Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

5 April 2017*

(Reference for a preliminary ruling — Taxation — Value added tax — Directive 2006/112/EC — Articles 2 and 273 — National legislation providing for an administrative penalty and a criminal penalty for the same offences, relating to the non-payment of value added tax — Charter of Fundamental Rights of the European Union — Article 50 — Ne bis in idem principle — Identity of the accused or penalised person — Absence)

In Joined Cases C-217/15 and C-350/15,

TWO REQUESTS for a preliminary ruling under Article 267 TFEU from the Tribunale di Santa Maria Capua Vetere (District Court, Santa Maria Capua Vetere, Italy), made by decisions of 23 April and 23 June 2015, received at the Court on 11 May and 10 July 2015, in criminal proceedings against

Massimo Orsi (C-217/15),

Luciano Baldetti (C-350/15),

THE COURT (Fourth Chamber),

composed of T. von Danwitz (Rapporteur), President of the Chamber, E. Juhász, C. Vajda, K. Jürimäe and C. Lycourgos, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: V. Giacobbo-Peyronnel, Administrator,

having regard to the written procedure and further to the hearing on 8 September 2016,

after considering the observations submitted on behalf of:

— Mr Orsi, by V. Di Vaio, avvocato,

— Mr Baldetti, by V. Di Vaio and V. D'Amore, avvocati,

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

— the Czech Government, by J. Vláčil and M. Smolek, acting as Agents,

— the French Government, by G. de Bergues, D. Colas and F.-X. Bréchot, and by E. de Moustier and S. Ghiandoni, acting as Agents,

* Language of the case: Italian.

— the European Commission, by F. Tomat and M. Owsiany-Hornung and by H. Krämer, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 12 January 2017,

gives the following

Judgment

1 These requests for preliminary rulings concern the interpretation of Article 50 of the Charter of Fundamental Rights of the European Union ('the Charter') and of Article 4 of Protocol No 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR').

2 The requests have been made in the context of two criminal proceedings brought, respectively, against Mr Massimo Orsi and Mr Luciano Baldetti, as a result of offences committed by them relating to value added tax (VAT).

Legal context

The ECHR

3 Article 4 of Protocol 7 to the ECHR, entitled 'Right not to be tried or punished twice', provides:

'1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.

2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and the penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

3. No derogation from this Article shall be made under Article 15 of the Convention.'

European Union law

4 Article 2(1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1) determines the transactions subject to VAT.

5 Under Article 273 of that 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 Article 13(1) of the decreto legislativo n. 471, Riforma delle sanzioni tributarie non penali in materia di imposte dirette, di imposta sul valore aggiunto e di riscossione dei tributi, a norma dell'articolo 3, comma 133, lettera q), della legge 23 dicembre 1996, n. 662 (Legislative Decree No 471 on the reform of non-criminal tax penalties in the field of direct taxation, value added tax and tax collection, in accordance with Article 3(133q) of Law No 662 of 23 December 1996) of 18 December 1997 (Ordinary Supplement to GURI No 5 of 8 January 1998) is worded as follows:

'Any person who fails to pay, in whole or in part, within the prescribed periods, instalments, periodic payments, the equalisation payment or the balance of tax due on the tax return, after deduction in those cases of the amount of the periodic payments and instalments, even if they have not been paid, shall be liable to an administrative penalty amounting to 30% of each outstanding amount, even where, after the correction of clerical or calculation errors noted during the inspection of the annual tax return, it transpires that the tax is greater or that the deductible surplus is less. …'

7 Article 10a of the decreto legislativo n. 74, Nuova disciplina dei reati in materia di imposte sui redditi e sul valore aggiunto, a norma dell'articolo 9 della legge 25 giugno 1999, n. 205 (Legislative Decree No 74 adopting new rules on offences relating to direct taxes and value added tax, pursuant to Article 9 of Law No 205 of 25 June 1999) of 10 March 2000 (GURI No 76 of 31 March 2000, p. 4) ('Legislative Decree No 74/2000') provides:

'Any person who fails to pay, by the deadline fixed for the filing of the withholding agent's annual tax return, the withholding tax resulting from the certification issued to the taxpayers in respect of whom tax is withheld shall be liable to a term of imprisonment of between six months and two years in the case where that amount exceeds EUR 50 000 for each tax period.'

8 Article 10b of that decree, entitled 'Failure to pay VAT', states:

'Article 10a shall also apply, within the limits there determined, to any person who fails to pay the value added tax owed on the basis of the annual return by the deadline for the payment on account relating to the subsequent tax period.'

The main proceedings and the question referred for a preliminary ruling

9 During the tax periods at issue in the main proceedings, Mr Orsi was the legal representative of S.A. COM Servizi Ambiente e Commercio Srl and Mr Baldetti that of Evoluzione Maglia Srl.

10 Proceedings have been brought against Mr Orsi and Mr Baldetti before the Tribunale di Santa Maria Capua Vetere (District Court, Santa Maria Capua Vetere, Italy) with respect to the offence provided for in and punishable under Article 10b of Legislative Decree No 74/2000, read in conjunction with Article 10a thereof, on the ground that they failed, in their capacity as legal representatives of those companies, to pay within the time limit stipulated by law, VAT due on the basis of the annual return in respect of the tax periods at issue in the main proceedings. The amount of unpaid VAT, in each case, is more than EUR 1 million.

11 Those criminal proceedings were brought after the Agenzia delle Entrate (tax authorities) reported those offences to the Procura della Repubblica (public prosecutor). During those criminal proceedings, a precautionary seizure was carried out of the assets of both Mr Orsi and Mr Baldetti. Both Mr Orsi and Mr Baldetti submitted an application for review of that seizure.

12 Before those criminal proceedings were initiated, the amounts of VAT at issue in the main proceedings were subject to an assessment by the tax authorities, which not only calculated that tax liability, but also imposed a tax penalty on S.A. COM Servizi Ambiente e Commercio and on Evoluzione Maglia, equivalent to 30% of the amount of VAT owed. Following a transaction relating to those assessment measures, they became definitive, without being contested.

13 In those circumstances, the Tribunale di Santa Maria Capua Vetere (District Court, Santa Maria Capua Vetere) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'On a proper construction of Article 4 of Protocol No 7 to the ECHR and Article 50 of the Charter, is the provision made under Article 10b of Legislative Decree No 74/2000 consistent with EU law, in so far as it permits the criminal liability of a person to whom a final assessment by the tax authorities of the State has already been issued imposing an administrative penalty … to be assessed in respect of the same act or omission (non-payment of VAT)?'

Consideration of the question referred

14 By its question, the referring court asks, in essence, whether Article 50 of the Charter and Article 4 of Protocol No 7 to the ECHR must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which allows criminal proceedings to be brought for non-payment of VAT, after the imposition of a definitive tax penalty with respect to the same act or omission.

15 Since the referring court refers not only to Article 50 of the Charter, but also to Article 4 of Protocol No 7 to the ECHR, it should be noted that whilst, as Article 6(3) TEU confirms, fundamental rights recognised by the ECHR constitute general principles of the European Union's law and whilst Article 52(3) of the Charter provides that the rights contained in the Charter which correspond to rights guaranteed by the ECHR are to have the same meaning and scope as those laid down by that convention, the latter does not constitute, as long as the European Union has not acceded to it, a legal instrument which has been formally incorporated into EU law (judgments of 26 February 2013, *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraph 44, and of 15 February 2016, *N.*, C-601/15 PPU, EU:C:2016:84, paragraph 45 and the case-law cited). Therefore, the examination of the question referred must be undertaken solely in the light of the fundamental rights guaranteed by the Charter (see, to that effect, judgments of 28 July 2016, *Conseil des ministres*, C-543/14, EU:C:2016:605, paragraph 23 and the case-law cited, and of 6 October 2016, *Paoletti and Others*, C-218/15, EU:C:2016:748, paragraph 22).

16 As regards Article 50 of the Charter, it should be noted that tax penalties and criminal proceedings, such as those at issue in the main proceedings, which concern offences relating to VAT and seek to ensure the correct collection of that tax and to avoid fraud, constitute implementation of Articles 2 and 273 of Directive 2006/112 and of Article 325 TFEU and, therefore, of European Union law for the purposes of Article 51(1) of the Charter (see, to that effect, judgments of 26 February 2013, *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraphs 24 to 27, and of 8 September 2015, *Taricco and Others*, C-105/14, EU:C:2015:555, paragraphs 49, 52 and 53). Therefore, since provisions of national law dealing with criminal proceedings concern offences relating to VAT, such as those at issue in the main proceedings, they come within the scope of application of Article 50 of the Charter.

17 The application of the *ne bis in idem* principle guaranteed in Article 50 of the Charter presupposes in the first place, as the Advocate General stated in point 32 of his Opinion, that it is the same person who is the subject of the penalties or criminal proceedings at issue.

18 It follows from the wording itself of that article, according to which '[n]o one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law', that it prohibits prosecuting or imposing criminal sanctions on the same person more than once for the same offence.

19 That interpretation of Article 50 of the Charter is supported by the explanations relating to the Charter of Fundamental Rights (OJ 2007 C 303, p. 17), which must be taken into account with a view to its interpretation (see, to that effect, judgment of 26 February 2013, *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraph 20). Concerning that article, those explanations refer to the Court's case-law relating to the *ne bis in idem* principle, as recognised as a general principle of European Union law prior to the entry into force of the Charter. According to that case-law, that principle cannot, in any event, be infringed if it is not the same person who was sanctioned more than once for the same unlawful act (see, to that effect, inter alia, judgments of 7 January 2004, *Aalborg Portland and Others* v *Commission*, C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, EU:C:2004:6, paragraph 338, and of 18 December 2008, *Coop de France bétail et viande and Others* v *Commission*, C-101/07 P and C-110/07 P, EU:C:2008:741, paragraph 127).

20 The Court confirmed that case-law after the entry into force of the Charter (see, to that effect, judgment of 26 February 2013, *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraph 34).

21 In this case, it follows from the information contained in the orders for reference, confirmed both by certain information contained in the documents available to the Court and by the Italian Government during the hearing before the Court, that the tax penalties at issue in the main proceedings were imposed on two companies with legal personality, namely S.A. COM Servizi Ambiente e Commercio and Evoluzione Maglia, whereas the criminal proceedings at issue in the main proceedings relate to Mr Orsi and Mr Baldetti, who are natural persons.

22 It therefore appears, as the Advocate General noted in point 36 of his Opinion, that, in the two criminal proceedings at issue in the main proceedings, the tax penalty and the criminal charges concern distinct persons, namely, in Case C-217/15, S.A. COM Servizi Ambiente e Commercio, which was subject to a tax penalty, and Mr Orsi, against whom criminal proceedings have been brought, and, in Case C-350/15, Evoluzione Maglia, which was subject to a tax penalty, and Mr Baldetti, against whom criminal proceedings have been initiated, so that the condition for the application of the *ne bis in idem* principle, according to which the same person must be subject to the penalties and criminal proceedings at issue appears not to be satisfied, which is however to be determined by the referring court.

23 In that regard, the fact that criminal proceedings have been brought against Mr Orsi and Mr Baldetti in respect of acts or omissions committed in their capacity as legal representatives of companies which were subject to tax penalties is not capable of calling into question the conclusion reached in the previous paragraph.

24 Finally, in accordance with Article 52(3) of the Charter, in so far as Article 50 thereof contains a right corresponding to that provided for in Article 4 of Protocol No 7 to the ECHR, it is necessary to ensure that the above interpretation of Article 50 thereof does not disregard the level of protection guaranteed by the ECHR (see, by analogy, judgment of 15 February 2016, *N.*, C-601/15 PPU, EU:C:2016:84, paragraph 77).

25 According to the case-law of the European Court of Human Rights, the imposition of penalties, whether tax or criminal, does not constitute an infringement of Article 4 of Protocol No 7 to the ECHR where the penalties at issue concern natural or legal persons who are legally distinct (ECtHR, 20 May 2014, *Pirttimäki v. Finland*, CE:ECHR:2014:0520JUD00353211, § 51).

26 Since the condition that the same person must be subject to the penalties and proceedings at issue is not satisfied in the context of the main proceedings, it is not necessary to examine the other conditions for the application of Article 50 of the Charter.

27 Therefore, the answer to the question referred is that Article 50 of the Charter must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which permits criminal proceedings to be brought for non-payment of VAT, after the imposition of a definitive tax penalty with respect to the same act or omission, where that penalty was imposed on a company with legal personality, while those criminal proceedings were brought against a natural person.

Costs

28 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 (Fourth Chamber) hereby rules:

Article 50 of the Charter of Fundamental Rights of the European Union must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which permits criminal proceedings to be brought for non-payment of value added tax, after the imposition of a definitive tax penalty with respect to the same act or omission, where that penalty was imposed on a company with legal personality, while those criminal proceedings were brought against a natural person.

[Signatures]