Provisional text

JUDGMENT OF THE COURT (Third Chamber)

1 July 2021 (*)

(Reference for a preliminary ruling – Taxation – Value added tax (VAT) – Directive 2006/112/EC – Tax inspection – Supply of services as an activity of an agent for performing artists – Transactions subject to VAT – Transactions not declared to the tax authority and not invoiced – Fraud – Reconstitution of the taxable amount for income tax purposes – Principle of VAT neutrality – Inclusion of VAT in the reconstituted taxable amount)

In Case C?521/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunal Superior de Justicia de Galicia (High Court of Justice, Galicia, Spain), made by decision of 19 June 2019, received at the Court on 8 July 2019, in the proceedings

CB

v

Tribunal Económico-Administrativo Regional de Galicia,

THE COURT (Third Chamber),

composed of A. Prechal, President of the Chamber, N. Wahl (Rapporteur), F. Biltgen, L.S. Rossi and J. Passer, Judges,

Advocate General: G. Hogan,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– CB, by C. Gómez Docampo, abogada,

– the Spanish Government, by S. Jiménez García, acting as Agent,

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

– the European Commission, by L. Lozano Palacios and J. Jokubauskait?, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 4 March 2021,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 73 and 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).

2 The request has been made in proceedings between CB and the Tribunal Económico-Administrativo Regional de Galicia (Regional Tax Tribunal, Galicia, Spain) concerning the assessments and penalties imposed on him as part of a tax adjustment relating to personal income tax due in respect of the years 2010 to 2012.

Legal context

EU law

3 Recital 7 of Directive 2006/112 states:

‘The common system of VAT should, even if rates and exemptions are not fully harmonised, result in neutrality in competition, such that within the territory of each Member State similar goods and services bear the same tax burden, whatever the length of the production and distribution chain.’

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 73 of that directive is worded as follows:

‘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 Article 78 of that directive provides:

‘The taxable amount shall include the following factors:

(a) taxes, duties, levies and charges, excluding the VAT itself;

(b) incidental expenses, such as commission, packing, transport and insurance costs, charged by the supplier to the customer.

For the purposes of point (b) of the first paragraph, Member States may regard expenses covered by a separate agreement as incidental expenses.’

7 Article 178 of Directive 2006/112 is worded as follows:

‘In order to exercise the right of deduction, a taxable person must meet the following conditions:

(a) for the purposes of deductions pursuant to Article 168(a), in respect of the supply of goods or services, he must hold an invoice drawn up in accordance with Articles 220 to 236 and Articles 238, 239 and 240;

…’

8 According to Article 193 of that directive, VAT is payable by any taxable person carrying out a taxable supply of goods or services, except where it is payable by another person in the cases referred to in Articles 194 to 199 and Article 202 of that directive.

9 Under Article 220(1) of Directive 2006/112:

‘Every taxable person shall ensure that, in respect of the following, an invoice is issued, either by himself or by his customer or, in his name and on his behalf, by a third party:

(1) supplies of goods or services which he has made to another taxable person or to a non-taxable legal person;

…

(5) any payment on account made to him by another taxable person or non-taxable legal person before the provision of services was completed.’

10 According to Article 226 of that directive:

‘Without prejudice to the particular provisions laid down in this Directive, only the following details are required for VAT purposes on invoices issued pursuant to Articles 220 and 221:

…

(6) the quantity and nature of the goods supplied or the extent and nature of the services rendered;

(7) the date on which the supply of goods or services was made or completed or the date on which the payment on account referred to in points (4) and (5) of Article 220 was made, in so far as that date can be determined and differs from the date of issue of the invoice;

(8) the taxable amount per rate or exemption, the unit price exclusive of VAT and any discounts or rebates if they are not included in the unit price;

(9) the VAT rate applied;

(10) the VAT amount payable, except where a special arrangement is applied under which, in accordance with this Directive, such a detail is excluded;

…’

11 Article 273 of the same directive provides:

‘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.

The option under the first paragraph may not be relied upon in order to impose additional invoicing obligations over and above those laid down in Chapter 3.'

Spanish law

12 Under Article 78(1) of Ley 37/1992 del Impuesto sobre el Valor Añadido (Law 37/1992 on Value Added Tax) of 28 November 1992 (BOE No 312 of 29 December 1992, p. 44247):

'The taxable amount shall be composed of the total amount of the consideration for taxable transactions received from the customer or third parties.'

13 Article 88 of Law 37/1992, entitled 'Passing on of the tax', states:

'1. Taxable persons must pass on in full the amount of the tax to the person for whom the taxable transaction is carried out, and the latter must pay that tax provided that the tax is passed on in accordance with the provisions of the present Law, regardless of the terms which the parties have agreed between themselves. In the case of the taxable and non-exempt supply of goods or services to a customer which is a public body, the taxable person, when drawing up his financial proposals, even if these are verbal, shall be deemed in all cases to have included in those proposals the [VAT] which, nevertheless, must be passed on as a separate item, where appropriate, in the documents submitted for the purposes of collecting payment, while the overall amount agreed must not be increased as a result of showing the tax passed on.

2. The tax must be passed on in an invoice, under the conditions and in accordance with the criteria established by law. For that purpose, the amount passed on shall be shown separately from the taxable amount, including in the case of prices which are set officially, stating the rate of tax applied. Transactions which are determined by law shall be exempt from the above.

3. The tax must be passed on at the time when the relevant invoice is issued and delivered.

4. The right to pass on the tax shall be lost after one year has passed following the due date.

5. The person for whom the taxable transaction is carried out shall not be required to pay the [VAT] passed on to him before that tax becomes due.

6. Any disputes which may arise in connection with the passing on of the tax, relating to the lawfulness of passing on the tax and to the amount of tax, shall be treated as tax disputes for the purposes of the relevant complaint before a tax tribunal.'

14 Article 89 of Law 37/1992, entitled 'Correction of the amounts of tax passed on', provides:

'1. Taxable persons must correct the amounts of tax passed on where those amounts have been calculated incorrectly or where circumstances arise which, in accordance with Article 80 of the present Law, lead to the adjustment of the taxable amount. The correction must be made at the time when the reasons for the incorrect calculation of the tax are identified or when the other circumstances referred to in the previous subparagraph arise, provided that four years have not passed from the due date of the tax to which the transaction is liable or, as the case may be, the circumstances referred to in Article 80 arose.

2. The provisions of the previous paragraph shall also apply where no tax has been passed on and the invoice for the transaction has been issued.

3. Notwithstanding the provisions of the previous paragraphs, the amounts of tax passed on shall not be corrected in the following situations:

(1) Where the correction is not based on the grounds provided for in Article 80 of the present Law, involves an increase in the amounts passed on and the persons for whom the transactions were carried out do not act as businesses or professional persons, except where the rates of tax are raised by statute in which case the correction may be made in the month in which the new tax rates enter into force or in the following month;

(2) Where the tax authorities demonstrate, through the relevant assessments, amounts of tax due and not passed on which are higher than that declared by the taxable person and it is established, by means of objective information, that that taxable person was involved in a fraud or that he knew or should have known, through the exercise of reasonable care in that regard, that he was carrying out a transaction which was part of a fraud.'

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

15 CB is a self-employed person carrying out an activity as an agent for performing artists which is subject to VAT. In that capacity, he provided services to the Lito group, a group of undertakings responsible for the management of infrastructure and orchestras, for patron saint feast days and village festivals in Galicia (Spain). More specifically, CB would contact the festival committees, informal resident groups responsible for organising those festivals, and negotiate performances by orchestras on behalf of the Lito group.

16 Payments made by the festival committees to the Lito group in that connection were in cash, without invoices being issued or accounting entries being made. As a result, they were not declared to the tax authorities for the purposes of either corporate tax or VAT.

17 CB, for his part, would receive 10% of the Lito group's income. Payments to him were also made in cash, were not declared and no invoices were issued for them. CB did not keep accounts or official records, nor did he issue or receive invoices and nor, consequently, did he complete VAT returns.

18 Following the inspection of CB's tax situation, the tax authority took the view that the amounts which he had received for acting as an agent for the Lito group, namely EUR 64 414.90 in 2010, EUR 67 565.40 in 2011 and EUR 60 692.50 in 2012, did not include VAT and that, therefore, the taxable base of income tax for those years had to be calculated taking those amounts into account in their entirety. The corresponding adjustments resulted in an income tax assessment for the years 2010 to 2012 and penalties were imposed on CB, who challenged by means of a complaint the acts of the tax authority ordering that assessment and the penalties imposed on him.

19 The Tribunal Económico-Administrativo Regional de Galicia (Regional Tax Tribunal, Galicia) dismissed CB's complaint, who had that body's decision referred to the referring court.

20 In that context, CB submits that the subsequent application of VAT to the amounts which the tax authority treated as income is contrary to the case-law of the Tribunal Supremo (Supreme Court, Spain) and the case-law of the Court of Justice, according to which, where that authority discovers transactions which are, in principle, subject to VAT and have not been declared or

invoiced, VAT must be regarded as included in the price agreed by the parties to those transactions.

21 Thus, CB takes the view that, in so far as, under Spanish law, it is impossible for him to reclaim VAT which has not been passed on because his conduct amounts to a tax offence, VAT must be treated as included in the price of the services he has provided.

22 The referring court states that, in order to resolve the dispute in the main proceedings, it must establish whether Law 37/1992, as interpreted by the Tribunal Supremo (Supreme Court), is in conformity with EU law in that it provides that, where traders carry out, in a voluntary and concerted manner, transactions which lead to cash payments with no invoices and no VAT declaration, such payments must be regarded as including VAT.

23 In those circumstances, the Tribunal Superior de Justicia de Galicia (High Court of Justice, Galicia, Spain) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘Must Articles 73 and 78 of [Directive 2006/112], in the light of the principles of neutrality, prohibition of tax evasion and abuse of rights, and prohibition of the illegal distortion of competition, be interpreted as precluding national legislation and the case-law interpreting it, pursuant to which, where the tax authorities discover concealed transactions subject to [VAT] for which no invoice was issued, the price agreed by the parties for those transactions must be regarded as already including [VAT]?

Is it therefore possible, in cases of fraud in which the transaction was concealed from the tax authorities, to consider, as may be deduced from the judgments of the [Court of Justice] of 28 July 2016, *Astone* (C?332/15, EU:C:2016:614); of 5 October 2016, *Maya Marinova* (C?576/15, EU:C:2016:740); and of 7 March 2018, *Dobre*, (C?159/17, EU:C:2018:161), that the amounts paid and received do not include [VAT] in order to conduct the proper assessment and impose the appropriate penalty?’

Consideration of the question referred

24 By its question, the referring court is essentially asking the Court as to the interpretation that should be given, in particular in the light of the principle of neutrality, to Articles 73 and 78 of Directive 2006/112, which relate to the determination of the taxable amount of a transaction between taxable persons for VAT purposes, where those persons, by fraud, have not indicated the existence of the transaction to the tax authority, issued invoices or shown the income generated during that transaction in a direct tax declaration. The referring court asks whether or not, in such circumstances, the amounts paid and received must be regarded as already including VAT.

25 It must be noted at the outset that, even though the prevention of tax evasion, avoidance and abuse is an objective recognised and encouraged by Directive 2006/112 (judgment of 12 November 2020, *ITH Comercial Timi?oara*, C?734/19, EU:C:2020:919, paragraph 39 and the case-law cited), the determination of the taxable amount of a transaction between taxable persons, for the purpose of Articles 73 and 78 of that directive, is not among the tools available to the Member States, under Article 273 thereof, for achieving that objective, in the sense that they could adopt, in case of fraud, an interpretation of those provisions different from that which should be adopted in the absence of fraudulent behaviour by taxable persons.

26 As the Advocate General observed in point 29 of his Opinion, the question referred by the national court must be seen as separate from the question of whether it is necessary to impose a sanction on the individuals concerned for violating the rules of the common VAT mechanism.

27 It must be borne in mind, in that regard, that the EU legislature, irrespective of the penalties provided for in the Member States in order to punish unlawful and, in particular, fraudulent, tax behaviour, has itself ensured that taxable persons who have not observed the basic rules of Directive 2006/112, in particular in relation to invoicing, bear the consequences of their behaviour by making it impossible to deduct VAT, including where, after a tax inspection, transactions which were not invoiced are retroactively subject to VAT.

28 Thus, according to settled case-law, although the right of taxable persons to deduct the VAT due or already paid on goods purchased and services received as inputs from the VAT which they are liable to pay is a fundamental principle of the common system of VAT established by EU legislation, is intended to relieve the operator entirely of the burden of the VAT due or paid in respect of all his or her economic activities and therefore ensuring neutrality of taxation of all economic activities, whatever their purpose or results of those activities, provided that they are themselves, in principle, subject to VAT, Article 178 of Directive 2006/112 provides that that right can be exercised only once the taxable person holds an invoice (see, to that effect, judgment of 21 March 2018, *Volkswagen*, C?533/16, EU:C:2018:204, paragraphs 37, 38, 42 and 43 and the case-law cited).

29 As the referring court confirms, it follows from the national legislation at issue in the main proceedings, namely from Article 88(2) and Article 89(3)(2) of Law 37/1992, that the impossibility for the taxable person to deduct the VAT amount charged on the transaction that has not been declared to the tax authority and that has not been invoiced by him or her affects, in this case, the applicant in the main proceedings, without prejudice to any tax penalties which have been or could be imposed on him.

30 Thus, as regards the determination of the taxable amount of transactions between taxable persons, that is to say, at a stage before VAT is paid by the end consumer, the supplier, in this case the applicant in the main proceedings, should have charged VAT to the recipient of the services, in this case the Lito group, and declared that VAT to the tax authority, which would have given him a right to deduct the VAT charged on all the goods or services that had been taken into account for his own supply of services. However, due to the fraud on the part of the applicant in the main proceedings, the provisions of Article 89(3)(2) of Law 37/1992 preclude any possibility of VAT correction and, therefore, also exercise of the right to deduct in question, which it will be for the referring court to verify.

31 The fact that taxable persons have failed to comply with the obligation to invoice laid down in Article 220 of Directive 2006/112 and that, therefore, the requisite details listed in Article 226(6) to (10) of that directive are by definition absent cannot constitute a restriction of the basic principle of that directive, which, according to the Court’s settled case-law, lies in the fact that the VAT system is aimed at taxing only the end consumer (judgment of 7 November 2013, *Tulic? and Plavo?in*, C?249/12 and C?250/12, EU:C:2013:722, paragraph 34 and the case-law cited).

32 Furthermore, even if, in the context of a tax inspection, the checks carried out by the national authority concerned are aimed at re-establishing the situation that would have existed had there been no irregularity and, a fortiori, fraud, and if that authority endeavours, using various methods, to reconstitute concealed transactions and lost revenue, it is nevertheless necessary to point out that those methods cannot claim perfect reliability and that they involve an inevitable margin of uncertainty, such that they are in reality aimed at obtaining the most probable and most

faithful tax result possible, according to the material facts collected during the tax inspection.

33 In those circumstances, the taxable amount as defined in Articles 73 and 78 of Directive 2006/112, namely the consideration, a subjective value, actually received by the taxable person and not including VAT, must, where it stems from a reconstitution a posteriori by the national tax authority concerned, on account of the failure to mention VAT on an invoice or the absence of an invoice, whether or not those omissions are the consequence of fraudulent intent, be understood taking that inevitable margin of uncertainty into account.

34 That is why the result of a transaction concealed from the tax authority by taxable persons for VAT purposes, when it should have given rise to invoices pursuant to Article 220 of Directive 2006/112 bearing the details required by Article 226 of that directive and been declared to that authority, must be deemed, where, as in the case in the main proceedings, it stems from a reconstitution by the tax authority concerned performed in the context of an inspection of direct taxes, to include the VAT charged on that transaction.

35 The situation would be otherwise, in the present case, were the referring court to consider that, at the end of the verification referred to in paragraph 30 of the present judgment, under the applicable national law, VAT correction is possible (see, to that effect, judgment of 7 November 2013, *Tulic? and Plavo?in*, C?249/12 and C?250/12, EU:C:2013:722, paragraph 37).

36 Any other interpretation would run counter to the principle of VAT neutrality and would place part of the VAT burden on a taxable person, when VAT must be borne solely by the end consumer, in accordance with the case-law cited in paragraphs 28 and 31 of the present judgment.

37 Nor does that solution run counter to the case-law illustrated by the judgments of 28 July 2016, *Astone* (C?332/15, EU:C:2016:614), of 5 October 2016, *Maya Marinova* (C?576/15, EU:C:2016:740), and of 7 March 2018, *Dobre* (C?159/17, EU:C:2018:161), since, as the Advocate General observed in point 33 of his Opinion, the Court in those judgments did not rule on whether or not VAT must be included in the amount of income reconstituted by the tax authority in the event of fraud, where the concealed transactions which generated that income, subject to VAT, should have been invoiced and the VAT declared.

38 It must be added that observance of the principle of VAT neutrality does not preclude the possibility for Member States, pursuant to Article 273 of Directive 2006/112, to adopt penalties aimed at combating tax fraud, and more broadly, the requirement imposed on those States, pursuant to Article 325(1) and (2) TFEU, to counter illegal activities affecting the financial interests of the European Union through effective and deterrent measures, and to take the same measures to counter fraud affecting the financial interests of the Union as they take to combat fraud affecting their own financial interests (see, to that effect, judgment of 5 December 2017, *M.A.S. and M.B.*, C?42/17, EU:C:2017:936, paragraph 30). It is in the context of such penalties, and not by the determination of the taxable amount within the meaning of Articles 73 and 78 of Directive 2006/112, that fraud such as that at issue in the main proceedings must be punished.

39 In the light of those considerations, the answer to the question referred is that Directive 2006/112, in particular Articles 73 and 78 thereof, read in the light of the principle of neutrality of VAT, must be interpreted as meaning that, where taxable persons for VAT purposes, by fraud, have not indicated the existence of the transaction to the tax authority, issued invoices or shown the income generated during that transaction in a direct tax declaration, the reconstitution, as part of an inspection of that declaration, of the amounts paid and received during the transaction at issue by the tax authority concerned must be regarded as a price already including VAT, unless, under national law, the taxable persons have the possibility of subsequently passing on and deducting the VAT at issue, notwithstanding the fraud.

Costs

40 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 (Third Chamber) hereby rules:

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, in particular Articles 73 and 78 thereof, read in the light of the principle of neutrality of value added tax (VAT), must be interpreted as meaning that, where taxable persons for VAT purposes, by fraud, have not indicated the existence of the transaction to the tax authority, issued invoices or shown the income generated during that transaction in a direct tax declaration, the reconstitution, as part of an inspection of that declaration, of the amounts paid and received during the transaction at issue by the tax authority concerned must be regarded as a price already including VAT, unless, under national law, the taxable persons have the possibility of subsequently passing on and deducting the VAT at issue, notwithstanding the fraud.

[Signatures]

* Language of the case: Spanish.