Provisional text

JUDGMENT OF THE COURT (Fourth Chamber)

21 November 2018 (*)

(Reference for a preliminary ruling — Value added tax (VAT) — Directive 2006/112/EC — Article 273 — Tax adjustment — Method of calculating the taxable amount by extrapolation — Right to deduct VAT — Presumption — Principles of neutrality and proportionality — National law basing the calculation of VAT on presumed turnover)

In Case C?648/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Commissione tributaria provinciale di Reggio Calabria (Provincial Tax Court, Reggio Calabria, Italy), made by decision of 3 May 2016, received at the Court on 16 December 2016, in the proceedings

Fortunata Silvia Fontana

v

Agenzia delle Entrate — Direzione provinciale di Reggio Calabria,

THE COURT (Fourth Chamber),

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

Advocate General: N. Wahl,

Registrar: V. Giacobbo-Peyronnel, Administrator,

having regard to the written procedure and further to the hearing on 18 January 2018,

after considering the observations submitted on behalf of:

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

– the European Commission, by F. Tomat and R. Lyal, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 22 March 2018,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 273 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 Ms Fortunata Silvia Fontana and the

Agenzia delle Entrate — Direzione provinciale di Reggio Calabria (Tax authorities — Provincial Directorate, Reggio Calabria, Italy; ‘the tax authorities’) regarding a tax assessment notice concerning an additional assessment to value added tax (VAT).

Legal context

European Union law

3 Recital 59 of the VAT Directive is worded as follows:

‘Member States should be able, within certain limits and subject to certain conditions, to introduce, or to continue to apply, special measures derogating from this Directive in order to simplify the levying of tax or to prevent certain forms of tax evasion or avoidance.’

4 Article 2(1) of that directive provides:

‘The following transactions shall be subject to VAT:

(a) the supply of goods for consideration within the territory of a Member State by a taxable person acting as such;

(b) the intra-Community acquisition of goods for consideration within the territory of a Member State by:

(i) a taxable person acting as such, or a non-taxable legal person, where the vendor is a taxable person acting as such who is not eligible for the exemption for small enterprises provided for in Articles 282 to 292 and who is not covered by Articles 33 or 36;

(ii) in the case of new means of transport, a taxable person, or a non-taxable legal person, whose other acquisitions are not subject to VAT pursuant to Article 3(1), or any other non-taxable person;

(iii) in the case of products subject to excise duty, where the excise duty on the intra-Community acquisition is chargeable, pursuant to Directive 92/12/EEC, within the territory of the Member State, a taxable person, or a non-taxable legal person, whose other acquisitions are not subject to VAT pursuant to Article 3(1);

(c) the supply of services for consideration within the territory of a Member State by a taxable person acting as such;

(d) the importation of goods.’

5 Article 73 of the VAT Directive provides:

‘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 or a third party, including subsidies directly linked to the price of the supply.’

6 Under Article 242 of that directive:

‘Every taxable person shall keep accounts in sufficient detail for VAT to be applied and its application checked by the tax authorities.’

7 Article 244 of that directive provides:

‘Every taxable person shall ensure that copies of the invoices issued by himself, or by his customer or, in his name and on his behalf, by a third party, and all the invoices which he has received, are stored.’

8 Article 250(1) of the VAT Directive states:

‘Every taxable person shall submit a VAT return setting out all the information needed to calculate the tax that has become chargeable and the deductions to be made including, in so far as is necessary for the establishment of the basis of assessment, the total value of the transactions relating to such tax and deductions and the value of any exempt transactions.’

9 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

10 Article 39(1) of decreto del Presidente della Repubblica n. 600 recante disposizioni comuni in materia di accertamento delle imposte sui redditi (Presidential Decree No 600 on common provisions on income tax) of 29 September 1973 (GURI No 268 of 16 October 1973), provides:

‘In the case of income of natural persons carrying out an independent or professional economic activity, the [Tax] Office shall make the adjustment:

...

(d) if the incompleteness, falsehood or inaccuracy of the elements indicated in the declaration and its annexes results from the inspection of the accounting records and other checks referred to in Article 33 or from the check on the completeness, accuracy and veracity of the accounting records on the basis of invoices and other documents relating to the undertaking and of the data and information collected by the [Tax] Office in accordance with Article 32. The existence of undeclared activities or the absence of declared liabilities can also be inferred on the basis of simple presumptions, provided these are serious, precise and consistent.’

11 Decreto del Presidente della Repubblica n. 633, istituzione e disciplina dell’imposta sul valore aggiunto (Presidential Decree No 633 establishing and governing VAT) of 26 October 1972 (GURI No 292 of 11 November 1972) regulates the detailed rules in accordance with which the adjustment of the VAT declarations is made. Article 54 of that decree provides, in essence, that the verification of the veracity of VAT declarations may be carried out by means of a formal revision of the declaration submitted by the undertaking, or in more detail, on the basis of the information and data available to the tax authorities or those collected by those authorities under their powers of investigation.

12 Article 62 *bis* of Decreto legge n. 331/93 (Legislative Decree No 331/93) (GURI No 203 of 30 August 1993), converted into Law No 427 of 29 October 1993 (GURI No 255 of 29 October

1993), provides:

‘1. After consulting the relevant trade and professional bodies, the services of the revenue department of the Ministry of Finance shall draw up by 31 December 1996, in relation to the various economic sectors, specific sector studies with a view to rendering the assessment process more effective and making it possible to establish in greater detail the presumptive coefficients referred to in Article 11 of Decree-Law No 69 of 2 March 1989, converted, after amendments, into Law No 154 of 27 April 1989 and its successive amendments. For that purpose, the services shall identify representative samples of taxpayers in those sectors which may be monitored in order to identify factors characteristic of the activity pursued. The sector studies shall be approved by decree of the Ministry of Finance and published in the *Gazzetta ufficiale* [*della Repubblica italiana*] by 31 December 1995. They may be reviewed and shall be valid for the purposes of assessment as of the 1995 tax year.’

13 Article 62 *sexies* (3) of Legislative Decree No 331/93 is worded as follows:

‘Tax assessments under Article 39(1)(d) of Presidential Decree No 600 of 29 September 1973, and its successive amendments, and Article 54 of Presidential Decree No 633 of 26 October 1972, and its successive amendments, may also be based on the existence of serious inconsistencies between declared income, remuneration and fees and those which may legitimately be inferred from the characteristics and conditions under which the specific activity pursued is exercised, or from the sector studies drawn up pursuant to Article 62 *bis* of the present decree.’

14 Article 10 of Law No 146 of 8 May 1998 (GURI No 110, ordinary supplement to GURI No 93) provides:

‘(1) The tax assessments based on the sector studies provided for in Article 62 *sexies* of Legislative Decree No 331 of 30 August 1993, amended and converted into Law No 427 of 29 October 1993 shall apply to taxpayers in accordance with the procedures laid down in this article when declared income or remuneration is less than the income or remuneration which may be determined on the basis of such studies.

...

(3 *bis*) In the cases referred to in paragraph 1, the Tax Office shall, before sending the tax assessment notice, invite the taxpayer to appear under Article 5 of Legislative Decree No 218 of 19 June 1997.

(3 *ter*) In the event of income inadequacy determined on the basis of the sector studies, the reasons justifying the income inadequacy declared to be inappropriate in relation to those resulting from the application of these studies may be certified. The reasons for inconsistencies between the declaration and the economic indicators identified by the abovementioned studies may also be certified. Such a certificate shall be issued, at the request of taxpayers, by the persons indicated in Article 3(3)(a) and (b) of the regulation established by Presidential Decree No 322 of 22 July 1998, who are authorised to submit the declarations electronically, by tax assistance employees in centres staffed by the persons referred to in Article 32(1)(a), (b) and (c) of Legislative Decree No 241 of 9 July 1997, and by the employees and officials of the professional associations authorised to provide the technical assistance provided for in Article 12(2) of Legislative Decree No 546 of 31 December 1992.

...

(5) For the purposes of [VAT], there shall be applied to the higher income or remuneration,

determined on the basis of the said sector studies, taking into account the existence of non-taxable transactions or transactions subject to special arrangements, the average rate resulting from the ratio between the tax on taxable transactions and the turnover declared, net of tax on supplies of depreciable goods, and the turnover declared.

...

(7) A commission of experts appointed by the Minister, also taking into account the reports made by professional economic organisations and professional orders, shall be set up by decree of the Ministry of Finance. This commission, before the approval and publication of each sector study, shall deliver an opinion on the capacity of these studies to represent the actual facts to which they refer. No payment shall be made for consulting the members of the commission.

...'

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

15 As a taxable person for the purpose of VAT, Ms Fontana was subject to a tax adjustment procedure for the 2010 tax year.

16 On 14 May 2014, the tax authorities sent to the applicant in the main proceedings an invitation to appear before it, which led to the opening of an *inter partes* tax adjustment procedure.

17 During that procedure, Ms Fontana challenged the amount of the tax adjustment which was planned to be notified to her and which was determined on the basis of the sector study relating to the category of accountants and tax consultants.

18 On 24 December 2014, the tax authorities sent to Ms Fontana a tax assessment notice concerning personal income tax, regional tax on productive activities and VAT payable for the 2010 tax year.

19 The applicant in the main proceedings brought an action before the Commissione tributaria provinciale di Reggio Calabria (Provincial Tax Court, Reggio Calabria, Italy) contesting, inter alia, the amount of VAT arrears claimed by the tax authorities. In particular, she argued that the tax authorities had wrongly applied to her situation the sector study relating to accountants and tax consultants, instead of the study relating to human resources management advisers, which the applicant in the main proceedings considers to be her main activity. She also argued that the amount of VAT had been assessed on the basis of a sector study which does not give a consistent image of the income generated by her company in terms of proportionality and consistency.

20 The Commissione tributaria provinciale di Reggio Calabria (Provincial Tax Court, Reggio Calabria) states that the objection raised by the applicant in the main proceedings relating to the fact that the tax authorities allegedly wrongly associated her activities with those of accountants and tax consultants is unfounded in so far as 'the arguments of the applicant in the main proceedings are not supported by an indisputable factual basis'.

21 It does, however, express doubts, in particular in the light of the principles of fiscal neutrality and proportionality, as regards the method of calculating the VAT arrears, based on a sector study.

22 In that regard, the referring court notes that such a method of calculation takes into account only global turnover, without taking into consideration each of the economic transactions carried out by the taxable person and his right to deduct the amount of input VAT which he has paid.

23 In those circumstances, the Commissione tributaria provinciale di Reggio Calabria

(Provincial Tax Court, Reggio Calabria) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

‘Do Articles 113 and 114 TFEU and [the VAT Directive] preclude the Italian domestic legislation in Article 62 *sexies* (3) and Article 62 *bis* of Legislative Decree No 331/93, [converted into] Law No 427 of 29 October 1993, which allows the application of VAT to the overall turnover established by extrapolation, in the light of the principle of deduction and the obligation to recover the tax and, more generally, the principle of the neutrality and the passing-on of the tax?’

Consideration of the question referred

Admissibility

24 The Italian Government takes the view that the question referred is hypothetical in so far as the objection raised by the applicant in the main proceedings, which mainly concerned the incorrect classification of her professional activity in the context of the sector studies, was dismissed by the referring court which, according to the Italian Government, has already, in effect, dismissed the argument that the sector study at issue in the main proceedings does not represent the actual facts of that economic activity.

25 In that regard, it is necessary to recall that questions concerning EU law enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court for a preliminary ruling only where it is obvious that the interpretation of EU law that is sought is unrelated to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgment of 26 October 2017, *BB construct*, C?534/16, EU:C:2017:820, paragraph 16 and the case-law cited).

26 In the present case, the applicant in the main proceedings contested the results of the sector study, on the ground that they did not reflect the actual facts of her economic activity. That led the referring court to ask whether the method of calculation, based on that sector study, which takes global turnover as its basis, without taking into account each of the economic transactions carried out by the taxable person, is or is not compatible with the TFEU, the VAT Directive and the principles of fiscal neutrality and proportionality.

27 Consequently, as the question referred by the referring court does not appear devoid of any connection with the actual facts or the purpose of the dispute in the main proceedings, it must be declared admissible.

Substance

28 As a preliminary point, it must be noted that Articles 113 and 114 TFEU, to which the referring court makes reference in the question referred, are not relevant in the present case, in so far as those articles concern the institutional arrangements for adopting measures to approximate the laws of the Member States within the European Union.

29 In view of that observation, it must be understood that, by its question, the referring court asks, in essence, whether the VAT Directive and the principles of fiscal neutrality and proportionality must be interpreted as meaning that they preclude national legislation, such as that at issue in the main proceedings, which allows the tax authorities to use extrapolation based on sector studies approved by ministerial decree in order to determine the amount of turnover achieved by a taxable person and, consequently, to make a tax adjustment imposing the payment of an additional sum of VAT.

30 In that regard, it should be noted that, in accordance with the general rule set out in Article 73 of the VAT Directive, the taxable amount for the supply of goods or services for consideration is the consideration actually received for them by the taxable person (judgment of 7 November 2013, *Tulic? and Plavo?in*, C?249/12 and C?250/12, EU:C:2013:722, paragraph 33 and the case-law cited).

31 To enable VAT to be applied and monitored by the tax authorities, Articles 242 and 244 and Article 250(1) of the VAT Directive require taxable persons liable to that tax to keep proper accounts, to store copies of all the invoices which they have issued, all the invoices which they have paid and, finally, to submit to the tax authorities a VAT return setting out all the information needed to calculate the VAT that has become chargeable.

32 To ensure the correct collection of VAT and to prevent evasion, the first paragraph of Article 273 of the VAT Directive provides that Member States may impose obligations other than those stated in that directive which they deem necessary for such purposes, 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. Furthermore, according to recital 59 of the VAT Directive, that directive aims to authorise Member States to take, within certain limits and subject to certain conditions, special measures derogating from that directive in order to simplify the levying of tax or to prevent certain forms of tax evasion or avoidance.

33 The Court has held that it follows from the first paragraph of Article 273, from Article 2 and Article 250(1) of the VAT Directive, and from Article 4(3) TEU that every Member State is under an obligation to take all legislative and administrative measures appropriate for ensuring collection of all the VAT due on its territory and for preventing evasion (judgments of 5 October 2016, *Maya Marinova*, C?576/15, EU:C:2016:740, paragraph 41 and the case-law cited, and of 20 March 2018, *Menci,* C?524/15, EU:C:2018:197, paragraph 18).

34 In that regard, it should be noted that, if a taxable person does not declare all of the turnover achieved, that should not hinder the collection of VAT and it is for the national competent authorities to re-establish the situation that would have prevailed in the absence of such behaviour by the taxable person (see, to that effect, judgment of 5 October 2016, *Maya Marinova*, C?576/15, EU:C:2016:740, paragraph 42).

35 The Court has held that, outside the limits laid down therein, the provisions of Article 273 of the VAT Directive do not specify either the conditions or the obligations which the Member States may impose and therefore gives the Member States a margin of discretion with regard to the means of achieving the objectives of ensuring the collection of VAT and preventing evasion. However, they must exercise their power in accordance with EU law and its general principles, and, in particular, in accordance with the principles of proportionality and fiscal neutrality (see, to that effect, in particular, judgments of 5 October 2016, *Maya Marinova*, C?576/15, EU:C:2016:740, paragraphs 43 and 44 and the case-law cited, and of 17 May 2018, *Vámos*, C?566/16,

EU:C:2018:321, paragraph 41).

36 Thus, Article 273 of the VAT Directive does not preclude, in principle, national legislation, such as that at issue in the main proceedings, which determines the amount of VAT payable by a taxable person on the basis of global turnover, as calculated by extrapolation on the basis of sector studies approved by ministerial decree, in order to ensure the correct collection of VAT and to prevent tax evasion.

37 Nevertheless, that national legislation and the application of that legislation can comply with EU law only if they comply with the principles of fiscal neutrality and proportionality (see, to that effect, judgment of 5 October 2016, *Maya Marinova*, C?576/15, EU:C:2016:740, paragraph 44).

38 It is for the referring court to determine whether the national measures at issue in the main proceedings are compatible with the requirements stated in the previous paragraph. The Court may, however, provide it with any helpful guidance to resolve the dispute before it (see, to that effect, judgment of 5 October 2016, *Maya Marinova*, C?576/15, EU:C:2016:740, paragraph 46).

39 As regards the principle of fiscal neutrality, according to the Court's case-law, the right of taxable persons to deduct from the VAT that they are liable to pay the VAT due or paid on goods purchased and services received by them as inputs is a fundamental principle of the common system of VAT. The deduction system is intended to relieve the trader entirely of the burden of the VAT due or paid in the course of all his economic activities, provided that they are in principle themselves subject to VAT (see, to that effect, judgment of 9 July 2015, *Salomie and Oltean*, C?183/14, EU:C:2015:454, paragraphs 56 and 57 and the case-law cited).

40 As the Court has repeatedly held, the right of deduction is an integral part of the VAT scheme and may not, in principle, be limited (judgment of 26 April 2018, *Zabrus Siret*, C?81/17, EU:C:2018:283, paragraph 33 and the case-law cited).

41 It is apparent from the application of the principle of fiscal neutrality that, when the tax authorities are planning to send a VAT adjustment notice, the amount of which is based on global additional turnover, calculated by extrapolation, the taxable person must have the right to deduct the input VAT he has paid, under the conditions set out to that effect in Title X of the VAT Directive.

42 As regards the principle of proportionality, that principle does not preclude national legislation which provides that only significant differences between the amount of turnover declared by the taxable person and the amount calculated by extrapolation, taking account of the turnover achieved by persons carrying out the same activity as that taxable person, can bring into operation the procedure leading to an adjustment. The sector studies used in order to calculate that turnover by extrapolation must be correct, reliable and up to date. Such a difference can give rise only to a rebuttable presumption, which may be rebutted by the taxable person, on the basis of evidence to the contrary.

43 In that context, it should be noted that, throughout the tax adjustment procedure, the taxable person's rights of defence must be guaranteed, which means in particular that, before adopting a measure which will adversely affect a taxable person, he must be placed in a position in which he can effectively make known his views as regards the information on which the authorities intend to base their decision (judgment of 3 July 2014, *Kamino International Logistics and Datema Hellmann Worldwide Logistics*, C?129/13 and C?130/13, EU:C:2014:2041, paragraph 30).

44 Thus, the taxable person must, first, be able to challenge both the accuracy of the sector study at issue and/or the relevance of that study for the purposes of the assessment of his specific

situation. Second, the taxable person must be in a position to explain why the declared turnover, although lower than the turnover calculated by extrapolation, reflects the actual facts of his activity during the relevant period. In so far as the application of a sector study means that that taxable person must prove, where necessary, negative facts, the principle of proportionality requires that the necessary standard of proof is not excessively high.

45 In those circumstances, it must be held that the mechanism at issue in the main proceedings, by its design, structure and the specific provisions governing it, does not appear to infringe the principle of proportionality, which, however, it is for the national court to verify.

46 In the light of all the foregoing, the answer to the question referred is that the VAT Directive and the principles of fiscal neutrality and proportionality must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which authorises tax authorities, in the event of serious differences between declared revenue and revenue estimated on the basis of sector studies, to use extrapolation, based on such sector studies, in order to determine the amount of turnover achieved by a taxable person and, consequently, to carry out a tax adjustment requiring the payment of additional VAT, provided that that legislation and its application enable the taxable person, in compliance with the principles of fiscal neutrality, proportionality and the right of defence, to challenge the results obtained by that method, on the basis of all of the evidence to the contrary available to him, and to exercise his right of deduction in accordance with the provisions in Title X of the VAT Directive, which it is for the referring court to verify.

Costs

47 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:

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, and the principles of fiscal neutrality and proportionality, must be interpreted as meaning that they do not preclude national legislation, such as that at issue in the main proceedings, which authorises tax authorities, in the event of serious differences between declared revenue and revenue estimated on the basis of sector studies, to use extrapolation, based on such sector studies, in order to determine the amount of turnover achieved by a taxable person and, consequently, to carry out a tax adjustment requiring the payment of additional value added tax (VAT), provided that that legislation and its application enable the taxable person, in compliance with the principles of fiscal neutrality, proportionality and the right of defence, to challenge the results obtained by that method, on the basis of all of the evidence to the contrary available to him, and to exercise his right of deduction in accordance with the provisions in Title X of Directive 2006/2012, which it is for the referring court to verify.

[Signatures]

* Language of the case: Italian.