Provisional text

JUDGMENT OF THE COURT (Eighth Chamber)

19 December 2018 (*)

(Failure of a Member State to fulfil obligations — Taxation — Value added tax (VAT) — Directive 2006/112/EC — Article 2(1) — Administrative practice of imposing VAT on the royalty payable to an author of an original work of art on the basis of the resale right)

In Case C?51/18,

ACTION for failure to fulfil obligations under Article 258 TFEU, brought on 29 January 2018,

European Commission, represented by N. Gossement and B.-R. Killmann, acting as Agents,

v

applicant,

Republic of Austria, represented by G. Hesse, acting as Agent,

defendant,

THE COURT (Eighth Chamber),

composed of M. Vilaras, President of the Fourth Chamber, acting as President of the Eighth Chamber, J. Malenovský (Rapporteur) and M. Safjan, Judges,

Advocate General: M. Wathelet,

Registrar: A. Calot Escobar,

having regard to the written procedure,

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

gives the following

Judgment

1 By its application, the European Commission asks the Court to declare that, by imposing value added tax (VAT) on the royalty payable to an author of an original work of art on the basis of the resale right, the Republic of Austria has failed to fulfil its obligations under 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, ‘the VAT Directive’).

Legal context

EU law

The VAT Directive

2 Recitals 3 and 5 of the VAT Directive are worded as follows:

‘(3) To ensure that the provisions are presented in a clear and rational manner, consistent with the principle of better regulation, it is appropriate to recast the structure and the wording of the Directive although this will not, in principle, bring about material changes in the existing legislation. A small number of substantive amendments are however inherent to the recasting exercise and should nevertheless be made. Where such changes are made, these are listed exhaustively in the provisions governing transposition and entry into force.

…

(5) A VAT system achieves the highest degree of simplicity and of neutrality when the tax is levied in as general a manner as possible and when its scope covers all stages of production and distribution, as well as the supply of services. It is therefore in the interests of the internal market and of Member States to adopt a common system which also applies to the retail trade.’

3 As set out in Article 2(1) of the VAT Directive:

‘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;

…

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

… ’

4 Article 24(1) of that directive reads as follows:

‘“Supply of services” shall mean any transaction which does not constitute a supply of goods.’

5 Under Article 25 of that directive:

‘A supply of services may consist, inter alia, in one of the following transactions:

(a) the assignment of intangible property, whether or not the subject of a document establishing title;

(b) the obligation to refrain from an act, or to tolerate an act or situation;

(c) the performance of services in pursuance of an order made by or in the name of a public authority or in pursuance of the law.’

6 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.’

Directive 2001/84/EC

7 Recital 3 of Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art (OJ 2001 L 272, p. 32) is worded as follows:

‘The resale right is intended to ensure that authors of graphic and plastic works of art share in the economic success of their original works of art. It helps to redress the balance between the economic situation of authors of graphic and plastic works of art and that of other creators who benefit from successive exploitations of their works.’

8 Article 1 of that directive, entitled ‘Subject matter of the resale right’, provides:

‘1. Member States shall provide, for the benefit of the author of an original work of art, a resale right, to be defined as an inalienable right, which cannot be waived, even in advance, to receive a royalty based on the sale price obtained for any resale of the work, subsequent to the first transfer of the work by the author.

2. The right referred to in paragraph 1 shall apply to all acts of resale involving as sellers, buyers or intermediaries art market professionals, such as salesrooms, art galleries and, in general, any dealers in works of art.

3. Member States may provide that the right referred to in paragraph 1 shall not apply to acts of resale where the seller has acquired the work directly from the author less than three years before that resale and where the resale price does not exceed EUR 10 000.

4. The royalty shall be payable by the seller. Member States may provide that one of the natural or legal persons referred to in paragraph 2 other than the seller shall alone be liable or shall share liability with the seller for payment of the royalty.’

9 Article 3 of that directive, relating to the threshold, provides:

‘1. It shall be for the Member States to set a minimum sale price from which the sales referred to in Article 1 shall be subject to resale right.

2. This minimum sale price may not under any circumstances exceed EUR 3 000.’

10 Under Article 4 of that directive, relating to rates:

‘1. The royalty provided for in Article 1 shall be set at the following rates:

(a) 4% for the portion of the sale price up to EUR 50 000;

(b) 3% for the portion of the sale price from EUR 50 000.01 to EUR 200 000;

(c) 1% for the portion of the sale price from EUR 200 000.01 to EUR 350 000;

(d) 0.5% for the portion of the sale price from EUR 350 000.01 to EUR 500 000;

(e) 0.25% for the portion of the sale price exceeding EUR 500 000.

However, the total amount of the royalty may not exceed EUR 12 500.

2. By way of derogation from paragraph 1, Member States may apply a rate of 5% for the portion of the sale price referred to in paragraph 1(a).

3. If the minimum sale price set should be lower than EUR 3 000, the Member State shall also determine the rate applicable to the portion of the sale price up to EUR 3 000; this rate may not be lower than 4%.'

Austrian law

The Urheberrechtsgesetz

11 The Urheberrechtsgesetz (Law on copyright) of 9 April 1936 (BGBl. 111/1936), in the version applicable to the present case ('the UrhG'), establishes, in Section III, the rights conferred on the author, which include the right to exploit, reproduce and distribute the work.

12 Paragraph 16 of the UrhG, entitled 'Right of distribution', provides:

'(1) The author shall have the exclusive right to distribute works. By virtue of that right, works may not be exhibited or placed on the market in a way that makes them available to the public without his consent.

(2) As long as a work is not published, the right of distribution shall also cover the exclusive right to make that work available to the public via presentation, publication, display, public exposition or a similar use of representation.

(3) Subject to Paragraph 16a, the right of distribution shall not apply to works which have been placed on the market by transfer of ownership in a Member State of the [European Union] or in a State party to the European Economic Area with the consent of the right holder.

…

(5) Where this Law makes reference to the expression "distribute a work", it refers only to the distribution of works reserved to the author in accordance with subparagraphs 1 to 3.'

13 Paragraph 16b of the UrhG, entitled 'Resale right', provides:

'(1) Paragraph 16(3) shall apply to the resale of an original work of graphic or plastic art subsequent to the first transfer of the work by the author, it being understood that the seller is required to pay the author a royalty proportional to the resale price excluding taxes (royalty on the basis of the resale right), in accordance with the following limits:

4% for the first portion up to [EUR] 50 000;

3% for the [EUR] 150 000 exceeding the threshold of the first portion,

1% for the [EUR] 150 000 exceeding the threshold of the previous portion,

0.5% for the [EUR] 150 000 exceeding the threshold of the previous portion,

0.25% for the [EUR] 150 000 exceeding the threshold of the previous portion,

The total amount of the royalty may not, however, exceed [EUR] 12 500.

(2) The resale right shall be owed only if the sale price amounts to at least [EUR] 2 500 and if an art market professional, such as an auction house, art gallery or other art dealer, participates in the transfer as a seller, buyer or intermediary; these persons incur liability as guarantors and payers, unless they are themselves taxable persons. The right may not be waived in advance. The resale right may also be relied upon by a collective management organisation; furthermore, this right is inalienable. Paragraph 23(1) shall apply *mutatis mutandis*.

(3) "Original works" within the meaning of subparagraph 1 shall mean works which:

1. have been made by the author himself,

2. have been made in limited numbers by the author himself or under his authority and which are, in principle, numbered and signed or authorised in some other appropriate manner by the author;

3. are otherwise regarded as original works.

(4) The royalty on the basis of the resale right shall not be owed where the seller has acquired the work from the author less than three years before and where the sale price does not exceed [EUR] 10 000.'

The Umsatzsteuergesetz 1994

14 Paragraph 1 of the Umsatzsteuergesetz (Law on turnover tax) of 23 August 1994 (BGBl. 663/1994), in the version applicable to the present case ('the UStG 1994'), provides:

'(1) The following transactions shall be subject to value added tax:

1. supplies and other services which an undertaking performs for consideration on the domestic market in the course of its business. Transactions are not excluded from taxation where they are carried out pursuant to statute or an order of an authority or are deemed to be carried out under statutory provisions;

… '

15 In accordance with Paragraph 3 of the UStG 1994:

'(1) Supplies are transactions in which an undertaking transfers to a customer or a third party authorised on his behalf the right to dispose of goods in his own name. The right to dispose of the goods may be procured by the undertaking itself or by a third party on its behalf.

… '

16 Paragraph 3a(1) of the UStG 1994 provides:

'Services which do not constitute supplies shall be regarded as "other services". Other services may also consist in refraining from an act, or tolerating an act or situation.'

Pre-litigation procedure

17 On 17 October 2014, the Commission sent a letter of formal notice to the Republic of Austria expressing its reservations in respect of the administrative practice of imposing VAT on the royalty payable to an author of an original work of art on the basis of the resale right.

18 In that letter, the Commission expressed the view that that royalty did not constitute consideration for the artistic service provided by the author of such a work of art. It also stated that the resale right was granted directly by law in order to bestow on the author a share in the economic success of his work. In the absence of a supply of goods or services provided by the author in the exercise of the resale right, VAT is not imposed on any transaction.

19 The Republic of Austria replied to that letter of formal notice by letter of 16 December 2014.

20 The Republic of Austria stated that the aim of the resale right was to ensure that the author shares in the economic success of his work. The fact that the author does not take part in the agreement between the seller and buyer during the resale of the work concerned does not preclude taxation of the royalty received by the author on the basis of the resale right. On the contrary, the principle of neutrality of the VAT system requires that VAT also be imposed on that royalty.

21 The Republic of Austria also indicated that the resale right enables the value added to the work in the event that it is resold to be taken into account, so that, as a subsidiary result, there is an increase in the taxable amount of the service provided by the author upon the first sale. Therefore, given that that first and only service is subject to VAT, the royalty payable on the basis of the resale right should also be subject to VAT.

22 Not being satisfied with the entirety of the Republic of Austria’s reply, on 25 July 2016, the Commission sent that Member State a reasoned opinion in which it reaffirmed that the royalty payable to an author on the basis of the resale right did not constitute consideration for the supply of goods or services provided by the author when first placed on the market, that the resale right is intended only to enable the author to profit from the economic advantages linked to the recognition of his artistic service and that the author could not oppose the resale of his work.

23 The Republic of Austria responded to that reasoned opinion by letter of 22 September 2016, again contending, in essence, that the royalty payable on the basis of the resale right is taxable.

24 It stated that, within the framework of the resale right, the author provides a service by tolerating the act of resale of the work. Although that service is provided for by law for the authors of an original work of art, it corresponds to a service comparable to that provided by other creators in the context of the representation of their works. Given that the remuneration for the representation of those works is subject to VAT as consideration for a supply of services, the royalty payable on the basis of the resale right should also be subject to VAT.

25 The Republic of Austria maintained its argument, raised in the alternative, according to which the taxation of that royalty is also justified in that it leads to an increase in the taxable amount of the service provided by the author when his work is first placed on the market. A change in the taxable amount, it is submitted, depends not on the existence of a legal relationship between the author and the seller of the work or its subsequent buyer, but on the fact that the author profits, on account of the resale right, from the value added to that work.

26 Not being satisfied with the Republic of Austria’s reply, the Commission decided to bring the present action.

The action

Arguments of the parties

27 The Commission submits that the obligation imposed on the parties involved in the resale of a work to pay a royalty to the author serves only to guarantee the author a fair share of the value of his original work. That fair share does not, however, constitute consideration for a service provided by the author, in so far as it relates only to the economic value of the original work resulting for the author from the resale of his work, which occurs without his authorisation. The amount of the royalty is fixed irrevocably by law.

28 Furthermore, it follows from the judgment of 18 January 2017, *SAWP* (C?37/16, EU:C:2017:22, paragraphs 25 and 26), that a supply of goods or services is made for consideration, within the meaning of the VAT Directive, only if there is a legal relationship between the provider and the recipient in the context of which there is reciprocal performance, the remuneration received by the provider constituting the value actually given in return for the service supplied to the recipient. There must therefore be a direct link between the service supplied and the value given in return, the amounts paid constituting actual consideration for an identifiable service supplied in the context of a legal relationship in which there is reciprocal performance.

29 However, the royalty payable to an author on the basis of the resale right clearly does not constitute the value given in return for a service supplied by the author, but is determined on the sole basis of the price obtained on resale of the work, the amount of which cannot be influenced by the author. The author is entitled to the royalty without having to, or even being able to, undertake any service, either by action or inaction. Consequently, the royalty from the resale right cannot be regarded as consideration for a supply of goods or services within the meaning of Article 2 of the VAT Directive.

30 Furthermore, in so far as, when a work is resold, the author of that work may not prevent that resale or even influence it, therefore no longer providing any service, it cannot be considered that the author supplies a service by tolerating that resale. Consequently, the resale right does not form part of the rights of use and exploitation related to copyright.

31 Moreover, the Republic of Austria’s argument, put forward during the pre-litigation procedure, that imposing VAT on successive exploitations of the rights of other creators but not on the royalty payable on the basis of the resale right is an infringement of the principle of fiscal neutrality should be rejected. Given that the situation of authors of original works of art is not that of other creators as regards the remuneration payable to them for exercising the subsisting rights of use and exploitation, the principle of neutrality of VAT does not preclude the imposition of VAT on the remuneration of those other creators but not on the royalty related to the resale right.

32 The same applies, in the Commission’s view, to the Republic of Austria’s argument that the royalty payable on the basis of the resale right must be subject to VAT on the ground that, for the author of the original work, there is a change in the taxable amount for the service he provided when the original work was first placed on the market. Such a royalty, calculated on the basis of the price obtained on resale of the work, is completely independent of the remuneration agreed by the author with the first person acquiring that work. It could, for instance, be the case that the author has made a gift of the original work and nevertheless has a right, in such a situation, to royalties on the basis of the resale right.

33 In its defence, the Republic of Austria argues that, in so far as the resale of a work constitutes an exchange of services in the context of a legal relationship, the royalty payable to the

author of that work on the basis of the resale right must be subject to VAT.

34 Relying on the judgments of 3 September 2015, *Asparuhovo Lake Investment Company* (C?463/14, EU:C:2015:542, paragraph 35), and of 29 October 2015, *Saudaçor* (C?174/14, EU:C:2015:733, paragraph 32), the Republic of Austria contends that imposing VAT on a service presupposes a direct link between the service supplied and the value given in return. In accordance with the judgments of 3 March 1994, *Tolsma* (C?16/93, EU:C:1994:80, paragraph 14 et seq.), and of 29 October 2015, *Saudaçor* (C?174/14, EU:C:2015:733, paragraph 32), such a direct link is established if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the payment received by the provider of the service constituting the value actually given in return for the service supplied to the recipient.

35 Therefore, the royalty payable on the basis of the resale right should be subject to VAT where there is an exchange of services occurring in the context of a legal relationship. Those conditions are, it its view, met in the present case.

36 As regards, more specifically, the existence of an exchange of services, the judgment of 18 January 2017, *SAWP* (C?37/16, EU:C:2017:22), is irrelevant, since the Court's reasoning in that judgment is not transposable to the royalty payable on the basis of the resale right, which is not comparable to actual compensation.

37 The royalty payable on the basis of the resale right is intended to ensure that the author shares in the economic success of his work. Due to the exhaustion of the right of distribution, the author must tolerate the resale of his work and the royalty relates to that tolerance. Thus, the author receives remuneration on account of the resale of his work which has, in the meantime, increased in value. That royalty therefore has a direct link to the service supplied by the author. Consequently, it essentially corresponds to new taxable consideration which is additional to the consideration obtained on the first purchase of the work. To that extent, the royalty payable on the basis of the resale right could be assimilated to a sort of compensation for dispossession, which would logically be subject to VAT.

38 Furthermore, the Republic of Austria reiterates the argument put forward during the pre-litigation procedure that the principle of fiscal neutrality precludes treating similar goods and supplies of services differently for VAT purposes.

39 Moreover, the Republic of Austria submits that, even if it were accepted that the royalty payable on the basis of the resale right does not constitute consideration for an independent supply, that royalty would, however, increase the taxable amount of the transaction carried out between the author of the work and the first purchaser of that work.

40 In that regard, the Republic of Austria refers to recital 3 of Directive 2001/84, according to which the resale right serves to offset increases in value. In that context, given that some original works of art greatly increase in value over time and that the added value benefits, in the event of resale, not the author but the seller, the royalty payable on the basis of the resale right could be regarded as the author's share in that increase in value. Therefore, the royalty payable on the basis of the resale right is comparable to 'indexation' to which the author is entitled under law.

Findings of the Court

41 By its action, the Commission claims that the Republic of Austria has failed to fulfil its obligations under Article 2(1) of the VAT Directive by imposing VAT on the royalty payable to an author of an original work of art on the basis of the resale right.

42 Pursuant to Article 2(1) of the VAT Directive, inter alia, supplies of goods and services for consideration within the territory of a Member State by a taxable person acting as such are subject to VAT.

43 It is not necessary to rule on the question whether, within the meaning of that provision, the payment of the royalty payable on the basis of the resale right may be classified as a ‘supply of goods’ or ‘supply of services’, which has not been raised by the parties; it should therefore be determined whether such a transaction is carried out for consideration (see, to that effect, judgment of 18 January 2017, *SAWP*, C?37/16, EU:C:2017:22, paragraph 24).

44 In that regard, it is clear from settled case-law that a supply of goods or services is made for consideration, within the meaning of the VAT Directive, only if there is a legal relationship between the supplier, on the one hand, and the customer or recipient, on the other hand, in the context of which there is reciprocal performance, the remuneration received by the supplier constituting the value actually given in return for the goods or service supplied to the customer or the recipient (see, to that effect, judgment of 18 January 2017, *SAWP*, C?37/16, EU:C:2017:22, paragraph 25 and the case-law cited).

45 The Republic of Austria contends, in the first place, that the royalty payable on the basis of the resale right constitutes consideration for an exchange of services in the context of a legal relationship. While that Member State does not dispute the fact that the author of an original work of art does not take part in the agreement between the seller and buyer in respect of the resale of the work, it contends, however, that the author of that work, in tolerating the act of resale, intervenes by providing a service in the context of such a relationship.

46 In that regard, it must be noted that, admittedly, under Article 25(b) of the VAT Directive, a supply of services may consist, inter alia, in tolerating an act or situation.

47 However, contrary to what the Republic of Austria seems to contend, the legal relationship which arises in the context of the resale of an original work of art do so only between the seller and the buyer and the existence of the resale right for the benefit of the creator of that work does not have any influence on that relationship. Consequently, it cannot be considered that, because he benefits from the resale right, the author of that work participates in any way, even indirectly, in the resale transaction, in particular by tolerating that transaction.

48 First of all, the parties to the resale transaction agree freely to the transfer of the work concerned by the seller and the price to be paid by the buyer, without having to solicit or consult the author of that work in any way. The author, for his part, does not possess any means of intervening in the resale transaction, in particular to prevent its occurrence in the event that he disagrees with it.

49 Next, the author of an original work of art which is resold receives, under Article 1(1) of Directive 2001/84, a percentage of the price obtained from the resale of that work, the payment of which is, in principle, imposed on the seller. However, in so far as the resale right from which that author benefits, which entails the obligation on the seller to pay the author the amount fixed on the basis of that right, is a benefit stemming from the EU legislature, it must be considered that it does not apply in the context of any kind of legal relationship between the author and the seller.

50 Finally, in accordance with the EU legislature’s intention, expressed in the first sentence of recital 3 of Directive 2001/84, the aim of the resale right is to ensure that authors of original works of art covered by that directive, namely graphic and plastic works of art, share in the economic success of their original works of art. It follows that the EU legislature does not in any way

envisage those authors participating in resale transactions for their works, but merely grants them a right to share in the economic outcome of acts of resale once they have occurred.

51 In those circumstances, the Republic of Austria's argument that the royalty payable on the basis of the resale right constitutes consideration, in the context of a legal relationship, for an exchange of services in which the author takes part by tolerating the act of resale, must be rejected.

52 In the second place, the Republic of Austria contends that the alleged service provided by the author of an original work of art covered by Directive 2001/84, within the framework of the resale right, corresponds to the services provided by other creators when their works are represented. Since those services are subject to VAT, the alleged service provided by the author of an original work of art within the framework of the resale right should follow suit.

53 In that regard, it is apparent from the second sentence of recital 3 of Directive 2001/84 that the EU legislature intended to highlight the difference between the economic situation of authors of graphic and plastic works of art, on the one hand, and that of other creators, on the other hand, considering that the latter, unlike the former, benefit from the successive exploitations of their works.

54 As the Commission correctly points out, plastic and graphic works of art are unique and the rights of use and exploitation attached to them are exhausted when they are first placed on the market. By contrast, other works are made available on several occasions and the remuneration which is payable to their authors in that regard pays for a service which corresponds to repeatedly making those works available. The royalty payable on the basis of the resale right is therefore not comparable to the remuneration gained from exercising the rights of use and exploitation attached to those other works, which subsist.

55 According to the Court's settled case-law, the principle of fiscal neutrality, which was intended by the EU legislature to reflect, in matters relating to VAT, the general principle of equal treatment, requires inter alia that different situations must not be treated in the same way unless such treatment is objectively justified (see, to that effect, judgment of 19 July 2012, *Lietuvos geležinkeliai*, C?250/11, EU:C:2012:496, paragraphs 44 and 45 and the case-law cited).

56 Thus, having regard to the finding in paragraph 54 of the present judgment, the fact that the remuneration from the rights of successive use and exploitation of works other than graphic and plastic works of art is subject to VAT cannot justify the royalty payable on the basis of the resale right also being subject to VAT.

57 It follows that the payment of the royalty payable on the basis of the resale right may not be regarded as being made for consideration within the meaning of Article 2(1) of the VAT Directive.

58 In the third place, the Republic of Austria's argument, raised in the alternative, according to which the royalty payable on the basis of the resale right should be subject to VAT on the ground that, for the author of the original work, the taxable amount for the service he provided when the original work was first placed on the market changes, must be rejected.

59 As follows from Article 73 of the VAT Directive, the taxable amount for a supply of services includes everything which constitutes consideration for the service provided. Since, as is apparent from the present judgment, the royalty payable on the basis of the resale right by no means constitutes consideration for the service offered by the author when his work is first placed upon the market or for any other service on his part, it cannot have the effect of changing the taxable amount for the service provided by the author when his work is first placed upon the market.

60 It follows from all the foregoing considerations that, given that the royalty payable to an author of an original work of art on the basis of the resale right does not fall under Article 2(1) of the VAT Directive, the Republic of Austria, by providing that such a royalty is subject to VAT, has failed to fulfil its obligations under that provision.

Costs

61 Under Article 138(1) of the Rules of Procedure of the Court of Justice, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Republic of Austria has been unsuccessful, the latter must be ordered to pay the costs.

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

1. **Declares that, by providing that the royalty payable to an author of an original work of art on the basis of the resale right is subject to value added tax, the Republic of Austria has failed to fulfil its obligations under Article 2(1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax;**

2. **Orders the Republic of Austria to pay the costs.**

[Signatures]

* Language of the case: German.