Anonymised version

Case C-521/19

Request for a preliminary ruling

Date lodged:

8 July 2019

Referring court:

Tribunal Superior de Justicia de Galicia (Spain)

Date of the decision to refer:

19 June 2019

Appellant:

CB

Respondent:

Tribunal Económico-Administrativo Regional de Galicia

[…]

[Wording of certification, references of the decision, parties and representatives]

ORDER

CHAMBER FOR CONTENTIOUS ADMINISTRATIVE PROCEEDINGS [...]

[…] [Composition of the Chamber]

CORUNNA, 19 June 2019.

FACTS

FIRST.- DISPUTE.

The proceedings have been brought against the decision of the Tribunal Económico-Administrativo Regional de Galicia (Regional Tax Tribunal, Galicia,

Spain) of 10 May 2018, which dismissed the contentious administrative action brought by CB against the assessments and penalties relating to personal income tax for the years 2010, 2011 and 2012. **[Or. 2]**

The assessments and penalties were the result of investigations by the Tax Inspectorate which commenced on 14 July 2014 to verify CB's activity (subject to and not exempt from VAT) under the heading IAE 853-performing artists' engagements agent.

CB provided services to Grupo Lito: an informal group of undertakings […] [identity of the owner of the group] which managed infrastructure (marquees, musical equipment, transport, etc.) and orchestras (70) which performed at patron saint (and other) festivals in towns around Galicia.

The relationship was as follows: Mr CB would contact the Festivals Committee (informal group of residents who organised festivals) in his area (which covered a number of municipalities) and negotiate performances by orchestras on behalf of Grupo Lito. On almost every occasion, payments from the Festivals Committee to Grupo Lito were made in cash, without an invoice and were not entered in the accounts and, therefore, were not declared for the purposes of corporation tax or VAT.

Mr CB would receive 10% of the amount paid to Grupo Lito: cash payments which were not declared and for which no invoices were issued either.

In 2012, Mr CB acted as an intermediary in respect of 150 performances which generated EUR 608 427 for Grupo Lito and an income of EUR 60 692.50 for Mr CB. In 2011, Grupo Lito received EUR 675 654 and Mr CB's income was EUR 67 565.40, while in 2010, Grupo Lito received EUR 644 149 and Mr CB's income was EUR 64 414.90.

Mr CB did not keep accounts or official records of any kind, nor did he issue or receive invoices and nor, consequently, did he complete VAT returns.

The tax authority took the view that the amounts of EUR 60 692.50, EUR 67 565.40 and EUR 64 414.90 received by Mr CB did not include VAT and that, therefore, income tax should be assessed on the total amount received.

SECOND.– Among other matters, CB maintains that the [Agencia Estatal de Administración Tributaria (AEAT)] (State Tax Administration Agency) subsequently applies the corresponding amount of VAT to amounts treated as income, contrary to the case-law of the Tribunal Supremo (Supreme Court, Spain) […] [references to judgments of the Tribunal Supremo (Supreme Court)] pursuant to which, 'Article 78(1) of Law 37/1992 on Valued Added Tax (Ley 37/1992 del Impuesto sobre el Valor Añadido) of 28 December 1992 ('LIVA') (BOE No 312 of 29 December 1992), in conjunction with Articles 73 and 78 of Council Directive 2006/112/EC **[Or. 3]** of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1) and the interpretation of those provisions in

the judgment of the Court of Justice of the European Union of 7 November 2013, *Tulică and Plavoşin*, Joined Cases C-249/12 and C-250/12, EU:C:2013:722, must be construed as meaning that, where the Tax Inspectorate discovers concealed transactions liable to value added tax for which no invoices were issued, the price agreed by the parties for those transactions must be regarded as already including that tax.'

CB submits, therefore, that since it is impossible for him to reclaim the VAT not passed on because his conduct constitutes a tax offence (Article 89(3)(2) of the Spanish Law on VAT (Ley del IVA)), the VAT should be treated as included in the price of the services provided, which has a bearing on the determination of the taxable amount for personal income tax, meaning that the administrative acts relating to the assessment of that tax should be amended to reduce the income from his business activity and, therefore, the taxable amount in the amount corresponding to the VAT payments which should have been passed on but were not.

THIRD.– By procedural decision of 30 May 2019, the parties were asked for their views on a possible reference for a preliminary ruling to the Court of Justice of the European Union concerning the compatibility of the AEAT's interpretation (which is contrary to the case-law of the Tribunal Supremo (Supreme Court)) with Article 78(1) of Law 37/1992 of 28 December 1992 on Value Added Tax, in conjunction with Articles 73 and 78 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, read together with the judgments of 28 July 2016 (Case C-332/15, *Astone*) and of 5 October 2016 (Case C-576/15, *Marinova*) and with the general findings of the judgment of 3 December 1974, *Van Binsbergen*, C-33/74 (EU law may not be relied on fraudulently) and the judgment in *Emsland-Stärke*, C-110/99 (which held that the prohibition of abuse of rights is an inherent principle of European Union law), in cases like this one in which the parties involved in the relationship carried out hidden transactions voluntarily and in a concerted fashion, without issuing invoices, using cash and without declaring the VAT, and once they had been discovered by the Tax Inspectorate, they argued, for their own benefit, that the payments should be treated as having been made inclusive of VAT.

FOURTH.– The appellant objected to the reference for a preliminary ruling on the ground that the judgment of the Tribunal Supremo (Supreme Court) of 27 September 2017 correctly interpreted the EU legislation […]. **[Or. 4]**

The State legal advisor, representing the tax authority, submitted that a reference for a preliminary ruling is necessary because the judgment of the Court of Justice of 7 November 2013, *Tulică and Plavoşin*, on which the Tribunal Supremo (Supreme Court) relied, is not applicable to situations in which there is fraudulent conduct, citing in support of that argument the judgments of the Court of Justice of 5 October 2016, *Maya Marinova*, C-576/15, EU:C:2016:740, paragraph 49; of 28 July 2016, *Astone*, C-332/15, EU:C:2016:614, paragraph 58; and of 18 December 2014, *Schoenimport 'Italmoda' Mariano Previti and Others*, Joined

Cases C-131/13, C-163/13 and C-164/13, EU:C:2014:2455, paragraph 48. Recently, and, therefore, after the majority of the judgments of the Tribunal Supremo (Supreme Court) which reiterate the interpretation of the VAT Directive which this court is now calling into question, the Court of Justice again stated that the tax authorities are entitled to refuse to allow a taxable person to deduct VAT when it is established that that person acted fraudulently in order to be able to benefit from that right (see judgment of 7 March 2018, *Dobre*, C-159/17, EU:C:2018:161) .

LAW

FIRST.– The articles of Law 37/1992 at issue are:

Article 78. Taxable amount. General rule. *1. The taxable amount shall be composed of the total amount of the consideration for taxable transactions received from the customer or third parties.*

Article 88. Passing on the tax. *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 this 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 value added tax 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.* **[Or. 5]** *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 from 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.*

Article 89. Correction of the amounts of tax passed on. *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 hereof, 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 hereof, 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 and 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 those 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.

SECOND.– RELEVANT PROVISIONS OF EUROPEAN UNION LAW. Articles 73 and 78 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax. [Or. 6]

Article 73

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.

Article 78

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.

THIRD.– Accordingly, the question is whether the express stipulation in Article 89(3)(2) and the application of that article by the AEAT to assess and impose penalties in situations where, during a tax inspection, a transaction is discovered which has been concealed by all the participants, voluntarily and in a concerted fashion (cash payments with no invoices and no declaration or payment of VAT), is compatible with the principle of the neutrality of VAT (judgments of

28 July 2016 (Case C-332/15, *Astone*), of 5 October 2016 (Case C-576/15, *Marinova*), and of 7 March 2018, *Dobre*, C-159/17, EU:C:2018:161) and with the general findings of the judgment of 3 December 1974, *Van Binsbergen*, C-33/74 (EU law may not be relied on fraudulently) and the judgment in *Emsland-Stärke*, C-110/99 (which held that the prohibition of abuse of rights is an inherent principle of EU law), such that, then, those **[Or. 7]** deliberately concealed transactions are deemed to include the applicable VAT in the same way as transactions between businesses which are not concealed and in which the payments are formally recorded, in accordance with the interpretation provided by the Tribunal Supremo (Supreme Court) in the judgments cited […] [references to the judgments of the Tribunal Supremo (Supreme Court) cited above] (applying the case-law laid down in the judgment of the Court of Justice of 7 November 2013, *Tulică and Plavoşin*). The alternative is that the neutrality of the tax, the legislation and the case-law of the Court of Justice cited cannot provide protection and VAT is also deemed to be due in these situations, where a transaction has been concealed and there is no formal record of payment, and these two matters come to light only as a result of an investigation by the tax authorities. That is an expression of the fact that the neutrality of the tax can protect only those who comply with the legislation and not those who deliberately infringe that legislation.

On those grounds

THE CHAMBER DECIDES

FIRST.– To stay the proceedings pending the outcome of this reference for a preliminary ruling.

SECOND.– To refer the following questions to the Court of Justice of the European Union for a preliminary ruling:

‘Must Articles 73 and 78 of the VAT Directive, 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 value added tax for which no invoice was issued, the price agreed by the parties for those transactions must be regarded as already including value added tax?

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 the European Union of 28 July 2016 (Case C-332/15 *Astone*), of 5 October 2016 (Case C-576/15 *Marinova*) and of 7 March 2018, *Dobre*, C-159/17, EU:C:2018:161, that the amounts paid and received do not include value added tax in order to conduct the proper assessment and impose the appropriate penalty?’

[…] **[Or. 8]** […] [Wording directing that the decision and the case-file be sent to the Court of Justice of the European Union]

[…] [Signatures, certification wording, date, etc.]