

Case C-121/24**Request for a preliminary ruling****Date lodged:**

14 February 2024

Referring court:

Administrativen sad Veliko Tarnovo (Bulgaria)

Date of the decision to refer:

7 February 2024

Applicant:

‘Vaniz’ EOOD

Defendant:

Direktor na Direktsia ‘Obzhalvane i danachno-osiguritelna praktika’ – Veliko Tarnovo

ORDER

[...]

The Administrativen sad Veliko Tarnovo (Administrative Court, Veliko Tarnovo),
[...]

[...]

[...] in its decision [...] in administrative case No 139 as registered by the Administrative Court, Veliko Tarnovo for the year 2023, took the following into account:

Specific points of contention concerning the interpretation of the provisions of national law relevant to the case in the main proceedings require a review of their compatibility with EU provisions and principles.

The court considers that correctly resolving the dispute before it will require an interpretation of provisions of EU law and therefore finds it necessary, at the request of one party and of its own motion, to make a reference to the Court of

Justice of the European Union for a preliminary ruling pursuant to the third paragraph of Article 267 TFEU.

I. Parties to the case:

1. Applicant: ‘Vaniz’ EOOD (a one-person limited liability company) [...]
2. Defendant: Direktor na Direktsia ‘Obzhalvane i danachno-osiguritelna praktika’ – Veliko Tarnovo (Director of the Appeals and Tax and Social Security Practice Directorate of Veliko Tarnovo [...])

II. Subject matter of the case in the main proceedings

Action against tax audit assessment No R-04000422000256-091-001/18.12.2022 of the Teritorialna direktsia na Natsionalnata agentsia za prihodite (Regional Directorate of the National Revenue Agency; ‘TD na NAP’) of Veliko Tarnovo, in which ‘Vaniz’ EOOD [established] in Veliko Tarnovo was found liable for value added tax (VAT) totalling 217 277.82 leva (BGN) and accrued interest of BGN 114 365.21 for the tax periods July, August and September 2017 in accordance with Article 177 of the Zakon za danak varhu dobavenata stoynost (Law on value added tax; ‘the ZDDS’)

III. The facts of the main proceedings:

‘Vaniz’ EOOD is a company which was entered in the commercial register on 2 December 2014 and registered under the ZDDS on 8 January 2015. The substance of its activities is road and freight transport. In its capacity as a trader registered for VAT purposes, ‘Vaniz’ EOOD received taxable supplies – purchase of lorries and vehicles – and services – rental of motor vehicles – as evidenced by a total of 35 invoices issued by Stars International EOOD for the tax periods July, August and September 2017. ‘Vaniz’ EOOD exercised its right of deduction on the basis of those invoices by including them in the registers of invoices to be kept under the ZDDS and in the tax returns for the abovementioned tax periods. Following completion of an audit, the revenue authorities found that the supplier, Stars International EOOD, in its tax return, had for the abovementioned tax periods declared as a result for tax purposes the VAT chargeable on the supplies provided and the tax specified on the invoices issued to Vaniz EOOD. The tax obligations of the supplier, Stars International EOOD, which were declared in the tax return have not been met.

By decision No 348/19.07.2019 in commercial case No 287/2018 before the Okrazhen sad Veliko Tarnovo (Regional Court, Veliko Tarnovo), insolvency proceedings under Article 625 of the Targovski zakon (Bulgarian Commercial Code) were opened in respect of Stars International EOOD; by decision No R94 of 4 August 2020 in the same commercial case, the Regional Court, Veliko

Tarnovo terminated the insolvency proceedings in respect of Stars International EOOD and ordered that the company be deleted from the commercial register.

Decision No R-04000422000256-020-001/17.01.2022 initiated a tax audit in respect of 'Vaniz' EOOD to establish its liability under Article 177 of the ZDDS for the VAT owed and not paid by Stars International EOOD which arose from the 35 invoices issued by Stars International EOOD to 'Vaniz' EOOD for the tax periods July, August and September 2017. Following completion of the tax audit, tax audit assessment No R-04000422000256-091-001/18.12.2022 of the TD na NAP of Veliko Tarnovo was issued, establishing the liability of 'Vaniz' EOOD for the debts of Stars International EOOD in the amount of BGN 217 277.82 and accrued interest of BGN 114 365.21 for the tax periods July, August and September 2017 in accordance with Article 177 of the ZDDS. The abovementioned provisions were applied on the grounds that the elements specified in Article 177(2) of the ZDDS were in place, under which the elements specified in Article 177(1) of the ZDDS are satisfied only where the recipient of a taxable supply knew or should have known that the tax in the invoices issued to him or her would not be paid.

The company contested the tax audit assessment in accordance with Article 152 of the Danachno-osiguriteln protsesualen kodeks (Code of tax and social security procedure; 'the DOPK') in administrative proceedings filed with the Director of the Appeals and Tax and Social Security Practice Directorate of Veliko Tarnovo, who confirmed the contested tax audit assessment in full by decision No 19/17.02.2023. 'Vaniz' EOOD challenged the confirmed tax audit assessment in accordance with Article 155 of the DOPK before the Administrative Court, Veliko Tarnovo, where the present administrative case No 139/23 was brought.

IV. Applicable legal provisions

A. National law:

Danachno-osiguriteln protsesualen kodeks (Code of tax and social security procedure, 'the DOPK'):

Article 21. '...

(2) The liability of third parties shall also be incurred where the facts specified in Article 168(5) to (7) are in place in respect of the debtor.

(3) The liability of third parties shall cease when the debt for which that liability was established by a final act is extinguished. [...]'

Article 112. '(1) A tax audit procedure shall be initiated by the issuing of a decision ordering a tax audit.'

Article 168. 'The claim governed by public law shall be extinguished:

[...]

6. following distribution of the proceeds of realising the assets of a legal person which has been declared insolvent, unless third parties are liable for the claim governed by public law;

7. upon deletion of a legal person following termination of winding-up proceedings, unless third parties are liable for the claim governed by public law;

[...]

Zakon za danak varhu dobavenata stoynost (Law on value added tax; ‘the ZDDS’):

Article 177. ‘(1) [amended – DV No 94 of 2012, in force since 1 January 2013] A registered person who is the recipient of a taxable supply shall be liable for unpaid tax due from another registered person where he or she has exercised the right to deduct input tax directly or indirectly connected with the tax due but not paid.

(2) Liability under paragraph 1 shall be incurred where the registered person knew or should have known that the tax would not be paid, and this is proved by the investigating authority in accordance with Articles 117 to 120 of the Danachno – osiguritelen protsesualen kodeks.

(3) Knowledge shall be imputed to a person for the purposes of paragraph 2 where both of the following conditions are satisfied:

1. the tax due, within the meaning of paragraph 1, for a particular tax period has in fact not been paid by any upstream supplier in respect of a taxable supply of the same goods or services, whether or not in the same, a changed or a processed form;

2. the taxable supply is fictitious, circumvents legislation or is made at a price that differs significantly from the market price.

(4) Liability under paragraph 1 shall not be dependent on obtaining a specific advantage on account of the non-payment of the tax due.

(5) In the circumstances envisaged in paragraphs 2 and 3, the upstream supplier of the taxable person who owes the unpaid tax shall also be liable.

(6) In the cases referred to in paragraphs 1 and 2, liability shall be enforced against the taxable person who is the direct recipient of the supply in respect of which the tax due has not been paid, and, where recovery fails, liability may be enforced against any downstream recipient in the chain of supply.

(7) Paragraph 6 shall also apply *mutatis mutandis* to upstream suppliers.’

B. EU law:

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax:

Recitals:

‘(44) Member States should be able to provide that someone other than the person liable for payment of VAT is to be held jointly and severally liable for its payment.’

Article 193

As modified by M19

As corrected by C11

‘VAT shall be 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.’

Article 205

‘In the situations referred to in Articles 193 to 200 and Articles 202, 203 and 204, Member States may provide that a person other than the person liable for payment of VAT is to be held jointly and severally liable for payment of VAT.’

Article 207

‘Member States shall take the measures necessary to ensure that persons who are regarded as liable for payment of VAT in the stead of a taxable person not established in their respective territory, in accordance with Articles 194 to 197 and Articles 199 and 204, comply with the payment obligations set out in this Section.

Member States shall also take the measures necessary to ensure that those persons who, in accordance with Article 205, are held to be jointly and severally liable for payment of the VAT comply with these payment obligations.’

V. Submissions and legal arguments of the parties:

The applicant, ‘Vaniz’ EOOD, challenges the tax audit assessment. It disputes the conditions for applying Article 177 of the ZDDS and submits that fulfilment of those conditions was not properly established in the case in question and is not supported by the evidence collected in the course of the proceedings. As well as submitting that the conditions for the company’s liability are not fulfilled because the subjective component – presumption of liability or knowledge of involvement in tax evasion – is not given, the company’s authorised representative argues that liability on the part of ‘Vaniz’ EOOD cannot be triggered under Article 177 of the

ZDDS for the tax for which Stars International EOOD is liable. The applicant's authorised representative bases that last argument on the fact that Stars International EOOD has been deleted from the commercial register and, pursuant to a judicial decision delivered in the context of insolvency proceedings, ceased to exist as a legal person acting in its own right on 4 August 2020. That representative submits that the tax audit procedure to establish the liabilities of 'Vaniz' EOOD under Article 177(2) of the ZDDS was initiated when a decision ordering a tax audit was issued on 17 January 2022 – that is to say, after the debtor, Stars International EOOD, was deleted as a trader [from the commercial register] and ceased to exist. The applicant maintains that the debts of a legal person count as extinguished once that legal person has been dissolved; it argues that a third party, 'Vaniz' EOOD in the present case, cannot be held jointly and severally liable a posteriori, a long time later, under the provisions of Article 177 of the ZDDS.

The applicant alleges that the cessation of the existence of a legal person which is the principal debtor of the claim under the ZDDS consequently precludes the initiation of a procedure to establish the joint and several liability of a third party, for which reason that tax audit assessment is unlawful.

In the view of the applicant's authorised representative, the provisions of Council Directive 2006/112/EC of 28 November 2006 preclude national legislation which permits a procedure to be initiated asserting a third party's joint and several liability after the principal debtor has already ceased to exist. Such a measure, that representative asserts, is not consistent with the stated objectives of the directive and is based on national legislation adopted by way of deviation from EU law.

The defendant, the Director of the Appeals and Tax and Social Security Practice Directorate of Veliko Tarnovo, disputes all the applicant's arguments and maintains that the conditions set out in Article 177 of the ZDDS were properly established in the present case and are supported by the evidence collected in the course of the tax audit procedure and submitted in the case. His authorised representative is of the opinion that there has been no breach of the provisions of EU law in Council Directive 2006/112/EC and there are no ambiguities or contradictions with regard to the applicable national provisions. He maintains that the Article 205 and the second sentence of Article 297 of Directive 2006/112/EC do not preclude national provisions such as Article 177 of the ZDDS, a position which, he submits, has been sufficiently established by the case-law of the Court of Justice of the European Union. The defendant argues that, under the provisions of Article 168(5), (6) and (7) of the DOPK, claims governed by public law are not extinguished in the event of the death of a natural person or the dissolution of a legal person if third parties are liable for the claim in question, for which reason, in the specific case, the VAT due from Stars International EOOD should not be considered extinguished despite the deregistration and deletion of that company, after which, in the procedure governed by Article 177 of the ZDDS, a third party – specifically, 'Vaniz' EOOD – was held jointly and severally liable.

VI. Case-law:

By its judgment of 20 May 2021 in Case C-4/20, the Court of Justice of the European Union answered the request for a preliminary ruling from the Administrativen sad Plovdiv (Administrative Court, Plovdiv, Bulgaria) relating to the substantive scope of liability under Article 177 of the ZDDS and the compatibility of those provisions with Article 205 of Directive 2006/112/EC. In the judgment cited, the Court ruled that Article 205 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as not precluding national legislation pursuant to which the person held jointly and severally liable, for the purpose of that article, must pay, in addition to the value added tax (VAT) not paid by the person liable for payment of that tax, the default interest on that amount, due from the person liable for payment, where it is proved that, in exercising its right of deduction, it knew or should have known that the person liable for payment would not pay that VAT. Paragraph 32 of the Court's judgment states that, in the exercise of the power governed by Article 205 of Directive 2006/112/EC, Member States must observe the general principles of law that form part of the EU legal order, which include, in particular, the principles of legal certainty and of proportionality. In its reasoning in paragraph 42 of the judgment, the Court points out that, nevertheless, Member States may extend the system of joint and several liability so that it encompasses the liabilities specified only if such an extension is justified in the light of the objectives pursued by Article 205 of Directive 2006/112 and is consistent with the principles of legal certainty and of proportionality.

In national law, there are two interpretative decisions of the Varhoven administrativen sad (Supreme Administrative Court; 'the VAS'), namely interpretative decision No 6/15.04.2021 in interpretative case No 6/2019 and interpretative decision No 4/10.05.2022 in interpretative case No 2/20 of the Obshto sabranie na sadiite na VAS (General Assembly of Judges of the VAS), which deal with the scope of joint and several liability under Article 177 of the ZDDS, which includes liability for interest, and the validity of a tax audit assessment issued in accordance with Article 177 of the ZDDS where a tax audit assessment concerning the same person has already been issued.

However, in the case-law of the VAS in its capacity as the court of cassation in relevant cases, the question of initiating a tax audit procedure to establish joint and several liability for debts under Article 177 of the ZDDS where the principal debtor no longer exists has not been explicitly discussed.

Moreover, no decision of the Court of Justice of the European Union in a similar case in the context of a request for a preliminary ruling is known.

VII. Grounds for the referral:

For the dispute concerning the lawfulness of the contested tax audit assessment to be resolved correctly, it is necessary first to clarify the scope of the provisions

governing the initiation of the procedure to establish the liability of ‘Vaniz’ EOOD for the tax owed by Stars International EOOD under Article 177 of the ZDDS. Since the applicability of the provisions of Article 21(2) of the DOPK, read in conjunction with Article 168 of the same law, to the case in the main proceedings concerning a tax audit procedure under Article 177 of the ZDDS falls within the exclusive province of the national court and the court will answer those questions when disposing of the case, it is necessary to clarify the relationship between that legislation and EU law, particularly Council Directive 2006/112/EC, by means of an interpretation of the applicable EU law by the Court of Justice of the European Union. A crucial question in that respect will evidently be whether the provisions of EU law preclude national legislation under which third parties would remain liable for the obligations of the principal debtor when that person has ceased to exist as a legal person acting in its own right. The provisions of national law, namely Article 21(2) and Article 168 of the DOPK, in principle allow for third parties to be held jointly and severally liable for the debts of others, even if the principal debtor no longer exists. Article 177 of the ZDDS lays down no substantive limits on third-party liability, while the abovementioned interpretative decisions of the VAS and judgment of the Court state that the joint and several liability of the third party encompasses obligations for both tax and interest. In contrast, the temporal parameters of that liability – that is to say, when it is permissible to initiate and conduct those proceedings – remain unclear. Account must be taken of the fact that what is at issue in the main proceedings is not the establishment of tax debts owed by the person concerned as a person registered under the ZDDS but liability for third-party debts. That person first learns that it is subject to such liability after the tax audit is initiated; at that point, the person with which it entered into a contract – the person owing the tax – has already ceased to exist. In view of the circumstances set out above, it would be legitimate to ask whether such an interpretation of the relevant legal provisions would be consistent with the principles set out in Directive 2006/112/EC, which were intended to ensure the proper functioning of the VAT system within the EU, and [whether those provisions] would not evidently breach the principles of reasonableness and proportionality. The existence of administrative practice in which tax audits are ordered to establish the joint and several liability of third parties where the principal debtor has ceased to exist as a legal entity is manifestly not an isolated instance. Therefore, clarification of the above questions will evidently be essential in determining how the tax authorities apply the provisions of Article 177 of the ZDDS in practice in a manner consistent with the parameters set out in Directive 2006/112/EC.

In light of those considerations, the present chamber of the Administrative Court, Veliko Tarnovo considers it appropriate to refer to the Court of Justice of the European Union for a preliminary ruling questions on the permissibility of administrative practice or national legislation which provides for the possibility of initiating a procedure to establish the joint and several liability of a third party for the VAT owed by a principal debtor where that debtor has ceased to exist as a legal person.

For these reasons and on the basis of Article 628 of the GPK, read in conjunction with Paragraph 2 of the Additional Provisions to the DOPK, and Article 631 of the GPK, read in conjunction with Paragraph 2 of the Additional Provisions to the DOPK, the Administrative Court, Veliko Tarnovo [...]

MAKES THE FOLLOWING ORDER:

The following questions are **REFERRED** to the Court of Justice of the European Union for a preliminary ruling pursuant to point (b) of the first paragraph of Article 267 of the Treaty on the Functioning of the European Union:

Do recital 44 and Article 205 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax and, accordingly, the principles of transparency and proportionality of liability permit the initiation, after the principal debtor has ceased to exist as a legal person, of a procedure intended to establish a person's joint and several liability to pay VAT and the extent of such joint and several liability?

Do they, following the deletion of the debtor [from the commercial register] without a legal successor assuming that debtor's rights and obligations, allow the existence of a registered claim against that debtor, for which a third party is liable a posteriori?

Is the administrative practice of the national tax authorities as described above consistent with the principle of legal certainty?

The proceedings in case [...] are **STAYED** pending delivery of the preliminary ruling of the Court of Justice of the European Union.

[...]

WORKING DOCUMENT