

62018CJ0214

JUDGMENT OF THE COURT (Eighth Chamber)

10 April 2019 (*1)

(Reference for a preliminary ruling — Directive 2006/112/EC — Value added tax (VAT) — Court enforcement officer — Enforcement — Fees laid down by law — Administrative practice of the competent national authorities considering those fees to be inclusive of VAT — Principles of neutrality and proportionality)

In Case C-214/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Sąd Rejonowy w Sopocie Wydział I Cywilny (District Court, Sopot, Civil Division I, Poland), made by decision of 8 March 2018, received at the Court on 26 March 2018, in the proceedings brought by

H. W.,

other parties:

PSM 'K',

Aleksandra Treder, court enforcement officer at the Sąd Rejonowy w Sopocie (District Court, Sopot),

THE COURT (Eighth Chamber),

composed of F. Biltgen, President of the Chamber, C.G. Fernlund (Rapporteur) and L.S. Rossi, Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

—

Ms Treder, by M.S. Tokarz, radca prawny, and J. Martini, doradca podatkowy,

—

the Polish Government, by B. Majczyna, acting as Agent,

—

the European Commission, by R. Lyal, A. Armenia and B. Sasinowska, acting as Agents,

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

gives the following

Judgment

1

This request for a preliminary ruling concerns the interpretation of Article 1, Article 2(1)(a) and (c), Article 73 and the first paragraph of Article 78 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1), as amended by Council Directive 2013/43/EU of 22 July 2013 (OJ 2013 L 201, p. 4) ('Directive 2006/112').

2

The request has been made in proceedings brought by H. W. concerning the decision of Ms Aleksandra Treder, the court enforcement officer responsible for carrying out enforcement proceedings against him, to add value added tax (VAT) to the enforcement fees concerned.

Legal context

EU law

3

Recital 5 of Directive 2006/112 states:

'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.'

4

Article 1 of that directive provides:

1. This Directive establishes the common system of [VAT].
2. The principle of the common system of VAT entails the application to goods and services of a general tax on consumption exactly proportional to the price of the goods and services, however many transactions take place in the production and distribution process before the stage at which the tax is charged.

On each transaction, VAT, calculated on the price of the goods or services at the rate applicable to such goods or services, shall be chargeable after deduction of the amount of VAT borne directly by the various cost components.

The common system of VAT shall be applied up to and including the retail trade stage.'

5

Article 2(1)(a) and (c) of the directive provides:

1. 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’.

6

Under Article 9(1) of the directive:

“Taxable person” shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity.

Any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions, shall be regarded as “economic activity”. The exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as an economic activity.’

7

Article 13 of the directive provides:

‘1. States, regional and local government authorities and other bodies governed by public law shall not be regarded as taxable persons in respect of the activities or transactions in which they engage as public authorities, even where they collect dues, fees, contributions or payments in connection with those activities or transactions.

However, when they engage in such activities or transactions, they shall be regarded as taxable persons in respect of those activities or transactions where their treatment as non-taxable persons would lead to significant distortions of competition.

...’

8

In accordance with Article 73 of the directive:

‘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.’

9

The first paragraph of Article 78 of the directive states:

‘The taxable amount shall include the following factors:

(a)

taxes, duties, levies and charges, excluding the VAT itself’.

10

Under Article 193 of the directive, ‘VAT shall be payable by any taxable person carrying out a taxable supply of goods or services’.

Polish law

The Constitution of the Republic of Poland

11

The Constitution of the Republic of Poland of 2 April 1997 (Dz. U. 1997, No 78, item 483), in the version in force at the material time for the main proceedings, provides in Article 217:

‘The imposition of taxes and other public duties, the determination of those subject to taxation and the rates of taxation, as well as the principles for granting tax reliefs and remissions, and also the categories of taxpayers exempt from taxation, shall be by means of statute.’

The Law on VAT

12

In accordance with Article 15(1), (2) and (6) of the Ustawa o podatku od towarów i usług (Law on tax on goods and services) of 11 March 2004, in the version in force at the material time for the main proceedings (Dz. U. 2017, item 1221) (‘the Law on VAT’):

‘1. “Taxable person” shall mean legal persons, organisational entities without legal personality and natural persons which, independently, carry out an economic activity referred to in paragraph 2, regardless of the purpose or result of such an activity.

2. Economic activity includes all activity of producers, traders and service providers, including extractors of natural resources and farmers, along with that of persons exercising professions. Economic activity includes, in particular, the exploitation of goods or intangible and legal assets in a continuous manner with a view to profit.

...

6. Public bodies and offices serving these bodies shall not be considered taxable persons within the scope of tasks imposed by separate legal provisions for the execution of which they have been established, with the exception of activities carried out under civil law contracts.’

13

Article 19a(1) of the Law on VAT provides:

‘The tax obligation arises at the moment when the goods are delivered or services performed, subject to paragraphs 5 and 7 to 11, Article 14(6), Article 20 and Article 21(1).’

14

Under Article 29a(1) and (6)(1) of the Law on VAT:

'1. Everything which constitutes consideration which the supplier of the goods or services has obtained or will obtain from the purchaser of the goods or services or from a third person on account of the sale, including grants, subsidies and other financial assistance of a similar character which have a direct effect on the price of the goods or services provided by the taxable person, shall constitute the taxable amount, subject to paragraphs 2 to 5, Articles 30a to 30c, Article 32, Article 119 and Article 120(4) and (5).

...

6. The taxable amount shall include:

(1)

taxes, duties, levies and other liabilities of a similar character, excluding the amount of the tax. ...'

The Law on court enforcement officers and enforcement

15

Court enforcement officers are subject to the Ustawa o komornikach sędziowskich i egzekucji (Law on court enforcement officers and enforcement) of 29 August 1997, in the version in force at the material time for the main proceedings (Dz. U. 2017, item 1277) ('the Law on court enforcement officers').

16

Article 28 of the Law on court enforcement officers provides:

'The provisions on income tax on natural persons, social insurance and universal health insurance, concerning persons carrying on non-agricultural economic activity, shall apply to court enforcement officers.'

17

Article 34 of that law states:

'The costs of the enforcement activity of court enforcement officers include:

(1)

personal and material costs incurred in connection with the carrying out of enforcement activity;

(2)

costs of safeguarding the property seized and of the necessary personal protection and of insuring the property of the office and the officer's own civil liability insurance;

(3)

costs of travel within the place where the court enforcement officer has his office, correspondence, cash expenditure, transport of small movable property not requiring specialised transport;

(4)

compulsory contributions to the enforcement officers' association charged in accordance with the provisions of the law;

(5)

other costs necessary for carrying out enforcement activities and activities prescribed by the provisions of the law, if they are not covered by Article 39.'

18

In accordance with Article 35 of that law:

'The court enforcement officer shall cover the costs referred to in Article 34 from the enforcement fees received.'

19

In accordance with Article 43 of that law:

'The court enforcement officer shall charge enforcement fees for carrying out enforcement proceedings and other activities enumerated in the law.'

20

Article 49 of the law states:

'1. In cases relating to enforcement of monetary debts the court enforcement officer shall charge the debtor a proportionate fee in the amount of 15% of the debt enforced, but not less than 10% or more than 30 times the amount of the average monthly remuneration. ...

1a. In the cases mentioned in paragraph 1 the court enforcement officer shall charge the debtor a fee proportionate to the amount of the debt enforced.

...

7. The debtor can file an application for a reduction of the amount of the fees mentioned in paragraphs 1 and 2. ...

10. After considering the application mentioned in paragraph 7, the court can, having regard in particular to the amount of work done by the court enforcement officer or the applicant's financial position and his income level, reduce the amount of the fees mentioned in paragraphs 1 and 2.'

21

Article 51 of that law provides:

'1. The definitive fixed fee shall amount to 20% of the average monthly remuneration for:

(1)

the bringing into possession of immovable property and removal of movable property from it; in the case of commercial and industrial firms, the fee is charged on each room forming part of the

premises of the firm;

(2)

the appointment of an administrator to control immovable property or a firm, and the appointment of a caretaker to supervise immovable property;

(3)

the clearance of premises from things or persons, with a separate fee being charged for each room;

(4)

enforcement of seizure of goods.

2. In the case of the clearance of residential premises, a separate fee is not charged on the following rooms: hallways, alcoves, corridors, verandas, bathrooms, larders, balconies and the like.

3. In the case of the clearance of non-residential rooms and premises, in particular garages, stables, barns or shops, a fee is charged on each space or room.'

22

Article 54 of that law provides:

'For bringing the creditor into possession in cases other than those mentioned in Article 51, a definitive fixed fee shall be charged in the amount of 15% of the average monthly remuneration, and in the event of enforcement as a result of further infringements of possession the fee shall be increased by 100% on each occasion.'

23

Under Article 63(4) of that law:

'The court enforcement officer's income ... shall be the enforcement fees taken and collected in a given month along with refunds for cash expenditure on travel ... reduced by the costs of the officer's enforcement activity and the sums mentioned in this article.'

The Law on income tax on natural persons

24

The Ustawa o podatku dochodowym od osób fizycznych (Law on income tax on natural persons) of 26 July 1991, in the version in force at the material time for the main proceedings (Dz. U. 2018, item 200), provides in the second sentence of Article 14(1):

'In the case of taxable persons carrying out the sale of goods or services subject to the tax on goods and services, the income received reduced by the tax on goods and services due shall be considered the income from the sale.'

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

25

PSM 'K', a creditor of H. W., instructed Ms Treder, a court enforcement officer at the Sąd Rejonowy w Sopocie (District Court, Sopot, Poland), to carry out an enforcement procedure against the debtor. By decision of 4 October 2016, Ms Treder closed the procedure and determined the amount of fees for the procedure pursuant to Article 49(1) of the Law on court enforcement officers, increasing the fees by VAT.

26

The guardian appointed to represent H. W., whose whereabouts were unknown, brought a claim in the Sąd Rejonowy w Sopocie Wydział I Cywilny (District Court, Sopot, Civil Division I), arguing that the court enforcement officer had been wrong to add VAT to the fees, on the ground that the fees, determined pursuant to Article 49(1) of the Law on court enforcement officers, already included VAT.

27

By decision of 9 March 2017, on a joint application by the parties, that court stayed the proceedings pending a ruling by the Sąd Najwyższy (Supreme Court, Poland) on whether the amount of fees determined by a court enforcement officer pursuant to that provision should be increased by VAT or whether VAT was already included in the amount of those fees.

28

On 27 July 2017 the Sąd Najwyższy (Supreme Court) held that the court enforcement officer could not increase the fees charged under Article 49(1) of the Law on court enforcement officers by the amount of VAT. According to that court, the absence of any mention in the Law on court enforcement officers of the possibility of adding VAT to those fees means that the fees must, in accordance with Article 29a(1) in conjunction with Article 29a(6)(1) of the Law on VAT, be regarded as gross liabilities already inclusive of VAT.

29

After the resumption of the proceedings before the Sąd Rejonowy w Sopocie Wydział I Cywilny (District Court, Sopot, Civil Division I), the court enforcement officer asked that court to request the Court for a preliminary ruling in order to determine whether the position that the fees fixed by the court enforcement officer under Article 49(1) of the Law on court enforcement officers include the amount of VAT due is consistent with Directive 2006/112.

30

The referring court states that the fees to which a court enforcement officer is entitled when he supplies services in an enforcement procedure are laid down by law. Until 9 June 2015 court enforcement officers were regarded as covered by the exemption in Article 15(6) of the Law on VAT, and consequently not subject to VAT on those supplies. By virtue of a position adopted on that date by the Finance Minister, court enforcement officers were regarded as not covered by that provision, and consequently as subject to VAT on those supplies. In addition, it was stated that the VAT due is included in the amount of the fees charged. On the other hand, that change did not entail an amendment to the national law governing the limits of the fees to be charged. As a result, the court enforcement officers' fees were effectively reduced by an amount equivalent to the VAT due.

31

That position of the Finance Minister was confirmed on 6 March 2017 by the Sąd Najwyższy (Supreme Court). That court found that court enforcement officers are subject to Article 15(1) in conjunction with Article 15(2) of the Law on VAT, on the ground that they carry on their activity not as bodies governed by public law but as self-employed members of a liberal profession, so that they cannot enjoy the exemption provided for in Article 15(6) of that law and Article 13(1) of Directive 2006/112.

32

The referring court adopts the interpretation according to which a court enforcement officer is subject to VAT in respect of the enforcement actions he performs. It further considers that the position of the Sąd Najwyższy (Supreme Court) that the officer cannot increase the fees charged by the amount of VAT is well founded.

33

However, in so far as no legislative amendment providing for an increase in the fees charged in order to cover the costs relating to court enforcement officers being subject to VAT took place, the referring court entertains doubts as to the conformity with EU law, more particularly the principles of the neutrality of VAT and of proportionality, of the position of the Sąd Najwyższy (Supreme Court) set out in paragraph 28 above, according to which the fees of court enforcement officers are gross liabilities already including VAT.

34

The referring court raises the question, first, whether considering that the fees charged by court enforcement officers already include VAT involves an infringement of the rule that VAT must be borne by the final consumer and, second, in substance, whether the principle of proportionality, as interpreted in point 2 of the operative part of the judgment of 26 March 2015, *Macikowski* (C-499/13, EU:C:2015:201), means that the amount of the fees cannot already include VAT.

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In those circumstances, the Sąd Rejonowy w Sopocie Wydział I Cywilny (Regional Court, Sopot, Civil Chamber I) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1)

In the light of the system of [VAT] deriving from [Directive 2006/112], in particular Article 1, Article (2)(1)(a) and (c) and Article 73 in conjunction with subparagraph (a) of the first paragraph of Article 78, and the principle of VAT neutrality, which is a general principle of EU law, is it permissible — taking into account the content of Article 29a(1) and Article 29a(6)(1) of the [Law on VAT] in conjunction with the wording of Article 49(1), Article 35 and Article 63(4) of the [Law on court enforcement officers] — to adopt the position that the enforcement fees charged by court enforcement officers already include the tax on goods and services (i.e. VAT)?

If the answer to the first question is in the affirmative:

(2)

In the light of the principle of proportionality, which is a general principle of EU law, is it permissible to adopt the position that a court enforcement officer — as a VAT taxable person in connection

with his enforcement activities — does actually possess all the legal instruments in order to perform the tax obligation correctly, assuming that the enforcement fee charged on the basis of the provisions of the [Law on court enforcement officers] includes the amount of the tax on goods and services (i.e. VAT)?'

Consideration of the questions referred

36

By its questions, which should be considered together, the referring court essentially asks whether the provisions of Directive 2006/112 and the principles of neutrality of VAT and proportionality must be interpreted as precluding an administrative practice of the competent national authorities, such as that at issue in the main proceedings, under which the VAT relating to supplies of services by a court enforcement officer in an enforcement procedure is regarded as included in the fees charged by that officer.

37

As a preliminary point, it should be observed, first, that Directive 2006/112, which entered into force on 1 January 2007, repealed the 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) without making substantive changes to that directive. Since the relevant provisions of Directive 2006/112 have essentially the same scope as the relevant provisions of the Sixth Directive 77/388, the Court's case-law on the latter directive is applicable also to Directive 2006/112.

38

Second, as follows from paragraph 32 above, the questions referred are based on the premiss that a court enforcement officer, such as the officer concerned in the main proceedings, carries on an economic activity not falling within the non-taxation rules laid down in Article 13 of Directive 2006/112 for bodies governed by public law, and that national law does not allow the fees charged for an enforcement service of a court enforcement officer to be increased by the amount of VAT due.

39

It must be stated that the Court's answer to the questions referred is based on the hypothesis that those premisses are correct.

40

It should be recalled, first, that under Article 1(2) of Directive 2006/112 the principle of the common system of VAT consists in the application to goods and services, up to the retail trade stage, of a general tax on consumption exactly proportional to the price of the goods and services, however many transactions take place in the production and distribution process before the stage at which the tax is charged.

41

In that respect, it follows from Article 2(1) and Article 9 of Directive 2006/112 that that common system is based on the general principle that any activity of an economic nature is in principle to be subject to VAT (see, to that effect, judgment of 19 January 2017, National Roads Authority, C-344/15, EU:C:2017:28, paragraph 36). Every service supplied for consideration by a taxable

person is thus subject to VAT (see, to that effect, judgment of 21 March 2013, *Commission v France*, C-197/12, not published, EU:C:2013:202, paragraph 30).

42

Second, as regards the possibility of derogating from the general principle that VAT is charged on every service supplied for consideration by a taxable person, the Court has previously held that all exemptions must be expressly provided for and precisely defined (see, to that effect, judgment of 26 March 1987, *Commission v Netherlands*, 235/85, EU:C:1987:161, paragraph 19). Moreover, the terms used to specify an exemption must in any event be interpreted strictly (see, to that effect, judgments of 19 July 2012, *Deutsche Bank*, C-44/11, EU:C:2012:484, paragraph 42 and the case-law cited, and of 29 October 2015, *Saudaçor*, C-174/14, EU:C:2015:733, paragraph 49 and the case-law cited).

43

It follows that, where a supply of services does not fall within the exemptions provided for by Directive 2006/112, the supply is subject to VAT by virtue of Article 2(1)(c) of that directive.

44

Third, in accordance with Article 193 of Directive 2006/112, the taxable person carrying out the taxable supply of services is liable to pay the VAT.

45

Consequently, where a court enforcement officer supplies a service such as those at issue in the main proceedings, in so far as the supply does not fall within the exemptions provided for by that directive, the officer is liable for VAT in respect of that transaction.

46

As regards the determination of the taxable amount of the VAT due in the present case, it follows from Article 73 and Article 78(a) of Directive 2006/112 that, for a supply of services, the taxable amount includes everything which constitutes consideration obtained or to be obtained by the supplier, in return for the supply, from the customer or a third party, excluding the VAT itself.

47

On the other hand, that directive contains no express rule on whether or not the court enforcement officer's fees should include the VAT due. It is therefore for the Member States to decide that point.

48

In the present case, as follows from paragraph 38 above, under national law no amount of VAT can be added to the fees charged by the court enforcement officer. Since the taxable amount, as stated in paragraph 46 above, includes everything which constitutes the consideration obtained with the exception of the VAT itself, the amount of the fees concerned must be regarded as already including VAT.

49

That interpretation also observes the principle of the neutrality of VAT. It enables taxable persons to contribute to the payment of VAT, in the same proportion, on the entire amount charged in

respect of the taxable transactions.

50

Furthermore, that interpretation is in accordance with the principle that VAT is a tax to be borne by the final consumer. In that it is not possible under national law to add to the amount of fees to be charged an additional element corresponding to the VAT due, to regard that amount as already including VAT has the result that the taxable amount for the VAT to be collected by the tax authorities cannot exceed the consideration actually paid by the final consumer which is the basis for calculating the VAT ultimately borne by him (see, to that effect, judgments of 24 October 1996, *Elida Gibbs*, C-317/94, EU:C:1996:400, paragraph 19, and of 7 November 2013, *Tulic* and *Plavo*, C-249/12 and C-250/12, EU:C:2013:722, paragraphs 34 and 35).

51

That interpretation also complies with the principle of proportionality, since it does not go beyond what is necessary for attaining the objective of ensuring the collection of VAT, and that way of determining the taxable amount is compatible with the basic principle of the system of VAT set out in paragraphs 40 and 41 above, namely that every economic activity is to be subject to VAT.

52

That conclusion is not invalidated by the interpretation of the principle of proportionality in point 2 of the operative part of the judgment of 26 March 2015, *Macikowski* (C-499/13, EU:C:2015:201), which underlies the referring court's second question. It must be recalled that, according to point 2 of that operative part, the Court held that the principle of proportionality does not preclude a provision of national law under which a court enforcement officer must be liable with his entire assets for the amount of VAT due on the proceeds of the sale of immovable property effected through enforcement where he does not discharge his obligation to collect and pay that tax, provided that he actually has all legal means to discharge that obligation. That answer must be read in the light of the circumstances of the case in which judgment was given on 26 March 2015, *Macikowski* (C-499/13, EU:C:2015:201), which differ from those of the present case. The case in which that judgment was given, in contrast to the main proceedings in the present case, concerned the situation of a court enforcement officer not as a taxable person for VAT purposes but as a person liable for that tax on behalf of another taxable person and unable, until the competent national court gives its consent, to dispose of the sum obtained in the enforcement in question and pay the VAT on that sum within the periods prescribed by national law. Furthermore, in the dispute in the main proceedings in the present case, it does not appear from the information provided to the Court that the court enforcement officer was deprived of the legal means of complying with her tax obligation as a taxable person for VAT purposes.

53

In the light of all the above considerations, the answer to the questions referred is that the provisions of Directive 2006/112 and the principles of neutrality of VAT and proportionality must be interpreted as not precluding an administrative practice of the competent national authorities, such as that at issue in the main proceedings, under which the VAT relating to supplies of services by a court enforcement officer in an enforcement procedure is regarded as included in the fees charged by that officer.

Costs

Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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 (Eighth Chamber) hereby rules:

The provisions of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, as amended by Council Directive 2013/43/EU of 22 July 2013, and the principles of neutrality of value added tax (VAT) and proportionality must be interpreted as not precluding an administrative practice of the competent national authorities, such as that at issue in the main proceedings, under which the VAT relating to supplies of services by a court enforcement officer in an enforcement procedure is regarded as included in the fees charged by that officer.

[Signatures]

(*1) Language of the case: Polish.