62016CJ0262
JUDGMENT OF THE COURT (Third Chamber)

12 October 2017 (*1)

(Reference for a preliminary ruling — Taxation — Value added tax — Directive 2006/112/EC — Article 296(2) — Article 299 — Common flat-rate scheme for farmers — Exclusion from the common scheme — Conditions — Concept of ‘category of farmers’)

In Case C?262/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Upper Tribunal (Tax and Chancery Chamber) (United Kingdom), made by decision of 10 May 2016, received at the Court on 12 May 2016, in the proceedings

Shields & Sons Partnership

v

Commissioners for Her Majesty’s Revenue and Customs,

THE COURT (Third Chamber),

composed of L. Bay Larsen, President of the Chamber, J. Malenovský, M. Safjan, D. Šváby and M. Vilaras (Rapporteur), Judges,

Advocate General: M. Szpunar,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 15 March 2017,

after considering the observations submitted on behalf of:

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Shields & Sons Partnership, by G. Edwards and M.C.P. Thomas, Barrister,

–

the United Kingdom Government, by G. Brown and J. Kraehling, acting as Agents, and R. Chapman, Barrister,

–

the French Government, by D. Colas and S. Ghiandoni, acting as Agents,

–

the European Commission, by M. Owsiany-Hornung, R. Lyal and M. Wilderspin, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 28 June 2017,

gives the following

Judgment

1

This request for a preliminary ruling concerns the interpretation of Article 296(2) 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 Shields & Sons Partnership and the Commissioners for Her Majesty’s Revenue and Customs (United Kingdom) (‘the Commissioners’) concerning the cancellation by the Commissioners of the certificate to use the common flat-rate scheme for farmers (‘the flat-rate scheme’) that had been issued to that partnership.

Legal context

EU law

3

Title XII of the VAT Directive sets out the special schemes for charging value added tax (VAT). Chapter 2 of that title, which comprises Articles 295 to 305 of the directive, concerns the flat-rate scheme.

4

Article 296 of the VAT Directive provides:

‘1. Where the application to farmers of the normal VAT arrangements, or the special scheme provided for in Chapter 1, is likely to give rise to difficulties, Member States may apply to farmers, in accordance with this Chapter, a flat-rate scheme designed to offset the VAT charged on purchases of goods and services made by the flat-rate farmers.

2. Each Member State may exclude from the flat-rate scheme certain categories of farmers, as well as farmers for whom application of the normal VAT arrangements, or of the simplified procedures provided for in Article 281, is not likely to give rise to administrative difficulties.

3. Every flat-rate farmer may opt, subject to the rules and conditions to be laid down by each Member State, for application of the normal VAT arrangements or, as the case may be, the simplified procedures provided for in Article 281.’

5

Article 297 of the directive provides:

‘Member States shall, where necessary, fix the flat-rate compensation percentages. They may fix varying percentages for forestry, for the different sub-divisions of agriculture and for fisheries.

Member States shall notify the Commission of the flat-rate compensation percentages fixed in

accordance with the first paragraph before applying them.’

6

Article 298 of the directive provides:

‘The flat-rate compensation percentages shall be calculated on the basis of macroeconomic statistics for flat-rate farmers alone for the preceding three years.

The percentages may be rounded up or down to the nearest half-point. Member States may also reduce such percentages to a nil rate.’

7

Article 299 of the directive is worded as follows:

‘The flat-rate compensation percentages may not have the effect of obtaining for flat-rate farmers refunds greater than the input VAT charged.’

United Kingdom law

8

Headed ‘Farmers etc.’, section 54 of the Value Added Tax Act 1994 (‘the 1994 Act’) states:

‘(1)

The Commissioners may, in accordance with such provision as may be contained in regulations made by them, certify for the purposes of this section any person who satisfies them—

(a)

that he is carrying on a business involving one or more designated activities;

(b)

that he is of such a description and has complied with such requirements as may be prescribed; …

...

(3)

The Commissioners may by regulations provide for an amount included in the consideration for any taxable supply which is made—

(a)

in the course or furtherance of the relevant part of his business by a person who is for the time being certified under this section;

(b)

at a time when that person is not a taxable person; and

(c)

to a taxable person,

to be treated, for the purpose of determining the entitlement of the person supplied to credit under sections 25 and 26, as VAT on a supply to that person.

(4)

The amount which, for the purposes of any provision made under subsection (3) above, may be included in the consideration for any supply shall be an amount equal to such percentage as the Treasury may by order specify of the sum which, with the addition of that amount, is equal to the consideration for the supply.

(5)

The Commissioners' power by regulations under section 39 to provide for the repayment to persons to whom that section applies of VAT which would be input tax of theirs if they were taxable persons in the United Kingdom includes power to provide for the payment to persons to whom that section applies of sums equal to the amounts which, if they were taxable persons in the United Kingdom, would be input tax of theirs by virtue of regulations under this section; and references in that section, or in any other enactment, to a repayment of VAT shall be construed accordingly.

(6)

Regulations under this section may provide—

...

(b)

for the cases and manner in which the Commissioners may cancel a person's certification;

...

(8)

In this section "designated activities" means such activities, being activities carried on by a person who, by virtue of carrying them on, falls to be treated as a farmer for the purposes of Article 25 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)] (common flat-rate scheme for farmers), as the Treasury may by order designate.'

9

Paragraph 1 of Part II of the schedule to the Value Added Tax (Flat-rate Scheme for Farmers) (Designated Activities) Order 1992 designates general stock farming among the activities which qualify a person for the flat-rate scheme.

10

The Value Added Tax (Flat-rate Scheme for Farmers) (Percentage Addition) Order 1992 sets the flat-rate compensation percentage, applicable to all farmers within the scheme, at 4%.

11

The Value Added Tax Regulations 1995 include Part XXIV, which was adopted pursuant to section 54 of the 1994 Act and contains regulations 202 to 211.

12

Regulation 203 of the Value Added Tax Regulations 1995, headed ‘Flat-rate scheme’, states:

‘(1)

The Commissioners shall, if the conditions mentioned in regulation 204 are satisfied, certify that a person is a flat-rate farmer for the purposes of the flat-rate scheme ...

(2)

Where a person is for the time being certified in accordance with this regulation, then (whether or not that person is a taxable person) any supply of goods or services made by him in the course or furtherance of the relevant part of his business shall be disregarded for the purpose of determining whether he is, has become or has ceased to be liable or entitled to be registered under Schedule 1 to the [1994] Act.’

13

Regulation 204 of the Value Added Tax Regulations 1995, headed ‘Admission to the scheme’, provides:

‘The conditions mentioned in regulation 203 are that—

(a)

the person satisfies the Commissioners that he is carrying on a business involving one or more designated activities,

(b)

he has not in the three years preceding the date of his application for certification—

(i)

been convicted of any offence in connection with VAT,

(ii)

made any payment to compound proceedings in respect of VAT under section 152 of the Customs and Excise Management Act 1979 as applied by section 72(12) of the [1994] Act,

(iii)

been assessed to a penalty under section 60 of the [1994] Act,

(c)

he makes an application for certification on the form numbered 14 in Schedule 1 to these Regulations, and

(d)

he satisfies the Commissioners that he is a person in respect of whom the total of the amounts as are mentioned in regulation 209 relating to supplies made in the year following the date of his certification will not exceed by [3000 pounds sterling (GBP) (approximately EUR 3410)] or more the amount of input tax to which he would otherwise be entitled to credit in that year.'

14

Under regulation 206(1)(i) of the Value Added Tax Regulations 1995, the Commissioners may cancel a person's certificate to use the flat-rate scheme where they consider it is necessary to do so for the protection of the revenue.

15

Paragraph 7.2 of VAT Notice 700/46/12, a document which, the referring tribunal explains, does not have the force of law but is regarded by the Commissioners as defining a category of farmers to be excluded from the flat-rate scheme, states:

'You must leave the scheme if you … are found to be recovering substantially more as a flat-rate farmer than you would if you were registered for VAT in the normal way.'

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

16

The appellant in the main proceedings is a family farming partnership which engages in agricultural activity in Northern Ireland (United Kingdom). It rears cattle purchased from an associated company, Shield Livestock Limited, which it fattens before selling them on to Anglo Beef Processors, a company that operates an abattoir.

17

On the advice of Anglo Beef Processors, the appellant in the main proceedings applied to join the flat-rate scheme, and the application was accepted on 1 May 2004. The appellant in the main proceedings was thus entitled to increase the sale price of the cattle by a flat rate of 4%, the increase conferring a right of deduction on its customers. In its application to join the scheme, it estimated that its turnover would be GBP 700000 (approximately EUR 795760) in the first year after joining the scheme. The accounting year ending on 30 June 2003 had shown a sales figure of GBP 633718 (approximately EUR 720410).

18

On 27 June 2012, officers of the Commissioners met the accountant of the appellant in the main proceedings in order to determine whether the latter could continue to use the flat-rate scheme. At that meeting, a number of financial statements were examined, including the profit and loss accounts and balance sheets of the appellant in the main proceedings, as well as a table comparing the amounts which it had received under the 4% flat rate and the amounts which it would have been able to deduct if it had been subject to the normal VAT arrangements.

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The officers of the Commissioners thus established that, for the accounting years 2004/05 to 2011/12, the appellant in the main proceedings had derived a financial advantage amounting to GBP 374884.23 (approximately EUR 426170) from its use of the flat-rate scheme.

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By decision of 15 October 2012, the Commissioners cancelled the certificate entitling the appellant in the main proceedings to use the flat-rate scheme, on the ground that the earnings derived from application of the flat-rate compensation percentage substantially exceeded the input tax which it would have been able to deduct if it had been subject to the normal VAT arrangements.

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Following a review requested by the appellant in the main proceedings, the Commissioners confirmed that decision.

22

By decision of 8 October 2014, the First-tier Tribunal (Tax Chamber) (United Kingdom) dismissed the appeal of the appellant in the main proceedings, which brought a further appeal before the Upper Tribunal (Tax and Chancery Chamber) (United Kingdom).

23

The latter tribunal states that the parties to the main proceedings disagree, in the case before it, on two issues relating to the interpretation of the VAT Directive.

24

The first issue is whether the only cases in which a farmer may be excluded from the flat-rate scheme are those provided for in Article 296(2) of the VAT Directive.

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The referring tribunal observes that the appellant in the main proceedings contends that that article lists exhaustively the conditions under which a Member State may exclude farmers from the flat-rate scheme, the VAT Directive not giving the Member States a discretion to exclude any particular individual. According to the appellant in the main proceedings, the flat-rate scheme must be operated so as to achieve fiscal neutrality of VAT pursuant to the relevant provisions of the VAT Directive. Among those provisions, it states that Article 296(2) provides for the possibility of excluding not particular farmers, but categories of farmers and farmers for whom application of the normal VAT arrangements is not likely to give rise to administrative difficulties. Finally, it states that Article 299 of the VAT Directive is concerned only with the setting of the flat-rate compensation percentages to ensure that the flat-rate scheme is fiscally neutral overall and that that article does not allow a particular farmer to be excluded from the scheme.

26

The Commissioners take the view that, in order to ensure fiscal neutrality of VAT, the Member States may subject use of the flat-rate scheme to conditions other than those referred to by the appellant in the main proceedings, provided that no provision of the VAT Directive is infringed. In

their submission, the aim of the flat-rate scheme is to be as close as possible to fiscal neutrality of VAT on an individual and overall basis. They consider that allowing particular farmers to remain on the scheme when they are deriving too substantial a gain from it would undermine the fiscal neutrality of VAT in respect of farmers taken as a whole.

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The second issue identified by the referring tribunal on which the parties to the main proceedings disagree is the interpretation of ‘categories of farmers’ within the meaning of Article 296(2) of the VAT Directive.

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According to the appellant in the main proceedings, the Commissioners excluded it from the flat-rate scheme in the light of its individual situation and not because it belonged to a category of farmers defined in accordance with Article 296(2) of the VAT Directive. The word ‘category’ designates a group which can be identified by reference to objective characteristics, this enabling any farmer to determine with reasonable certainty whether or not he falls within that group. In the present instance, the Commissioners have failed to identify any group of farmers with sufficient certainty. To accept as a category of farmers within the meaning of Article 296(2) of the VAT Directive the category proposed by the Commissioners would grant the latter a discretion since such a category would result from words which are imprecise or which leave the Commissioners quite free to take their decision by reference to subjective factors.

29

The Commissioners take the view that the category proposed is sufficiently precise to be a category of farmers within the meaning of Article 296(2) of the VAT Directive and that it is defined in paragraph 7.2 of VAT Notice 700/46/12, according to which farmers who are found to be recovering substantially more as farmers subject to the flat-rate scheme than they would if they were subject to the normal VAT arrangements may be excluded from the flat-rate scheme. They state that regulation 206(1)(i) of the Value Added Tax Regulations 1995 is to like effect.

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In those circumstances, the Upper Tribunal (Tax and Chancery Chamber) decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

‘1.

With regard to the common flat-rate scheme for farmers which is established by Chapter 2 of Title XII of [the VAT Directive], is Article 296(2) [of that directive] to be interpreted as providing an exhaustive regime as to when a Member State is able to exclude a farmer from the [flat-rate scheme]? In particular:

1.1

Is a Member State only able to exclude farmers from the [flat-rate scheme] pursuant to Article 296(2)?

1.2

Is a Member State also able to exclude a farmer from the [flat-rate scheme] using Article 299 [of the VAT Directive]?

1.3

Does the principle of fiscal neutrality give a Member State a right to exclude a farmer from the [flat-rate scheme]?

1.4

Do Member States have an entitlement to exclude farmers from the [flat-rate scheme] on any other grounds?

2.

How is the term “categories of farmers” in Article 296(2) of [the VAT Directive] to be interpreted? In particular:

2.1

Must a relevant category of farmers be capable of being identified by reference to objective characteristics?

2.2

Can a relevant category of farmers be capable of being identified by reference to economic considerations?

2.3

What level of precision is required in identifying a category of farmers which a Member State has purported to exclude?

2.4

Does it entitle a Member State to treat as a relevant category “farmers who are found to be recovering substantially more as members of the flat-rate scheme than they would if they were registered for VAT”?’

Consideration of the questions referred

The first question

31

By its first question, the referring tribunal asks, in essence, whether Article 296(2) of the VAT Directive must be interpreted as defining exhaustively all the cases in which a Member State may exclude a farmer from the flat-rate scheme or whether Article 299 of that directive, the principle of fiscal neutrality or other grounds may form the basis of such an exclusion.

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First of all, it should be pointed out that, in the main proceedings, the Commissioners cancelled, on an individual basis, the certificate entitling the appellant in the main proceedings to use the flat-rate

scheme on the ground that the earnings derived from application of the flat-rate compensation percentage substantially exceeded the input tax which it would have been able to deduct if it had been subject to the normal VAT arrangements.

33

It should be recalled that the flat-rate scheme is a scheme which derogates from and is an exception to the general scheme of the VAT Directive and which must therefore be applied only to the extent necessary to achieve its objective (judgments of 15 July 2004, Harbs, C?321/02, EU:C:2004:447, paragraph 27; of 8 March 2012, Commission v Portugal, C?524/10, EU:C:2012:129, paragraph 49; and of 12 October 2016, Nigl and Others, C?340/15, EU:C:2016:764, paragraph 37).

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Among the two objectives of the flat-rate scheme is that relating to the need for administrative simplification for the farmers concerned, which must be reconciled with the objective of offsetting the input VAT borne by those farmers when acquiring goods used for the purposes of their activities (see, to that effect, judgments of 8 March 2012, Commission v Portugal, C?524/10, EU:C:2012:129, paragraph 50, and of 12 October 2016, Nigl and Others, C?340/15, EU:C:2016:764, paragraph 38).

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The first question should be answered in the light of those factors.

36

Article 296(2) of the VAT Directive refers only to the possibility of excluding from the flat-rate scheme certain categories of farmers and farmers for whom application of the normal VAT arrangements, or of the simplified procedures provided for in Article 281 of the directive, is not likely to give rise to administrative difficulties.

37

Neither the objectives of the flat-rate scheme nor the context of Article 296(2) of the VAT Directive mean that the legislature is to be regarded as having intended to allow other grounds of exclusion.

38

It is true that one of the objectives pursued by the flat-rate scheme is to enable farmers who are subject to it to offset the VAT costs which they have borne on account of their activity. However, the risk of excessive offsetting in respect of VAT is taken into consideration by Article 299 of the VAT Directive with regard to flat-rate farmers as a whole. To that end, Article 299 prohibits the Member States from setting flat-rate compensation percentages at levels which would have the effect of obtaining for flat-rate farmers as a whole refunds greater than the input VAT charged.

39

Furthermore, Articles 297 to 299 of the VAT Directive provide that the flat-rate compensation percentages are set globally by each Member State in the light of macroeconomic statistics for flat-rate farmers alone for the preceding three years. Therefore, Article 299 of the directive cannot justify the adoption of a decision to exclude, on an individual basis, a farmer from the flat-rate scheme in the light of the refunds obtained by applying those percentages.

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Finally, whilst the referring tribunal mentions the possibility of cancelling a certificate to use the flat-rate scheme on the ground that, in a situation such as that at issue in the main proceedings, its use would undermine the principle of neutrality of VAT, it should be observed, as the Advocate General has noted in point 26 of his Opinion, that the EU legislature intentionally based that scheme on a certain generalisation, derogating from that principle as it could legitimately do, since fiscal neutrality, within the meaning possessed by that concept in the main proceedings, is not an independent legal principle, but one of the objectives pursued by the VAT Directive, an objective that is in particular given concrete expression by Article 167 et seq. of the directive, which lay down the principle of a right to deduct input VAT.

41

Indeed, the Court has already held that, as a matter of principle, the flat-rate scheme cannot ensure the complete neutrality of VAT, since the flat-rate scheme is intended precisely to reconcile that objective with the objective of simplification of the rules to which flat-rate farmers are subject (see, to that effect, judgment of 8 March 2012, Commission v Portugal, C?524/10, EU:C:2012:129, paragraph 53).

42

Accordingly, it cannot be regarded as contrary to EU law for a farmer using that scheme to obtain, as in the present instance, compensation in respect of VAT that is greater than the amount of input VAT that he would have been able to deduct if he had been subject to VAT under the normal or simplified taxation arrangements.

43

Therefore, the principle of fiscal neutrality cannot justify a measure providing for exclusion from the flat-rate scheme, such as cancellation of a certificate to use that scheme.

44

It follows from all the foregoing considerations that the answer to the first question is that Article 296(2) of the VAT Directive must be interpreted as laying down exhaustively all the cases in which a Member State may exclude a farmer from the flat-rate scheme.

The second question

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By its second question, the referring tribunal asks, in essence, whether Article 296(2) of the VAT Directive must be interpreted as meaning that farmers who are found to be recovering substantially more as members of the flat-rate scheme than they would if they were subject to the normal VAT arrangements or the simplified VAT arrangements can constitute a category of farmers within the meaning of that provision.

46

Article 296(2) of the VAT Directive sets out the possibilities for excluding farmers from the flat-rate scheme, stating that such an exclusion may in particular concern categories of farmers, but it does not define the concept of ‘categories of farmers’.

47

It is true that such a concept refers to the activity engaged in by the farmers concerned, who, in order to form a category, must share one or more characteristics.

48

Nevertheless, in the light of the principle of legal certainty, categories of farmers, as referred to in Article 296(2) of the VAT Directive, must be laid down on the basis of objective, clear and precise criteria, by national legislation or, as the case may be, by the executive empowered in that regard by the national legislature. In addition, as the Advocate General has observed in point 36 of his Opinion, those criteria must be laid down in advance, in the sense that the category subject to exclusion must be defined beforehand and in an abstract way, so that any farmer faced with a potential decision about entering the scheme is in a position to assess whether he belongs to the category that is subject to exclusion and whether he will still belong to that category in the future.

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Thus, a farmer must be able to carry out in advance an individual analysis of his situation in order to determine whether, in the light of the objective criteria laid down by that legislation, he falls within a category of farmers that is excluded from the flat-rate scheme. Conversely, if the requirements of clarity and certainty in legal situations are not to be disregarded, a category of farmers, within the meaning of Article 296(2) of the VAT Directive, cannot be defined by reference to a criterion which would not permit the persons concerned to conduct an individual analysis of that kind.

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In the present instance, that is precisely the case with a criterion for excluding farmers from the flat-rate scheme which is founded on the concept of an amount that is ‘substantially more’ than another.

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It follows from all the foregoing considerations that Article 296(2) of the VAT Directive must be interpreted as meaning that farmers who are found to be recovering substantially more as members of the flat-rate scheme than they would if they were subject to the normal VAT arrangements or the simplified VAT arrangements cannot constitute a category of farmers within the meaning of that provision.

Costs

52

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

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

1.

Article 296(2) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as laying down exhaustively all the cases in which a Member State may exclude a farmer from the common flat-rate scheme for farmers.

2.

Article 296(2) of Directive 2006/112 must be interpreted as meaning that farmers who are found to be recovering substantially more as members of the common flat-rate scheme for farmers than they would if they were subject to the normal value added tax arrangements or the simplified value added tax arrangements cannot constitute a category of farmers within the meaning of that provision.

Bay Larsen

Malenovský

Safjan

Šváby

Vilaras

Delivered in open court in Luxembourg on 12 October 2017.

A. Calot Escobar

Registrar

L. Bay Larsen

President of the Third Chamber

(*1) Language of the case: English.