Provisional text

JUDGMENT OF THE COURT (Sixth Chamber)

11 November 2021 (*)

(Reference for a preliminary ruling – Value added tax (VAT) – Directive 2006/112/EC – Article 90 – Reduction of the taxable amount for VAT purposes – Total or partial non-payment of the price on account of the debtor's insolvency – Conditions imposed by national legislation for the adjustment of output VAT – Condition that the claim not paid in whole or in part must not have arisen during the six-month period preceding the declaration of insolvency of the debtor company – Non-compliance)

In Case C?398/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Krajský soud v Brn? (Regional Court, Brno, Czech Republic), made by decision of 29 July 2020, received at the Court on 20 August 2020, in the proceedings

ELVOSPOL, s. r. o.

v

Odvolací finan?ní ?editelství,

THE COURT (Sixth Chamber),

composed of L. Bay Larsen, Vice-President of the Court, acting as President of the Sixth Chamber, J-C. Bonichot (Rapporteur) and M. Safjan, Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– ELVOSPOL, s. r. o., by T. Klíma,

– the Odvolací finan?ní ?editelství, by T. Rozehnal,

– the Czech Government, by M. Smolek, O. Serdula and J. Vlá?il, acting as Agents,

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

– the European Commission, by P. Carlin and M. Salyková, 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 90 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 ELVOSPOL, s. r. o. (‘ELVOSPOL’), a company incorporated under Czech law, and the Odvolací finan?ní ?editelství (Appellate Tax Directorate, Czech Republic) concerning the latter’s refusal to grant ELVOSPOL an adjustment of the amount of value added tax (VAT).

Legal context

EU law

3 Article 63 of the VAT Directive provides:

‘The chargeable event shall occur and VAT shall become chargeable when the goods or the services are supplied.’

4 Article 73 of that 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.’

5 Under Article 90 of the directive:

‘1. In the case of cancellation, refusal or total or partial non-payment, or where the price is reduced after the supply takes place, the taxable amount shall be reduced accordingly under conditions which shall be determined by the Member States.

2. In the case of total or partial non-payment, Member States may derogate from paragraph 1.’

6 Article 273 of the VAT 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.’

Czech law

7 Paragraph 44 of Zákon ?. 235/2004 Sb., o dani z p?idané hodnoty (Law No 235/2004 on value added tax; ‘the Law on VAT’) provides, in subparagraph 1 thereof:

‘A taxable person for whom tax becomes chargeable on a taxable supply to another taxable person and who has a claim relating to such supply that has not yet been extinguished arising no later than 6 months before a court decision declaring insolvency (“the creditor”) may make an

adjustment to the amount of output tax based on the claim identified where:

(a) the taxable person in respect of whom the creditor has that claim (“the debtor”) is the subject of insolvency proceedings and where the insolvency court has declared the debtor’s assets to be liquidated,

(b) the creditor has declared the claim in question no later than the time limit set by the decision of the insolvency court, that claim has been established and account is taken of it in the insolvency proceedings,

(c) the creditor and the debtor are not, and were not at the time the claim arose,

1. persons whose capital is connected …,

2. related persons, or

3. shareholders in the same company, in the case of taxable persons,

(d) the creditor has sent the debtor the tax document provided for in Paragraph 46(1).’

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

8 On 29 November 2013, ELVOSPOL supplied goods to MPS Mont a.s. (‘Mont’). On 19 May 2014, a Czech court declared the latter company insolvent and determined the manner in which it was to be wound up.

9 The applicant in the main proceedings then proceeded, in its VAT return for May 2015, and then in a supplementary tax return, to adjust its taxable amount on the basis of Paragraph 44(1) of the Law on VAT, arguing that Mont had not paid the invoice for the supply made.

10 The Finan?ní ú?ad pro Jihomoravský kraj (Tax Office for the Region of Southern Moravia, Czech Republic) (‘the tax authorities’) took the view, however, that the applicant’s interpretation of Paragraph 44(1) of the Law on VAT was incorrect and that it was not entitled to adjust the taxable amount. In those circumstances, on 22 February 2016, the tax authorities adopted a decision by which they determined the amount of VAT without taking into account the request for adjustment.

11 The applicant in the main proceedings challenged that decision before the Appellate Tax Directorate. By decision of 2 May 2018, that directorate rejected that objection, taking the view that the applicant in the main proceedings could not adjust its taxable amount on the basis of Paragraph 44(1) of the Law on VAT, since the unpaid claim had arisen during the six-month period preceding Mont’s declaration of insolvency.

12 According to the Appellate Tax Directorate, in order to be able to make an adjustment to the amount of VAT, Paragraph 44(1) of the Law on VAT lays down a number of conditions, one of them being that the unpaid claim must not have arisen during the six-month period preceding the court decision declaring the debtor company concerned insolvent. The unpaid claim at issue in the main proceedings arose on 29 November 2013, that is to say, during the six-month period preceding the court’s decision of 19 May 2014 declaring Mont insolvent.

13 The applicant in the main proceedings brought an action against the decision of the Appellate Tax Directorate before the Krajský soud v Brn? (Regional Court, Brno, Czech Republic), the referring court.

14 That court asks whether a national provision, such as Paragraph 44(1) of the Law on VAT,

which makes adjustment of the amount of VAT subject to the condition that the unpaid claim has not arisen during the six-month period preceding the declaration of insolvency of the debtor company, is contrary to Article 90 of the VAT Directive.

15 In that regard, the referring court recalls, referring to the case-law of the Court relating to Article 90 of the VAT Directive, that the principle of neutrality means that, as a collector of taxes on behalf of the State, the trader must be fully relieved of the burden of the tax payable or paid in the course of its economic activities themselves subject to VAT and that, although Member States may deviate from the possibility of adjusting the taxable amount, they may not wholly exclude such adjustment without infringing the principle of neutrality.

16 In the light of that case-law of the Court, the referring court considers that a national provision such as Paragraph 44(1) of the Law on VAT, which makes adjustment of the amount of VAT subject to the condition that the unpaid claim must not have arisen during the six-month period preceding the declaration of insolvency of the debtor company concerned, could be contrary to the principle of the neutrality of VAT.

17 The referring court also doubts whether such a national provision may fall within the derogation provided for in Article 90(2) of the VAT Directive. In that regard, it points out that, according to the case-law of the Court, that provision is based on the notion that, in certain circumstances and because of the legal situation prevailing in the Member State concerned, non-payment of consideration may be difficult to verify or may only be temporary. Therefore, exercising such an option to derogate must be warranted by uncertainty as to the payment of the consideration and be proportionate to that objective.

18 Furthermore, the referring court asks whether a national provision such as Paragraph 44(1) of the Law on VAT could be justified by Article 273 of the VAT Directive, which allows Member States to impose the obligations which they deem necessary to ensure the correct collection of VAT and to prevent evasion. The referring court notes that, according to the Court’s case-law, measures based on the latter provision must be limited to what is strictly necessary and must not be used in such a way as to undermine the principle of the neutrality of VAT.

19 The referring court also states that, according to an order of the Nejvyšší správní soud (Supreme Administrative Court, Czech Republic) of 16 July 2019, Paragraph 44(1) of the Law on VAT is based on the economic assumption that the closer the period of negotiation and conclusion of a transaction between a professional and its trading partner is to the time of the latter’s insolvency, the more that professional is in a position to distinguish on the market the signs of that insolvency. According to that order, a professional who deals with a future insolvent trading partner during the six-month period preceding the declaration of insolvency cannot, according to general economic knowledge, be unaware of the imminent nature of the insolvency, with the result that there is no justification for providing him or her with the opportunity to adjust the amount of VAT.

20 While noting that those justifications, which underlie the adoption of Paragraph 44(1) of the Law on VAT, are not based on the idea that non-payment of consideration may be difficult to verify or be only temporary, the referring court considers that those justifications are not intended to prevent evasion. According to the referring court, the mere fact of carrying out transactions subject to VAT with an economic operator who may display signs of imminent insolvency does not in itself mean that such transactions are a priori dishonest or carried out with the aim of obtaining an unjustified tax advantage.

21 Thus, according to the referring court, a national provision, such as Paragraph 44(1) of the Law on VAT, which makes adjustment of the amount of VAT subject to the condition that the outstanding claim must not have arisen during the six-month period preceding the declaration of

insolvency of the debtor company, cannot be justified either by Article 90(2) or by Article 273 of the VAT Directive.

22 In those circumstances, the Krajský soud v Brn? (Regional Court, Brno) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Is national legislation contrary to the purpose of Article 90(1) and (2) of [the VAT Directive] if it lays down a condition preventing [VAT] payers, where tax becomes chargeable on a taxable supply to another taxpayer who paid for the supply only in part or not at all, from making a correction to the amount of output tax in respect of the value of the claim if that claim arose less than six months before a court decision declaring the other taxpayer insolvent?’

Consideration of the question referred

23 By its question, the referring court asks, in essence, whether Article 90 of the VAT Directive must be interpreted as precluding a national provision which makes adjustment of the amount of VAT subject to the condition that the partially or totally unpaid claim must not have arisen during the six-month period preceding the declaration of insolvency of the debtor company.

24 Article 90(1) of the VAT Directive provides that, in the case of cancellation, refusal or total or partial non-payment, or where the price is reduced after the supply takes place, the taxable amount is to be reduced accordingly under conditions which are to be determined by the Member States.

25 According to the Court’s case-law, that provision requires the Member States to reduce the taxable amount for VAT purposes and, consequently, the amount of VAT payable by the taxable person whenever, after a transaction has been concluded, part or all of the consideration has not been received by the taxable person. That provision embodies one of the fundamental principles of the VAT Directive, according to which the taxable amount is the consideration actually received and the corollary of which is that the tax authorities may not collect an amount of VAT exceeding the tax which the taxable person received (judgment of 15 October 2020, *E. (VAT – Reduction of the taxable amount)*, C?335/19, EU:C:2020:829, paragraph 21 and the case-law cited).

26 Article 90(2) of the VAT Directive, for its part, provides that, in the case of total or partial non-payment of consideration, Member States may derogate from the obligation to reduce the taxable amount for VAT purposes provided for in Article 90(1) of that directive.

27 The Court has stated that that option to derogate, which is strictly limited to situations of total or partial non-payment, is based on the notion that, in certain circumstances and because of the legal situation prevailing in the Member State concerned, non-payment of consideration may be difficult to establish or may only be temporary (judgment of 11 June 2020, *SCT*, C?146/19, EU:C:2020:464, paragraph 23 and the case-law cited).

28 It follows that the exercise of that option to derogate must be justified if the measures taken by the Member States for its implementation are not to undermine the objective of fiscal harmonisation pursued by the VAT Directive, and it cannot allow the Member States to exclude altogether reduction of the taxable amount for VAT purposes in the event of non-payment (judgment of 15 October 2020, *E. (VAT – Reduction of the taxable amount)*, C?335/19, EU:C:2020:829, paragraph 29 and the case-law cited).

29 In that regard, the Court has held that that option to derogate is intended only to enable Member States to counteract the uncertainty associated with recovery of the sums owed (judgment of 11 June 2020, *SCT*, C?146/19, EU:C:2020:464, paragraph 24 and the case-law

cited).

30 That uncertainty may be taken into account, in accordance with the principle of fiscal neutrality, by depriving the taxable person of the right to a reduction of the taxable amount for as long as the claim is not definitively irrecoverable. However, it may equally be taken into account by granting the reduction when the taxable person demonstrates a reasonable probability that the debt will not be honoured, without prejudice to the possibility of the taxable amount being re-evaluated upwards in the event that payment nonetheless occurs (see, to that effect, judgment of 3 July 2019, *UniCredit Leasing*, C?242/18, EU:C:2019:558, paragraph 62 and the case-law cited).

31 On the other hand, to accept that it is possible for Member States to exclude any reduction of the taxable amount for VAT purposes in the event of definitive non-payment would run counter to the principle of the neutrality of VAT, which means, inter alia, that the trader, as tax collector on behalf of the State, is entirely to be relieved of the burden of tax due or paid in the course of his or her economic activities which are themselves subject to VAT (see, to that effect, judgment of 11 June 2020, *SCT*, C?146/19, EU:C:2020:464, paragraph 25 and the case-law cited).

32 The Court has held, in that regard, that a situation characterised by the definitive reduction of the debtor's obligations towards his or her creditors cannot be classified as 'non-payment' within the meaning of Article 90(2) of the VAT Directive. In such a situation, a Member State must allow the taxable amount for VAT purposes to be reduced where the taxable person is able to demonstrate that his or her claim against the debtor is definitively irrecoverable (see, to that effect, judgment of 11 June 2020, *SCT*, C?146/19, EU:C:2020:464, paragraphs 26 and 27 and the case-law cited).

33 In the present case, the question referred concerns unpaid claims arising during the six-month period preceding the declaration of insolvency of the debtor company concerned, in respect of which it has not been established that they should be regarded as 'definitively irrecoverable', within the meaning of the case-law cited in paragraphs 30 and 32 above.

34 It is apparent from the order for reference that such a classification depends on the treatment of those claims in the context of the insolvency proceedings. There is therefore uncertainty as to the recovery of the claims arising during the six-month period preceding the declaration of insolvency of the debtor company concerned, uncertainty based on the manner in which those claims will be dealt with in those insolvency proceedings.

35 However, the general condition that, in order to give rise to an adjustment of the taxable amount for VAT purposes, unpaid claims must not have arisen during the six-month period preceding the declaration of insolvency of the debtor company, cannot be regarded, in the absence of any objective evidence relating to the context of the claims, as seeking to counteract the uncertainty linked to the recovery of those claims.

36 That condition bears no relation to the manner in which the claims at issue will actually be dealt with in insolvency proceedings, since it does not take account of the fact that certain claims may potentially be recovered at the end of those proceedings.

37 On the contrary, the consequence of such a condition is to exclude altogether any reduction of the taxable amount for VAT purposes in the case of unpaid claims arising during the six-month period preceding the declaration of insolvency of the debtor company concerned, even where those claims become definitively irrecoverable at the end of the insolvency proceedings. Such automatic refusal of the right to a reduction is contrary to the principle of the neutrality of VAT in that the taxable amount would not consist of the consideration actually received by the taxable creditor, which would then have to bear the burden of the tax instead of the consumer.

38 For all of those reasons, a national provision such as that at issue in the main proceedings cannot be regarded as implementing the option provided for in Article 90(2) of the VAT Directive.

39 Furthermore, the Czech Government's argument that such a provision is intended to implement Article 273 of the VAT Directive cannot be accepted.

40 In that regard, it should be borne in mind that, although, under Article 273 of the VAT Directive, Member States may adopt measures which have the effect of limiting the right to reduction of the taxable amount provided for in Article 90(1) of the VAT Directive, those measures must be aimed at ensuring the correct collection of VAT and preventing evasion.

41 Furthermore, in accordance with the Court's case-law, such measures may not, in principle, derogate from the rules relating to the taxable amount except within the limits strictly necessary for achieving that specific aim. They must have as little effect as possible on the objectives and principles of the VAT Directive and may not therefore be used in such a way that they would have the effect of undermining the neutrality of VAT (judgment of 6 December 2018, *Tratave*, C?672/17, EU:C:2018:989, paragraph 33 and the case-law cited).

42 The exclusion of any possibility of obtaining an adjustment of the taxable amount corresponding to a claim which arose during the six-month period preceding the declaration of insolvency of the debtor company concerned cannot be regarded as preventing tax evasion and as proportionate to such an objective.

43 First, as the referring court points out, the fact that an unpaid claim arose during the six-month period preceding the declaration of insolvency of the debtor company cannot, in the absence of any additional evidence, reasonably lead to a presumption that the creditor and the debtor acted with the aim of committing tax evasion or avoidance.

44 Secondly, excluding any possibility of a reduction of the taxable amount in such circumstances and forcing a creditor, such as the applicant in the main proceedings, to pay an amount of VAT which it did not receive in the course of its economic activities goes beyond what is strictly necessary to achieve the objectives referred to in Article 273 of the VAT Directive (see, to that effect, judgment of 15 October 2020, *E. (VAT – Reduction of the taxable amount)*, C?335/19, EU:C:2020:829, paragraph 45 and the case-law cited).

45 Furthermore, it cannot be maintained that a national provision such as that at issue in the main proceedings is intended to ensure the correct collection of VAT.

46 On the contrary, the application of that provision has the consequence of systematically refusing the right to reduction of the taxable amount in the case of unpaid claims arising during the six-month period preceding the declaration of insolvency of the debtor company concerned, even though some of those claims could become definitively irrecoverable at the end of the insolvency proceedings, which undermines the neutrality of VAT.

47 Consequently, the answer to the question referred for a preliminary ruling is that Article 90 of the VAT Directive must be interpreted as precluding a national provision which makes adjustment of the amount of VAT subject to the condition that the partially or totally unpaid claim must not have arisen during the six-month period preceding the declaration of insolvency of the debtor company, where it is not ruled out under that condition that such a claim may ultimately be definitively irrecoverable.

Costs

48 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 (Sixth Chamber) hereby rules:

Article 90 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as precluding a national provision which makes adjustment of the amount of value added tax subject to the condition that the partially or totally unpaid claim must not have arisen during the six-month period preceding the declaration of insolvency of the debtor company, where it is not ruled out under that condition that such a claim may ultimately be definitively irrecoverable.

[Signatures]

* Language of the case: Czech.