

Case C-4/20**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

7 January 2020

Referring court:

Varhoven administrativen sad (Bulgaria)

Date of the decision to refer:

16 December 2019

Appellant in the appeal in cassation:

‘Alti’ OOD

Respondent in the appeal in cassation:

Direktor na Direktsia ‘Obzhalvane i danachno-osiguritelna praktika’ — Plovdiv pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite (Director of the ‘Appeals and Tax/Social Insurance Practice’ Directorate — Plovdiv within the Central Administration of the National Revenue Agency)

Subject matter of the main proceedings

Appeal against a tax assessment notice by which the recipient of a supply is held jointly and severally liable for the value added tax not paid by the supplier plus the default interest owed by the supplier.

Subject matter and legal basis of the request for a preliminary ruling

Interpretation of EU law; Article 267(1)(b) TFEU

Questions referred

1. Are Article 205 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax and the principle of proportionality to be

interpreted as meaning that the joint and several liability of a registered person, which is the recipient of a taxable supply, for the value added tax not paid by its supplier in addition to the supplier's principal debt (the value added tax debt) also includes the accessory obligation to pay compensation for late payment in the amount of the statutory interest on the principal debt from the beginning of the debtor's default until the issuance of the tax assessment notice by which the joint and several liability is established or until the discharge of the debt?

2. Are Article 205 of Directive 2006/112 and the principle of proportionality to be interpreted as precluding a national provision such as Article 16(3) of the Danachno-osiguriteln protsesualen kodeks (Tax and Insurance Procedure Code) according to which a third party's liability for unpaid taxes of a taxable person includes the taxes and the interest?

Provisions of EU law and case-law relied on

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, in particular Articles 193 and 205.

Judgment of 11 May 2006, *Federation of Technological Industries and Others*, C-384/04 (EU:C:2006:309), in particular paragraphs 28 to 33.

Judgment of 21 December 2011, *Vlaamse Oliemaatschappij*, C-499/10 (EU:C:2011:871), in particular paragraphs 19 to 22.

Judgment of 18 May 2017, *Latvijas Dzelzceļš*, C-154/16 (EU:C:2017:392), in particular paragraph 85.

Judgment of 21 February 2008, *Netto Supermarkt*, C-271/06 (EU:C:2008:105), in particular 19 to 22.

Provisions of national law relied on

Zakon za danak varhu dobavenata stoynost (Value Added Tax Law, 'the ZDDS'), in particular Article 177.

Danachno-osiguriteln protsesualen kodeks (Tax and Social Insurance Procedure Code, 'the DOPK'), in particular Articles 14 and 16.

Zakon za zadalzheniata i dogovorite (Law on obligations and contracts, 'the ZZD'), in particular Articles 121, 122 and 126.

Brief summary of the facts and procedure

- 1 'Alti' OOD is a Bulgarian company with limited liability.

- 2 In 2014, 'Alti' OOD (also 'the recipient') acquired from the Bulgarian single-member company with limited liability 'Fotomag' EOOD (also 'the supplier') a 'CLAAS Lexion 570 T' combine harvester, a 'John Deere 8420' tractor and a 'CLAAS 7190' cart. 'Fotomag' EOOD issued 'Alti' OOD with the following invoices in respect of the supplies: an invoice (for the combine harvester) of 11 April 2014, with a taxable amount of 284 000 Leva (BGN) and value added tax (VAT) in the amount of BGN 56 800, an invoice (for the tractor) likewise of 11 April 2014, with a taxable amount of BGN 166 000 and VAT in the amount of BGN 32 200, and an invoice (for the cart) of 8 May 2014, with a taxable amount of BGN 7 500 and VAT in the amount of BGN 1 500. The recipient transferred the amounts into a bank account of the supplier and exercised the right of input tax deduction; it entered the invoices in its purchase ledgers and in the tax returns for the April 2014 and June 2014 tax periods.
- 3 According to an invoice of 10 April 2014, the supplier in turn acquired the agricultural technology mentioned from SJB Tractors Ltd (United Kingdom). After a tax audit had been carried out at 'Fotomag' EOOD, a tax assessment notice was issued against it on 27 June 2016, by which it was found that the undertaking had reported the intra-Community acquisitions in the April 2014 tax period and had calculated the VAT on the basis of the first two invoices issued to 'Alti' OOD. As a result, VAT in the amount of BGN 86 680 was to be paid for that tax period, of which the supplier still owed BGN 86 211.82 when the tax assessment notice was issued. For May 2014, it recorded VAT in the amount of BGN 1 500, as calculated in the third invoice issued to 'Alti' OOD. However, that VAT was not paid.
- 4 A tax audit was also ordered in respect of the recipient. On 23 February 2018, the revenue authorities issued a tax assessment notice against 'Alti' OOD, holding it jointly and severally liable under Article 177 of the ZDDS for the VAT that had been shown by 'Fotomag' EOOD in the three invoices issued by it, but not paid, as follows: for the April 2014 tax period in the amount of BGN 86 211.82 together with default interest of BGN 33 123.83 for the period from 15 May 2014 to 23 February 2018, and for the May 2014 tax period in the amount of BGN 1 500 together with default interest of BGN 563.08 for the period from 15 June 2014 to 23 February 2018.
- 5 'Alti' OOD raised an objection to the tax assessment notice. As it was dissatisfied with the outcome of the administrative proceedings, it brought an action against the administrative act at the Administrativen sad (Administrative Court) of Plovdiv. The Administrative Court before which the matter was brought dismissed the action as unfounded for the following reasons:
 - 5.1. The supplier and the recipient were registered under the ZDDS in the periods in question, in which the taxable supplies were effected. The recipient exercised the right of input tax deduction in respect of the invoices issued thereto by the supplier. The supplier did not pay to the budget the VAT owed for the

supplies. The parties are in dispute as to whether the recipient knew or should have known that its supplier would not pay the VAT.

5.2. Article 177(3) of the ZDDS provides for a rebuttable presumption of knowledge. The evidence gathered in the proceedings proves that ‘Alti’ OOD had known that its supplier would not discharge its obligation to pay the VAT. This is the case because the actual relations between ‘Alti’ OOD and ‘Fotomag’ EOOD go beyond the customary business relations between supplier and recipient and are aimed at circumventing the law. In the present case, the intended legal consequence, not permitted by law, consisted in input tax being deducted instead of an intra-Community acquisition being declared and a transaction resulting in ‘zero’ with regard to the input tax deduction being made. The representatives of both undertakings had knowledge thereof.

5.3. ‘Alti’ OOD concluded a contract for the supply of agricultural technology with an undertaking which had not previously performed such activity and had no corresponding experience. The supplier did not have the necessary means to acquire the technology to be sold to ‘Alti’ OOD, but had borrowed them from ‘Sunvision’ AD, a company whose managing director is the manager of ‘Alti’ OOD and whose shareholder is the manager of the supplier. The manager of ‘Alti’ OOD also arranged the transportation. Furthermore, the bank transfers in the chain ‘Sunvision’ AD — ‘Fotomag’ EOOD, ‘Sunvision’ AD — ‘Alti’ OOD — ‘Fotomag’ EOOD — ‘Sunvision’ AD were made by the same person, who was authorised by each of the three undertakings. That person also kept the books of ‘Alti’ OOD and the supplier as well as of ‘Bultrans 73’ EOOD, via whose email address the transportation was arranged.

5.4. The Administrative Court found that default interest was to be paid in the context of the joint and several liability. This resulted from the fact that the application of Article 16(3) of the DOPK was not excluded and it was expressly established in that provision that the party liable for the liabilities of a taxable person was liable for the taxes and the statutory social insurance contributions as well as for the interest and the costs for the charging thereof. The joint and several liability under Article 177(1) of the ZDDS was not limited to the amount of the ‘owed and unpaid tax’. The supplier’s default also put the recipient in default.

- 6 ‘Alti’ OOD lodged an appeal in cassation against the judgment of the Plovdiv Administrative Court at the Varhoven administrativen sad (Supreme Administrative Court, ‘the VAS’). The VAS is of the opinion that, for the case to be decided, there is a need for an interpretation of Article 205 of Directive 2006/112, and it is therefore referring the two questions set out above to the Court of Justice for a preliminary ruling.

Principal arguments of the parties in the main proceedings

- 7 The following findings were made by the revenue authorities in the scope of the tax audit at ‘Alti’ OOD: firstly, the acquisition of the goods by ‘Fotomag’ EOOD

was financed by a third company, namely 'Sunvision' AD, whose partners are the managers of 'Fotomag' EOOD and 'Alti' OOD. Secondly, the transportation of the combine harvester from the United Kingdom was organised via the email address of 'Bultrans 73' EOOD, whose manager and legal representative is the manager of 'Alti' OOD. Thirdly, the same person keeps the books of 'Fotomag' EOOD and 'Alti' OOD, and both companies have granted that person wide-ranging powers, including the authority to manage their bank accounts and to file their VAT returns under the ZDDS.

- 8 With these findings, the revenue authorities justified their conclusion that the acquisition of agricultural technology by 'Fotomag' EOOD via an intra-Community acquisition was organised by 'Alti' OOD for the purpose of VAT abuse. The recipient had known that the supplier would not pay the VAT that it owed according to the invoices issued by it. The revenue authorities are of the opinion that the transaction in question between 'Fotomag' EOOD and 'Alti' OOD circumvented the law. The statutory presumption of knowledge therefore applied, this in turn being a condition for the joint and several liability of the recipient of the supplies under Article 177 of the ZDDS.
- 9 'Alti' OOD asserts that the subjective element of Article 177 of the ZDDS, namely the knowledge that the supplier would not pay VAT, has not been proven. In order for knowledge to exist, this must be proven in respect of the manager of the company.
- 10 'Alti' OOD also asserts that, similarly to liability for third-party liabilities, no default interest is owed for the period between the VAT debt becoming due and the tax assessment notice being issued. The recipient of a taxable supply does not owe VAT, which means that it has not breached any duty to pay VAT with the period prescribed by the ZDDS. The liability of the recipient of a taxable supply under Article 177 of the ZDDS does not include default interest.

Brief summary of the basis for the reference

- 11 The referring court is examining the main question at issue on the basis of the applicability of the joint and several liability of the recipient under Article 177 of the ZDDS and the scope of that liability. According to that provision, a registered person which is the recipient of a taxable supply or service is liable for the tax owed and not paid by another registered person where it has made use of the right to deduct input tax directly or indirectly connected with the tax owed and not paid. The liability occurs if the registered person knew or should have known that the tax would not be paid.
- 12 The Supreme Administrative Court is of the opinion that this provision of the Bulgarian ZDDS, in the light of the judgments of the Court of Justice of the European Union of 21 February 2008, *Netto Supermarkt* (C-271/06), and of 11 May 2006, *Federation of Technological Industries and Others* (C-384/04), is compatible with EU law and in particular with Article 205 of Directive 2006/112.

It follows from the very nature of joint and several liability under Article 205 of Directive 2006/112 that each debtor is liable for the total amount of the debt and the creditor remains, in principle, free to request the payment of that debt by one or several debtors as it chooses.

- 13 When determining the scope of this joint and several liability, the Bulgarian legislature did not expressly regulate in Article 177 of the ZDDS that, in addition to the unpaid tax, the recipient of the supply also owes default interest from the time the tax becomes due. Instead, under Article 177(1) of the ZDDS, the recipient's liability is limited to the amount of the tax owed for the supply and not paid by the taxable person, provided the recipient has exercised the right of input tax deduction to that extent. However, arguments in support of the joint and several liability being more comprehensive in the present case can be derived from other provisions of national law (in particular from Article 16(3) of the DOPK and Article 126(3) of the ZZD).
- 14 As the Bulgarian case-law on this matter is not uniform, the referring court is uncertain as to the correct answer to the question in the present.
- 15 According to the first opinion expressed in the national case-law, the joint and several debtors under Article 177 of the ZDDS are liable for the liabilities of the taxable person. Under Bulgarian law, they are, in the cases prescribed by law, obliged to pay the tax which the taxable person has not paid in good time. Article 16(3) of the DOPK expressly provides that the liability of the third party (which is not the taxable person) includes the tax and the statutory social insurance contributions as well as the interest and the costs for the charging thereof. Therefore, the joint and several liability under Article 177 of the ZDDS is not limited to the amount of the owed and unpaid tax. The relative effect of joint and several liability that is typical of contractual legal relationships does not apply to public liabilities, which means that default by one joint and several debtor also puts the other joint and several debtors in default. Therefore, the recipient of the supply is jointly and severally liable not only for the supplier's principal debt (the VAT debt), but also for the accessory obligation to pay compensation for late payment in the amount of the statutory interest on the principal debt from the beginning of the default until the discharge of the debt.
- 16 According to the second opinion expressed in the national case-law, the liability under Article 177 of the ZDDS is a particular type of joint and several liability for a person registered under the ZDDS, which occurs when the complex requirements prescribed in that provision are met. Such a liability occurs when a registered person is under the obligation to settle the VAT debt of another registered person. Article 177 of the ZDDS constitutes a special provision in relation to Article 16(3) of the DOPK. Article 177 of the ZDDS governs an exception to the general principle, in that it provides for the joint and several liability of a person other than the supplier. The provision expressly limits the liability to 'the owed and unpaid tax'. As an exception, it must be applied in accordance with its precise meaning.

- 17 The relevant judgments of the Court of Justice of the European Union do not provide an answer to the question of whether, in view of the nature of joint and several liability and in consideration of the principle of proportionality, a national provision such as Article 16(3) of the DOPK, which provides that this liability also includes default interest, is admissible. Therefore, the referring court considers an interpretation of the provisions of Directive 2006/112 and in particular of Article 205 of that directive to be necessary. It is referring the questions set out above to the Court of Justice of the European Union for a preliminary ruling under Article 267(1)(b) TFEU.

WORKING DOCUMENT