Provisional text

JUDGMENT OF THE COURT (First Chamber)

23 November 2017 (*)

(Reference for a preliminary ruling — Value added tax (VAT) — Taxable amount — Sixth Directive 77/388/EEC — Second subparagraph of Article 11C(1) — Restriction of the right to reduce the taxable amount in the event of non-payment by the other party to the contract — Scope for implementation by the Member States — Proportionality of the period of pre-financing by the trader)

In Case C?246/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Commissione tributaria provinciale di Siracusa (Provincial Tax Court, Syracuse, Italy), made by decision of 7 March 2016, received at the Court on 28 April 2016, in the proceedings

Enzo Di Maura

v

Agenzia delle Entrate — Direzione Provinciale di Siracusa,

THE COURT (First Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, J?C. Bonichot (Rapporteur), A. Arabadjiev, S. Rodin and E. Regan, Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

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

– the United Kingdom Government, by J. Kraehling and G. Brown, acting as Agents, and E. Mitrophanous, Barrister,

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

after hearing the Opinion of the Advocate General at the sitting on 8 June 2017,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 11C(1) of the Sixth

Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the law of the Member State relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1) ('the Sixth Directive') and of the principles of proportionality, effectiveness of EU law and neutrality of value added tax (VAT).

2 The request has been made in proceedings between Enzo Di Maura and the Agenzia delle Entrate — Direzione Provinciale di Siracusa (Provincial Tax Authority, Syracuse, Italy) ('the tax authority'), concerning a tax assessment notice for the tax year 2004 and relating to the reduction of the VAT taxable amount.

Legal context

EU law

3 Article 11C(1) of the Sixth Directive, which governs the reduction of the taxable amount, states:

'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.

However, in the case of total or partial non-payment, Member States may derogate from this rule.'

Italian law

4 Article 26 of the decreto del presidente della Repubblica n. 633, Istituzione e disciplina dell'imposta sul valore aggiunto (Decree No 633 of the President of the Republic, Introduction and Regulation of value added tax) of 26 October 1972 (GURI No 292, of 11 November 1972), in the version applicable at the material time ('the Presidential Decree'), entitled 'Changes to the taxable amount or to the tax', states, in paragraph 2:

'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 if the taxable amount is reduced, 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 transaction 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.'

5 The referring court notes that that provision has been consistently interpreted by the tax authorities and the Italian courts as meaning that, if the taxable amount is to be reduced in the event of non-payment, the taxable person must furnish proof that the insolvency proceedings have been unsuccessful, which is possible only after 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.

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

6 Due to the fact that one of his clients was declared bankrupt without paying an invoice for EUR 35 000, Mr Di Maura made a corresponding reduction of his VAT taxable amount, which he believed he was entitled to do under the abovementioned provisions of the Presidential Decree.

7 The tax authority did not approve that adjustment on the basis that such an adjustment could be carried out only after the failure of insolvency proceedings or of individual enforcement proceedings, that is to say only once it had become certain that the debt would not be honoured, and not following a simple judgment declaring insolvency, such as that to which Mr Di Maura's debtor was subject.

8 Mr Di Maura brought the dispute before the Commissione tributaria provinciale di Siracusa (Provincial Tax Court, Syracuse, Italy) and argued that, on the contrary, the reduction of the taxable amount on account of the non-payment of the consideration must be possible to achieve at the time when the debtor is declared bankrupt.

9 The Commissione tributaria provinciale di Siracusa (Provincial Tax Court, Syracuse) is uncertain as to whether the abovementioned provision of the Presidential Decree complies with the principles of proportionality, effectiveness of EU law and the neutrality of VAT, in particular in view of the average time taken to process insolvency proceedings in Italy, which it points out may not uncommonly exceed ten years. It also takes the view that the limit on the right of reduction of the taxable basis of assessment laid down by Italian law is excessive, since the Sixth Directive makes that type of limitation conditional on non-payment and not on unsuccessful insolvency proceedings or enforcement proceedings.

10 In those circumstances, the Commissione tributaria provinciale di Siracusa (Provincial Tax Court, Syracuse) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Having regard to Article 11(C)(1) and the second sentence of Article 20(1)(b) of [the Sixth Directive] in relation to the downward adjustment of the taxable amount and the adjustment 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 FEU Treaty, and the principle of neutrality that governs the application of VAT, to impose limits that make it impossible or excessively costly — in terms of time too, in connection 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 answer to the first question is in the affirmative, is it compatible with the principles set out above that a provision — such as Article 26(2) of [the Presidential Decree] — makes the right to recover the tax contingent on proof that insolvency procedures have previously been unsuccessfully conducted, that is to say, in accordance with case-law and the practice of the tax authority of the Member State, the recovery must take place 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, those conditions could be met only years after the date of opening of the insolvency?'

Consideration of the questions referred

11 By its questions, which it is appropriate to examine together, the referring court asks, in essence, whether the second subparagraph of Article 11C(1) of the Sixth Directive must be interpreted as meaning that a Member State may make the reduction of the taxable amount for

VAT in the event of total or partial non-payment subject to the condition that insolvency proceedings have been unsuccessful when such proceedings may last longer than ten years.

12 As a preliminary point, it should be borne in mind that Article 11A(1)(a) of the Sixth Directive states that, within the territory of the country, the taxable amount is, in principle, everything which constitutes the consideration which has been or is to be obtained by the supplier or provider from the purchaser, the customer or a third party.

13 That provision embodies one of the fundamental principles of the Sixth Directive, according to which the taxable amount is the consideration actually received, and the corollary of which is that the tax authorities may not collect an amount of VAT exceeding the tax which the taxable person has himself received as consideration (judgment of 3 July 1997, *Goldsmiths*, C?330/95, EU:C:1997:339, paragraph 15).

14 In accordance with that principle, the first subparagraph of Article 11C(1) of the Sixth Directive, which relates to cases of cancellation, refusal or total or partial non-payment, or where the price is reduced after the supply takes place, requires the Member States to reduce the taxable amount and, consequently, the amount of VAT payable by the taxable person whenever, after a transaction has been concluded, part or all of the consideration is not received by the taxable person (see, to that effect, judgment of 3 July 1997, *Goldsmiths*, C?330/95, EU:C:1997:339, paragraph 16).

15 The second subparagraph of Article 11C(1) of the Sixth Directive allows Member States to derogate from the rule referred to in the previous paragraph in situations of total or partial non-payment.

16 If the total or partial non-payment of the purchase price occurs without there being a cancellation or refusal of the contract, the purchaser remains liable for the agreed price and the seller, even though no longer proprietor of the goods, in principle continues to have the right to receive payment, which he can rely on in legal proceedings. Since it is conceivable, however, that such a debt will become definitively irrecoverable, the EU legislature intended to leave it to each Member State to decide whether the situation of non-payment of the purchase price which, of itself, unlike cancellation or refusal of the contract, does not restore the parties to their original situation, leads to an entitlement to have the taxable amount reduced accordingly, under conditions to be determined by the Member State concerned, or whether such a reduction is not to be allowed in that situation (judgment of 15 May 2014, *Almos Agrárkülkereskedelmi*, C?337/13, EU:C:2014:328, paragraph 25).

17 However, as the Court has already held, the power to derogate, which is strictly limited to situations of total or partial non-payment, is based on the notion that in certain circumstances and because of the legal situation prevailing in the Member State concerned, non-payment of consideration may be difficult to establish or may only be temporary (judgment of 3 July 1997, *Goldsmiths*, C?330/95, EU:C:1997:339, paragraph 18).

18 It follows that the exercise of such a power to derogate must be justified, so that the measures taken by the Member States for its implementation do not undermine the objective of fiscal harmonisation pursued by the Sixth Directive (judgment of 3 July 1997, *Goldsmiths*, C?330/95, EU:C:1997:339, paragraph 18).

19 Indeed, it follows, by analogy to paragraph 23 of the judgment of 15 May 2014, *Almos Agrárkülkereskedelmi* (C?337/13, EU:C:2014:328), that, when the Member State concerned intends to apply the derogation provided for under the second subparagraph of Article 11C(1) of the Sixth Directive, taxable persons cannot rely on a right to reduction of their VAT

taxable amount under the first subparagraph of Article 11C(1) of the Sixth Directive in the event of non-payment of the price.

20 Nevertheless, contrary to the arguments put forward by the Italian and United Kingdom Governments, that reasoning, as noted by the Advocate General in points 32 to 44 of her Opinion, cannot be understood as calling into question the case-law cited in paragraphs 17 and 18 above, to the extent that it would be possible for Member States to exclude altogether reduction of the VAT taxable amount.

21 In that regard, it follows from the Court's settled case-law that exceptions must be interpreted strictly (see, to that effect, judgments of 20 June 2002, *Commission* v *Germany*, C?287/00, EU:C:2002:388, paragraph 47; of 14 June 2007, *Horizon College*, C?434/05, EU:C:2007:343, paragraph 16; and of 21 March 2013, *PFC Clinic*, C?91/12, EU:C:2013:198, paragraph 23). It follows from the wording of the second subparagraph of Article 11C(1) of the Sixth Directive that although the Member States have the possibility of derogating from the correction to the taxable amount set out in the first subparagraph, the EU legislature did not confer on them the power to exclude it altogether.

22 That finding is also supported by a purposive interpretation of the second subparagraph of Article 11C(1) of the Sixth Directive. Although it is relevant that the Member States may counteract the inherent uncertainty of the definitive non-payment of an invoice, recalled in paragraph 16 of the present judgment, such a power of derogation cannot extend beyond that uncertainty, and in particular cannot extend to whether a reduction of the taxable amount may not be carried out in situations of non-payment.

23 Moreover, to accept that it is possible for Member States to exclude any reduction of the VAT taxable amount would run counter to the principle of the neutrality of VAT, which means, inter alia, that the trader, as tax collector on behalf of the State, is entirely to be relieved of the burden of tax due or paid in the course of his economic activities, themselves subject to VAT (see, to that effect, judgments of 13 March 2008, *Securenta*, C?437/06, EU:C:2008:166, paragraph 25, and of 13 March 2014, *Malburg*, C?204/13, EU:C:2014:147, paragraph 41).

24 Accordingly, in order to answer the questions referred for a preliminary ruling, it is necessary to assess to what extent a mechanism for reducing the taxable amount such as that at issue in the main proceedings is justified.

25 In that regard, in accordance with the principle of proportionality, which is one of the general principles of EU law, the means employed for the implementation of the Sixth Directive must be appropriate to achieve the objectives stated in that measure and must not go beyond what is necessary in order to attain them (see, by analogy, judgment of 26 April 2012, *Commission* v *Netherlands*, C?508/10, EU:C:2012:243, paragraph 75).

26 As was stated in paragraph 22 above, the objective of the derogation from the right to reduce the taxable amount laid down by the second subparagraph of Article 11C(1) of the Sixth Directive is to take account of the inherent uncertainty of the definitive non-payment of an invoice.

27 That uncertainty is plainly taken into account by depriving the taxable person of his right to reduce the taxable amount for as long as the debt is not definitely unrecoverable, as provided for, in essence, by the national legislation at issue in the main proceedings. However, it is clear that the same objective could also be pursued by granting the reduction when the taxable person demonstrates a reasonable probability that the debt will not be honoured, even if the taxable base is re-evaluated upwards in the event that payment nonetheless occurs. It would thus be for the national authorities to determine, with due regard to the principle of proportionality and subject to

review by the courts, the evidence for a probable extended period of non-payment to be provided by the taxable person, according to the specific features of the applicable national law. Such a rule would be an equally effective means of attaining the objective pursued, while being less onerous for the taxable person, who pre-finances the VAT by collecting it on behalf of the State, as recalled in paragraph 23 above.

28 The finding in the preceding paragraph applies a fortiori in the context of national legislation such as that at issue in the main proceedings, under which certainty that the debt is definitively irrecoverable can be obtained, in practice, only around ten years later. Such a period is, in any event, such as to inflict on traders subject to that legislation, when they are confronted with non-payment of an invoice, a cash-flow disadvantage compared to their competitors in other Member States, which would clearly undermine the objective of fiscal harmonisation pursued by the Sixth Directive.

29 It follows from the foregoing that the answer to the questions referred for a preliminary ruling is that the second subparagraph of Article 11C(1) of the Sixth Directive must be interpreted as meaning that a Member State may not make the reduction of the VAT taxable amount in the event of total or partial non-payment subject to the condition that insolvency proceedings have been unsuccessful when such proceedings may last longer than ten years.

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 (First Chamber) hereby rules:

Article 11C(1) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the law of the Member State relating to turnover taxes — Common system of value added tax: uniform basis of assessment must be interpreted as meaning that a Member State may not make the reduction of the VAT taxable amount in the event of total or partial non-payment subject to the condition that insolvency proceedings have been unsuccessful when such proceedings may last longer than ten years.

[Signatures]

* Language of the case: Italian.