax audit relating to the period from 1 January 2007 to 4 November 2009. It was established in the course of that audit that Marinov had hired road vehicles under leasing contracts and had deducted VAT in respect of each lease to a total of BGN 28 426.64. At the time of its removal from the register, the company was in possession of the leased vehicles, as well as a number of other vehicles which it had acquired and in respect of which VAT had been deducted. The tax authorities stated in their amended assessment notice of 27 April 2011 that, at the time of the removal from the VAT register, Marinov had carried out taxable transactions within the meaning of Article 111 of the ZDDS with those assets.

16 In accordance with point (2) of Article 27(3) of the ZDDS, the tax authorities established the taxable amount for VAT in respect of the vehicles belonging to Marinov on the basis of their 'open market value', determined following an expert's report, and claimed back VAT in the amount of BGN 32 124.57 on that value.

17 Following the Direktor's rejection of Marinov's challenge of the amended tax assessment notice, Marinov brought an action before the Administrativen sad – Varna (Administrative Court, Varna). Before that court, it contested the evaluation of its assets on the basis of their 'open market value'. It claimed that the depreciation in value of those assets since their acquisition should have been taken into account, and requested that the court obtain an expert's report in order to determine the value of those assets in accordance with the accounting standards applicable on the day of its removal from the register.

18 The Direktor contests the action, contending that, in accordance with the national legislation, the 'open market value' to be taken into account is the purchase price to which Article 74 of the VAT Directive refers, since it is the price determined by supply and demand on the market.

19 As it must determine the taxable amount and the amount of VAT owed, the referring court raises the question whether Article 27(3)(2) of the ZDDS, which requires that the open market value of the assets be taken into account, is compatible with Articles 18(c), 74 and 80 of the VAT Directive.

20 The referring court first considers whether removal from the VAT register pursuant to Article 106(1) of the ZDDS comes within the scope of Article 18(c) of the VAT Directive.

21 It then addresses the question whether, if that is the case, Article 27(3)(2) of the ZDDS, under which the taxable amount is to be the open market value of the assets, is compatible with, on the one hand, Article 74 of the VAT Directive and, on the other, with Article 80 of that directive, which specifies the circumstances in which the taxable amount is to be the open market value. If those provisions are compatible, the referring court asks whether Article 74 of the VAT Directive has direct effect.

22 Lastly, pointing out that the Bulgarian Law on Value Added Tax does not take into account the condition of the assets, the referring court wishes to ascertain, in the event that Article 74 of the VAT Directive has direct effect, to what extent depreciations in value which have occurred since the assets were acquired are to be taken into account in determining the taxable amount for the purposes of VAT of transactions falling within the scope of Article 18(c) of that directive.

23 It was in those circumstances that the Administrativen sad – Varna decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘1. Is Article 18(c) of [the VAT Directive] to be interpreted as also covering cases in which the cessation of the taxable economic activity is attributable to the fact that the taxable person is no longer able to charge or deduct VAT because he has been removed from the VAT register?

2. Do Articles 74 and 80 of [the VAT Directive] preclude a provision of national law under which, in the event of the cessation of the taxable economic activity, the taxable amount of the transaction is to be the open market value of the assets in existence at the time of removal from the register?

3. Does Article 74 of [the VAT Directive] have direct effect?

4. Is significance to be attached to the length of the period from the purchase of the assets to the cessation of the taxable economic activity and to the depreciations in value which have occurred since the assets were purchased, for the purposes of determining the taxable amount in accordance with Article 74 of [the VAT Directive]?’

Consideration of the questions referred

The first question

24 By its first question, the referring court asks in essence whether Article 18(c) of the VAT Directive is to be interpreted as also covering the cessation of the taxable economic activity resulting from the removal of the taxable person from the VAT register.

25 In that regard, it must be recalled that, under Article 18(c) of the VAT Directive, the retention of goods by a taxable person, or by his successors, when he ceases to carry out a taxable economic activity, where the VAT on such goods became wholly or partly deductible may, with the exception of the cases referred to in Article 19 of that Directive, be treated as a supply of goods for consideration.

26 It is clear from the wording of Article 18(c) of the VAT Directive that it covers the cessation of the taxable economic activity in general, without differentiating between the causes or the circumstances of that cessation, and excluding only the cases referred to in Article 19 of that directive.

27 The main objective of Article 18(c) of the VAT Directive is to avoid a situation where the final consumption of goods on which the VAT became deductible is untaxed following the cessation of the taxable economic activity, regardless of the causes or circumstances of that cessation.

28 Accordingly, the answer to the first question is that, on a proper construction of Article 18(c) of the VAT Directive, that provision also covers the cessation of the taxable economic activity resulting from the removal of the taxable person from the VAT register.

The second and fourth questions

29 By its second and fourth questions, which it is appropriate to examine together, the referring court asks in essence whether Articles 74 and 80 of the VAT Directive are to be interpreted as precluding a provision of national law under which, in the event of the cessation of the taxable economic activity, the taxable amount of the transaction is to be the ‘open market value’ of the assets in existence at the time of that cessation and no account is taken of the change in value of those assets between the date of their acquisition and the date of the cessation of the taxable economic activity.

30 In that respect, it must be observed that the determination of the taxable amount of a transaction such as that contemplated in Article 18(c) of the VAT Directive is governed by Article 74, and not Article 80, of that directive. In accordance with the Court's case-law, the conditions for the application of Article 80 of the VAT Directive are exhaustive and national legislation cannot, on the basis of that provision, provide that the taxable amount is to be the open market value of the transaction in cases other than those listed thereunder (see Joined Cases C-621/10 and C-129/11 *Balkan and Sea Properties and Provadinvest* [2012] ECR, paragraphs 45, 51 and 52). It is not apparent from the order for reference that the situation under consideration falls within one of the cases listed in Article 80 of the VAT Directive.

31 Article 74 of the VAT Directive provides that, for transactions such as that at issue in the present case, the taxable amount is to be the purchase price of the goods or of similar goods or, in the absence of a purchase price, the cost price, determined at the time when those transactions take place. Article 74 of the VAT Directive constitutes a derogation from the general rule set out in Article 73.

32 It must be borne in mind that the Court has held that 'the purchase price, determined at the time of allocation', for the purposes of Article 74 of the VAT Directive, refers to the residual value of the goods at the time of allocation (see Joined Cases C-322/99 and C-323/99 *Fischer and Brandenstein* [2001] ECR I-4049, paragraph 80). In respect of an application of a good also covered by that provision, the Court has held that the taxable amount was the value of the good in question, determined at the time of the application, and which corresponds to the market price for a similar good, account being taken of the costs of transforming that good (see, inter alia, Case C-299/11 *Gemeente Vlaardingen* [2012] ECR, paragraph 30).

33 It follows that, in the event of the cessation of the taxable economic activity, the taxable amount of the transaction is the value of the goods in question determined at the time of that cessation, which therefore takes into account the change in the value of those assets between their acquisition and the cessation.

34 Under Article 27(3) of the ZDDS, the taxable amount of transactions such as that at issue in the main proceedings is the 'open market value', which is defined in Bulgarian law as the amount that would be payable under the same conditions for the same or similar goods or services in an arm's length transaction. It is for the referring court to determine whether the 'open market value' for the purposes of that provision, as interpreted and applied by the Bulgarian tax authorities, corresponds in practice to the residual value of goods at the date of the cessation of the taxable economic activity.

35 Accordingly, the answer to the second and fourth questions must be that Article 74 of the VAT Directive is to be interpreted as precluding a provision of national law under which, in the event of the cessation of the taxable economic activity, the taxable amount of the transaction is to be the open market value of the assets in existence at the time of that cessation, unless that value corresponds in practice to the residual value of those goods at that date and account is thus taken of the change in the value of those goods between the date of their acquisition and the date of the cessation of the taxable economic activity.

The third question

36 By its third question, the referring court asks if Article 74 of the VAT Directive has direct effect.

37 According to settled case-law of the Court, whenever the provisions of a directive appear, so far as their subject-matter is concerned, to be unconditional and sufficiently precise, they may be relied on before the national courts by individuals against the State where the State has failed to transpose the directive into national law within the time-limit or has transposed it incorrectly (see Case C-549/11 *Orfey Balgaria* [2012] ECR, paragraph 51 and the case-law cited).

38 It must be pointed out that Article 74 of the VAT Directive sets out, clearly and unconditionally, the criteria for determining the taxable amount in respect of the application of goods by a taxable person in the event of cessation of his taxable economic activity. That provision therefore meets those conditions.

39 Furthermore, it must be recalled that it is for the referring court, to the extent of its discretion under national law, to interpret and apply national law in conformity with the requirements of European Union law and, where such an interpretation is not possible, to disapply any provision of domestic law that would be contrary to those requirements (see, to that effect, *Balkan and Sea Properties and Provadinvest*, paragraph 54 and the case-law cited).

40 It follows that the answer to the third question is that Article 74 of the VAT Directive has direct effect.

Costs

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

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

1. **Article 18(c) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax is to be interpreted as also covering the cessation of the taxable economic activity as a result of the removal of the taxable person from the value added tax register.**

2. **Article 74 of Directive 2006/112 is to be interpreted as precluding a provision of national law under which, in the event of the cessation of the taxable economic activity, the taxable amount of the transaction is to be the open market value of the assets in existence at the time of that cessation, unless that value corresponds in practice to the residual value of those goods at that date and account is thus taken of the change in the value of those goods between the date of their acquisition and the date of the cessation of the taxable economic activity.**

3. **Article 74 of Directive 2006/112 has direct effect.**

[Signatures]