Anonymised version

Case C-677/21

Request for a preliminary ruling

Date lodged:

11 November 2021

Referring court:

Vredegerecht te Antwerpen (Belgium)

Date of the decision to refer:

8 November 2021

Applicant:

Fluvius Antwerpen

Defendant:

MX

Vredegerecht
van het 2de kanton
Antwerpen
(Magistrates' Court of the
2nd canton of Antwerp)

JUDGMENT

…

- **Opdrachthoudende vereniging (mandated association) FLUVIUS ANTWERPEN** …, with its registered office at … Antwerp, …

…

applicant

- **MX** …, residing at … Antwerp, …

defendant

Procedure

…

[Information concerning the proceedings before the referring court]

Assessment of the claim

1 MX was summoned by the distribution network operator, Fluvius Antwerpen (‘Fluvius’), to pay the sum of EUR 813.41 (inclusive of VAT), together with default interest in the amount of EUR 4.80 as well as statutory interest from the time of the summons in respect of the consumption of electricity … for the period from 7 May 2017 to 7 August 2019.

That invoicing did not take place because MX was supplied with electricity by Fluvius pursuant the latter’s public service obligation under Article 5.2.3(1) of the Energiebesluit (Energy Decision). This provision stipulates that if a domestic customer’s contract is terminated by his or her energy supplier, for example for non-payment, and this customer does not enter into a new contract with another energy supplier, he or she will be supplied by the distribution network operator.

This invoicing took place because MX used electricity at the address at which he resides … without having concluded a contract for such use with a commercial energy supplier and without having had a contract previously terminated by a (different) commercial energy supplier at that address and, as a result, was supplied by Fluvius on the basis of the public service obligation. In other words, the invoicing took place after Fluvius had established, with the passage of time, that actual usage, referred to as unlawful usage. Based on a comparison between the meter reading at the start of the unlawful usage and the meter reading at the end of the unlawful usage, an amount of EUR 813.41, which included EUR 131.45 in VAT, was invoiced for the usage over that period.

Given the legal basis for the invoicing, namely the unlawful usage, the vrederechter (magistrate) asked Fluvius to take a position on the chargeability of VAT on the amount invoiced.

2 … [Fluvius takes the following position]:

- Article 5.5.1(5) of the Energiebesluit provides that, when usage takes place without a supply contract, that usage may be charged to the owner or user by the network operator.

- Since the relationship between that customer and the distribution network operator supplying the energy is regulatory in nature, the unlawful usage does not constitute an unlawful act ….

- VAT is payable on this unlawful usage pursuant to Article 10(2) of the BTW-Wetboek (VAT Code). According to that article, there is a supply subject to VAT if there is a transfer of the ownership of property against payment of a fee pursuant to an order made by or in the name of a public authority and, more generally, in pursuance of a law, decree, ordinance, decision or administrative regulation.

3

3.1 … [reference to national case-law which the referring court does not consider relevant]

3.2 For the period that has been invoiced, the connection regulations of Fluvius … are relevant …

Those connection regulations say nothing about the level of the fee that will be charged in the event of unlawful usage or about whether VAT is payable on that fee. … Article 7.10 … provides as follows:

> … *Unlawful usage of energy and fees for regularisation Both registered and possibly unregistered consumption as a result of Unlawful usage will be subject to a charge by the DNO.* …

4 Prior to 1 May 2018, there was no regulatory text expressly stating whether or not VAT ought to be charged on the fee payable by a person who has used energy unlawfully. However, since 1 May 2018, after the amendment of the Energiedecreet (Energy Decree) and the Energiebesluit, rules on the matter have existed.

Unlawful usage and the fee for such usage are currently regulated by Article 1.1.3, 40° /l, in conjunction with Article 5.1.2 of the Energiedecreet and Article 4.1.2 of the Energiebesluit.

Article 1.1.3, 40° /1 of the Energiedecreet defines the term ‘energy fraud’ as *any unlawful action by any person, whether active or passive, that is accompanied by the gaining of an unlawful advantage.* The vrederechter is of the view that the usage of electricity from the network without entering into a commercial agreement and without reporting it to the distribution network operator can be regarded as *an unlawful action, active or passive, that is accompanied by the gaining of an unlawful advantage.*

Article 5.1.2 of the Energiedecreet also provides that the costs incurred by the network operator to remedy the energy fraud referred to in Article 1.1.3, 40° /l, (a), (b), (c), (d) and (g), the costs of the disconnection referred to in the previous

paragraph, the regularisation of the connection or of the metering installation, the reconnection, the unlawfully gained advantage, the costs related to the unlawfully gained advantage and the interest are to be borne by the relevant network user. In addition, the network operator or its mandated representative will recover the aforementioned costs as well as the unlawfully gained advantage and the interest directly from the network user.

Article 4.1.2(1) of the Energiebesluit prescribes the way in which the unlawful advantage must be calculated and which items form part of the unlawfully gained advantage. The unlawfully gained advantage relates, among other things, to the evaded costs for the supplied energy (Article 4.1.2(1)(3), 4° of the Energiebesluit).

Article 4.1.2(3) further provides that the fee charged for the unlawfully gained advantage is determined in a specific manner and includes taxes, levies and VAT.

5 The vrederechter, however, questions whether the provision governing the charging of VAT is not contrary to Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (‘the VAT Directive’).

In the first place, the vrederechter questions whether Article 2(1)(a) and Article 14(1) and (2)(a) of the VAT Directive allow VAT to be levied on the fee payable for the unlawful usage of energy.

Article 2(1)(a) provides that the supply of goods for consideration in a Member State by a taxable person acting as such is subject to VAT. Article 14(1) adds that ‘supply of goods’ means the transfer of the right to dispose of tangible property as owner. The following are also regarded as a supply of goods: the transfer, by order made by or in the name of a public authority or in pursuance of the law, of the ownership of property against payment of compensation (Article 14(2)(a) of the VAT Directive).

Can it be inferred from these provisions that the unlawfully used energy must be regarded as:

- a supply of goods, being the transfer of the right to dispose of tangible property as owner (Article (2)(1)(a) in conjunction with Article 14(1) of the VAT Directive),

- or as the transfer of the ownership of property by order made by or in the name of a public authority or in pursuance of the law (Article 14(2)(a) of the VAT Directive)?

In the second place, the vrederechter questions whether Article 9(1) and Article 13(1) of the VAT Directive allow Fluvius, as a body governed by public law, to claim VAT on the compensation to which it is entitled for the unlawful usage of energy and, consequently, whether it is a taxable person for VAT purposes in respect of that unlawful usage.

Article 9(1) of the VAT Directive defines who a taxable person is, namely, any person who, independently, carries out any economic activity, whatever the purpose or results of that activity. The exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis will in particular be regarded as an economic activity.

The first paragraph of Article 13(1) adds that public authorities, including bodies governed by public law, will 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. The third paragraph introduces some nuance to the previous provision by stating that, in any event, bodies governed by public law will be regarded as taxable persons in respect of the activities listed in Annex I, provided that those activities are not carried out on such a small scale as to be negligible. The supply of gas and electricity is covered by this provision.

Can it be inferred from those provisions that, if Fluvius is entitled to compensation for unlawfully used energy, it is to be regarded as a taxable person within the meaning of Article 9(1) of the VAT Directive because the unlawfully used energy is the result of the exploitation of tangible property for the purposes of obtaining income therefrom on a continuing basis?

And if that is the case, must the first paragraph of Article 13(1) of the VAT Directive be understood to mean that Fluvius is a public authority and, if so, does it then follow from the third paragraph of Article 13(1) of the directive that the economic activity of Fluvius in connection with the unlawful usage of energy is on such a significant scale that Fluvius must be regarded as a taxable person for VAT purposes in connection with that usage?

6 …

… [decision of the referring court]

Decision

… [order for the payment of compensation for the unlawfully used energy]

and before ruling on the VAT (value added tax) claimed by the mandated association Fluvius Antwerp, refers this case to the Court of Justice of the European Union with a view to obtaining answers to the following questions referred for a preliminary ruling to the Court of Justice of the European Union by the vrederechter:

> *‘Must Article 2(1)(a), read in conjunction with Article 14(1) of Directive 2006/112/EC, be interpreted as meaning that the unlawful usage of energy is a supply of goods, being the transfer of the right to dispose of tangible property as owner?’*

'If not, must Article 14(2)(a) of Directive 2006/112/EC be interpreted as meaning that the unlawful usage of energy is a supply of goods, being a transfer, by order made by or in the name of a public authority or in pursuance of the law, of the ownership of property against payment of compensation?'

'Must Article 9(1) of Directive 2006/112/EC be interpreted as meaning that, if Fluvius Antwerpen is entitled to compensation for unlawfully used energy, it is to be regarded as a taxable person since the unlawful usage is the result of an "economic activity" of Fluvius Antwerpen, namely the exploitation of tangible property for the purposes of obtaining income therefrom on a continuing basis?'

'If Article 9(1) of Directive 2006/112/EC must be interpreted as meaning that the unlawful usage of energy constitutes an economic activity, must the first paragraph of Article 13(1) of Directive 2006/112/EC then be interpreted as meaning that Fluvius Antwerpen is a public authority and, if so, must the third paragraph of Article 13(1) then be interpreted as meaning that the unlawful usage of energy is the result of an activity of Fluvius Antwerpen that is not carried out on such a small scale as to be negligible?'

… [closing formula]