Case C-277/24 [Adjak] [i]

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:

22 April 2024

Referring court:

Wojewódzki Sąd Administracyjny we Wrocławiu (Poland)

Date of the decision to refer:

25 January 2024

Applicant:

M.B.

Defendant:

Dyrektor Izby Administracji Skarbowej we Wrocławiu

Subject matter of the main proceedings

Application from a former member of the Management Board of a limited liability company to participate in proceedings the purpose of which is to determine that company's VAT liability.

Subject matter and legal basis of the reference

Interpretation of EU law, VAT Directive; Article 267 TFEU

Question referred for a preliminary ruling

Are Articles 205 and 273 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1, as amended) in conjunction with Article 2 of the Treaty on European Union (OJ

[i] The present case has been given a fictitious name, which does not correspond to the real name of any of the parties to the proceedings.

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2016 C 202, p. 13; the rule of law, respect for human rights), as well as Article 17 of the Charter of Fundamental Rights of the European Union (OJ 2016 C 202, p. 389) (the right to property), Article 41 thereof (the right to good administration) and Article 47 thereof (the right to an effective remedy and the right to a fair trial), and (as guaranteed under EU law) the principle of proportionality, the right to a fair hearing and the rights of the defence, to be interpreted as precluding national legislation and the national practice based thereon which deny a natural person (a member of the Management Board of a legal person) – who may be jointly and severally liable for the VAT debt of the legal person with all his or her private assets – the right to participate actively in the procedure for determining that legal person's tax debt in the form of a final decision of the tax authority, while at the same time that natural person, in separate proceedings seeking to determine his or her joint and several liability for the legal person's VAT debt, is deprived of an adequate means of effectively challenging the findings and assessments which have been made previously concerning the existence or the amount of that legal person's tax debt and which are set out in the final decision of the tax authority issued previously without the participation of that natural person, which decision therefore constitutes a precedent in those proceedings under a national provision confirmed by national practice?

Provisions of European Union law relied on

TEU: Article 2

Charter of Fundamental Rights of the European Union ('the Charter'): Article 17(1), Article 41(1), Article 47

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax ('the VAT Directive'): Article 205, Article 273

Provisions of national law relied on

Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r. (Constitution of the Republic of Poland of 2 April 1997).

Ustawa z dnia 29 sierpnia 1997 r. – Ordynacja podatkowa (Law of 29 August 1997 – Law establishing the Tax Code):

Article 107 – sets out the conditions for third parties to be jointly and severally liable with all their assets for the taxable person's tax arrears

Article 116 – sets out the conditions for joint and several liability of, inter alia, members of the Management Board for the company's tax arrears

Article 133 – provides who may be a party to tax proceedings

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Succinct presentation of the facts and procedure in the main proceedings

The applicant M.B., by application dated 22 August 2022, requested the head of the tax office ('the first-instance authority') to be admitted as a party to the tax proceedings pending against B. sp. z o.o. ('the company') to verify the company's value added tax (VAT) return for the period from June to October 2016 and to request access to the file of the proceedings in question, on the grounds that she was the Chairperson of the company's Management Board between 2014 and 2018 and has the greatest knowledge of the company's operation during the period covered by the proceedings.

The first-instance authority refused to grant the applicant's request, indicating that it follows from the provisions of the Law establishing the Tax Code that only a liquidator may replace a party in the 'conduct of its affairs' in cases where it is incapable of performing legal actions because it lacks any organ to do so (which was the situation in the present case), and that only a party has the right to inspect the file.

The applicant lodged a complaint against that decision, as a result of which the Director of the Tax Administration Chamber (the second-instance authority), annulled it in its entirety and discontinued the proceedings in the case. The second-instance authority pointed out that the attribution to a person or entity of the status of a party to tax proceedings is determined by the tax authority, which is entitled to make its own objective assessment of whether the person making the request does in fact have locus standi. In the opinion of the second-instance authority, the applicant does not fall into any of the categories of persons or entities listed in Article 133 of the Law establishing the Tax Code. Thus, the second-instance authority considered that there was no legal basis on which the first-instance authority could have made the decision challenged.

The applicant brought an action before the Wojewódzki Sąd Administracyjny (Regional Administrative Court; the referring court) on the ground that she was the sole member of the Management Board of the company during the period for which the proceedings were pending. For that very reason, she has the greatest knowledge of the object of its activity, which is crucial in the proceedings conducted. The first-instance authority stated that it was sufficient that it heard the applicant as a witness. However, that hearing took place on a single occasion two to three years earlier, and the proceedings are still ongoing and evidence is being gathered, so that a single hearing is insufficient. Furthermore, under the Law establishing the Tax Code, any unsatisfied claims will impinge on the applicant as an individual, which indeed justifies her application.

Succinct presentation of the reasoning in the request for a preliminary ruling

1 The national practice to date based on the Law establishing the Tax Code results in the fact that in VAT proceedings to which a legal person such as a company (a taxable person for VAT purposes) is a party, it is the only party to the

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proceedings. Persons such as the applicant (a former member of the company's Management Board), despite the fact that they are jointly and severally liable for the company's tax debts (Article 116 of Law establishing the Tax Code), including VAT debts, do not have the status of a party in those proceedings, with which status a number of procedural guarantees of active participation in the proceedings, including the right to lodge appeals against decisions of the tax authorities, are connected.

2 National practice accepts that, in order to rule on the joint and several liability of a Management Board member, there are two types of proceedings: (1) assessment proceedings – determining the amount of a company's tax debt, in which only the company (the VAT taxable person for VAT purposes) is a party; (2) proceedings concerning the tax liability of a third party (including a former Management Board member), when the company (being the taxable person) fails to meet its tax obligations. In the second type of proceedings, the former member of the company's Management Board is a party. However, the object of this second type of proceedings is no longer the VAT assessment itself. Proceedings concerning the joint and several liability of a former member of a company's Management Board for the company's VAT debt are thus conducted on the basis of a tax decision previously issued in assessment proceedings, to which only the company was a party. Such a decision may therefore be considered as a precedent in proceedings concerning a former member of the company's Management Board. That is because the provisions of the Law establishing the Tax Code and domestic practice do not provide for the possibility for a former member of the Management Board to challenge the amount of the tax debt of a company (a taxable person) in the course of separate (subsequent) third party liability proceedings. In the course of proceedings concerning the joint and several tax liability of a member of the Management Board, it is solely determined whether the prerequisites for such liability are met, justifying the transfer of the tax arrears previously established by a decision of the tax authority. Adopting the view that a former member of the Management Board of a company does not have the status of a party in tax assessment proceedings conducted against the company therefore deprives that person of the right effectively to initiate extraordinary proceedings (revision, declaration of invalidity of a decision).

3 The verdict of the Trybunał Konstytucyjny (Constitutional Court) stating that Article 133(1) of the Law establishing the Tax Code is not inconsistent with the [Polish] Constitution, as well as the jurisprudence of administrative courts converging with that verdict, which, in fact, existed even before that verdict was issued (for example, judgments presenting the view that a member of the Management Board of a limited liability company is not a party to the proceedings in a case concerning the company's tax debt, including its VAT debt), were of significant importance for shaping the discussed domestic practice within the scope of application of Article 133(1) of the Law establishing the Tax Code.

4 It follows from Article 273 of the VAT Directive that Member States may impose other obligations which they deem necessary to ensure the correct collection of

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VAT. The liability of third parties for a company's tax debt, which exists under Polish law and applies to VAT, is such a regulation.

5 The system of joint and several liability of a former member of a company's Management Board for the tax debts of that company contributes to ensuring the correct collection of VAT or the prevention of tax evasion within the meaning of Article 273 of the VAT Directive, in accordance with the obligation laid down in Article 325(1) TFEU. This assertion cannot be undermined by the fact that the persons deemed jointly and severally liable under the above mechanism are not themselves taxable persons for VAT purposes. The essence of the dispute, however, concerns the procedural guarantees to be granted to those persons in relation to their potential obligation to make good from their personal assets the VAT debt of the company. In doing so, Article 273 of the VAT Directive gives Member States discretion to choose the measures they may adopt to ensure the correct collection of VAT and to prevent tax evasion.

6 Next, as set out in Article 205 of the VAT Directive, in the situations referred to in Articles 193 to 200 and 202 to 204 of that directive, 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. While Article 193 of the VAT Directive introduces the basic principle that VAT is payable by the taxable person carrying out the taxable supply of goods or services, the text of that article clarifies that other persons may or must be liable for payment of VAT in the situations referred to in Articles 194 to 199b and 202 of that directive. It is apparent from the context formed by Articles 193 to 205 of the VAT Directive that Article 205 of that directive is part of a set of provisions aimed at identifying the person liable for payment of VAT in various situations. Thus, those provisions are designed to ensure that the Treasury can effectively collect VAT from the person who is the most appropriate in the particular situation.

7 In its judgment of 13 October 2022, *Direktor na Direktsia 'Obzhalvane i danachno-osiguritelna praktika'* (C-1/21, EU:C:2022:788), the Court accepted that Article 273 of the VAT Directive and the principle of proportionality must be interpreted as not precluding national legislation providing for a system of joint and several liability for a legal person's VAT debts in, inter alia, the following circumstances:

- the person held jointly and severally liable is a manager or member of an executive body of the legal person;

- that joint and several liability is incurred only in the alternative, where it proves impossible to recover from the legal person the amounts of VAT payable.

8 In that judgment, the Court ruled that Article 273 of the VAT Directive and the principle of proportionality must be interpreted as not precluding national legislation providing for a system of joint and several liability which extends to default interest payable by the legal person for failure to pay VAT within the

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mandatory time limits laid down by that directive on account of acts committed in bad faith by the person designated as jointly and severally liable.

9 Applying the above interpretation of the VAT Directive to the realities of the present case, it should be said that in a situation where the tax authority aims to determine, in VAT assessment proceedings conducted against a company, circumstances such as the existence and amount of that tax debt, such a member of the Management Board (or former member of the Management Board) should be granted the status of a party to the proceedings already at the stage of that determination. Otherwise, that may result in the tax authority making findings characterised by arbitrariness, which will be impossible to remedy at the next stage of the proceedings.

10 In EU law, the right to property is protected in particular under Article 17 of the Charter. The depletion of the right to property (depletion of ‘possessions’) as a result of public levies and taxes can only take place under the conditions laid down by law. Taking into account the scope of the legal protection of the right to property (possessions) indicated above under EU and international law, it is necessary to look at this issue through the prism of protection measures arising from Article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (‘ECHR’), which states that anyone whose rights and freedoms as set forth in the Convention are violated is to have the right to an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

11 Article 41 of the Charter, on the other hand, enshrines the right to good administration, which reflects a general principle of EU law (judgment of 8 May 2014, *N.*, C-604/12, EU:C:2014:302, paragraph 49). Enforcement of that right includes, in particular, the right to be heard, which cannot be treated merely formally, but must ensure that the tax authorities treat the person heard with respect for his or her interests.

12 In the next place, it should be pointed out that the principle of effective judicial protection is a general principle of EU law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the ECHR, and which has also been reaffirmed by Article 47 of the Charter (judgment of 13 March 2007, *Unibet (London) Ltd and Unibet (International) Ltd* v *Justitiekanslern*, C-432/05, EU:C:2007:163). The concept of effective legal protection is broader than that of effective judicial protection, since the former includes protection in proceedings before administrative authorities, whereas the latter covers protection granted by the courts. Article 47 of the Charter confers, inter alia, the right to an effective remedy which includes the right to institute proceedings before an independent and impartial tribunal previously established by law. The European Court of Human Rights has repeatedly pointed out that Article 13 ECHR requires national legal systems to provide effective remedies (appeals). A national measure falling within the procedural autonomy of the Member States may not render in practice impossible

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or excessively difficult the exercise of rights conferred by EU law (judgments of 15 April 2010, *Barth*, C-542/08, EU:C:2010:193, paragraph 17 and of 17 November 1998, *Aprile*, C-228/96 and C-228/96, EU:C:1998:544, paragraph 18).

13 The rights of the defence are recognised as a general principle of EU law, guaranteeing the possibility of effectively presenting one's point of view prior to the adoption of a decision which could adversely affect the interests of the person or entity concerned. At the same time, under the principle of sincere cooperation laid down in Article 4(3) TEU it is for the courts of the Member States to ensure judicial protection of a person or entity's rights under EU law and Article 19(1) TEU requires Member States to provide remedies sufficient to ensure effective legal protection in the fields covered by EU law (see judgments of 8 November 2016, *Lesoochranárske zoskupenie VLK*, C-243/15, EU:C:2016:838, paragraph 50, and of 9 February 2017, *M*, C-560/14, EU:C:2017:101, paragraph 30 and the case-law cited therein). The principle of effective judicial protection of the rights of legal persons or entities under EU law comprises various elements; in particular, the rights of the defence, the principle of equality of arms, the right of access to a tribunal and the right to be advised, defended and represented (judgment of 6 November 2012, *Otis and Others*, C-[1]99/11, EU:C:2012:684, paragraph 48). The right to be heard in all proceedings is an integral part of respect for the right to defence, guaranteeing everyone the opportunity to usefully and effectively present his or her position during the administrative proceedings and prior to any decision that could adversely affect his or her interests (judgments of 11 December 2014, *Boudjlida*, C-249/13, EU:C:2014:2431, paragraphs 34 and 36, and of 9 February 2017, *M.*, C-560/14, EU:C:2017:101, paragraphs 25 and 31). Fundamental rights, such as respect for the rights of the defence – which also includes the right to be heard – do not constitute unfettered prerogatives and may be restricted, provided that those restrictions do in fact correspond to objectives of general interest pursued by the measure in question and do not involve, with regard to the objectives pursued, a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed (see, by analogy, the judgments of 10 September 2013, *G. and R.*, C-383/13 PPU, EU:C:2013:533, paragraph 33; of 11 December 2014, *Boudjlida*, C-249/13, EU:C:2014:2431, paragraph 43; and of 7 July 2016, *Lebek*, C-70/15, EU:C:2016:524, paragraph 37). However, the question whether there is an infringement of the rights of the defence and of the right to effective judicial protection must be examined in relation to the specific circumstances of each particular case, including, the nature of the act at issue, the context of its adoption and the legal rules governing the matter in question (see judgments of 18 July 2013, *Commission and Others* v *Kadi*, C-584/10 P, C-593/10 P and C-595/10 P, EU:C:2013:518, paragraph 102, and of 9 February 2017, *M.*, C-560/14, EU:C:2017:101, paragraph 33).

14 The right to take cognisance of evidence extends to evidence gathered by the administrative authority during the proceedings as well as to evidence used in related proceedings, such as criminal or administrative proceedings, where the

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authority intends to base its decision on evidence obtained in the course of such proceedings. The addressee of a decision must have the opportunity to comment on that evidence before the decision is issued. Making evidence available to a party after a decision has been made, at the stage of court proceedings, does not remedy a breach of the rights of the defence (see judgment of 16 October 2019, *Glencore Agriculture Hungary Kft.* v *Nemzeti Adó- es Vámhivatal Fellebbviteli Igazgatósága,* C-189/18, EU:C:2019:861, paragraphs 52 and 57). The right to full knowledge of the evidence is linked in the Court's case-law to the principle of 'equality of arms'. Being an integral part of the principle of effective judicial protection, that principle derives from the right to a fair trial and guarantees the parties equal treatment before the court. However, a restriction on a party's right to full knowledge of the evidence may be justified by the need to protect the legal interests of other parties to proceedings or to protect classified information. Nevertheless, in such a case, in order to ensure the effectiveness of the remedy, the court must have at its disposal the information required, including confidential information and business secrets, in order to determine, with full knowledge of the facts, whether that information can be disclosed, [and] must examine all the relevant matters of fact and of law (judgment of 7 September 2021, *UAB 'Klaipėdos regiono atliekų tvarkymo centras'* v *UAB 'Ecoservice Klaipėda' and Others*, C-927/19, EU:C:2021:700, paragraphs 129 and 135).

15 The procedural situation of the individual must also be governed by the principle of proportionality, which requires that the measures resulting from a provision of EU law be appropriate for attaining the legitimate objectives pursued by the legal act in question and must not go beyond what is necessary to achieve them (judgment of 8 June 2010, V*odafone and Others*, C-58/08, EU:C:2010:321, paragraph 51). The principle of proportionality requires a balance to be struck between competing interests and an appropriate balance to be struck between, on the one hand, the requirements of the general interest of society and, on the other, the requirements of the protection of the fundamental rights of the individual (see judgment of the ECtHR of 26 April 1991 in *Ezelin* v. *France*, 11800/85, § 52). In accordance with the principle of proportionality, Member States must employ means which, whilst enabling them effectively to attain the objective pursued, cause the least possible detriment to the objectives and principles laid down by the relevant EU legislation (see judgments of 18 December 1997, *Molenheide and Others*, C-286/94, C-340/95, C-401/95 and C-47/96, EU:C:1997:623, paragraph 46, and of 27 September 2007, *Teleos and Others*, C-409/04, EU:C:2007:548, paragraph 52). Thus, while it is legitimate for Member States' measures to seek to preserve the rights of the State Treasury as effectively as possible, they should not go further than is necessary for that purpose (see judgment in *Molenheide and Others*, cited above, paragraph 47; judgment of 11 May 2006, *Federation of Technological Industries and Others*, C-384/04, EU:C:2006:309, paragraph 30; and judgment of 21 February 2008, *Netto Supermarkt GmbH & Co. OHG* v *Finanzamt Malchin*, C-271/06, EU:C:2008:105, paragraphs 18 and 19). The principle of proportionality requires – when there is a choice between several appropriate measures – that recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the

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aims pursued, such as ensuring the correct collection of VAT (see judgment of 12 July 2001, *Jippes and Others,* C-189/01, EU:C:2001:420, paragraph 81).

16 It therefore had to be concluded that the applicant's being deprived, as a result of national legislation and practice, of the right to participate actively in tax proceedings which will result in a determination of the company's (the taxable person for VAT purposes) VAT liability, for which the applicant may be held jointly and severally liable with her personal assets, gives rise to justified doubts. Primarily, those doubts arise from the point of view of a failure to comply with the standards stemming from Article 2 TEU, in particular as regards the rule of law, and respect for human rights (Article 17 of the Charter). An individual who is deprived of the right to participate in proceedings that ultimately affect his or her assets is de facto deprived of the right to self-determination in this respect, and the sphere of his or her assets is determined by the tax authority in the exercise of its public authority. There are further doubts as to the failure to provide a former member of the Management Board of the company (the taxable person for VAT purposes) with an effective and adequate remedy to challenge the substance and amount of the VAT debt (given that that party lacks the status of a party to the proceedings concerning the substance and amount of the debt). The party is thereby deprived of his or her right to a fair hearing in his or her individual case, since the amount and basis of the company's tax liability as determined subsequently becomes – by virtue of a final decision issued without the participation of the third party – the debt of that third party, who, however, has no adequate and effective legal remedy to challenge the findings of the tax authorities that have decided on the existence and amount of the VAT debt in respect of the company. The exonerating circumstances in Article 116 of the Law establishing the Tax Code provide certain possibilities to avoid joint and several liability for the company's debts, but they do not allow the existence or the amount of the company's tax debt to be challenged. Consequently, they do not give the individual a real right to defend his or her rights. A further point should be made with regard to doubts as to the failure to provide a former member of the Management Board of a company (the taxable person for VAT purposes) with a right to protection of his or her property. The tax assessment proceedings conducted without the participation of that person immediately and directly affect the sphere of his or her rights, including his or her assets. Doubts must be raised concerning a failure to provide a former member of the Management Board of a company (the taxable person for VAT purposes) with the right to good administration, with which the applicant's right to initiate proceedings before a court on the merits of the tax case is linked. Since that party lacks the status of a party to the tax proceedings, he or she is precluded from subsequently bringing an action before an administrative court against the decision assessing the company's VAT liability. It follows that there is doubt concerning a failure to ensure the applicant's rights of the defence. The defence here is to be understood here as the right to challenge the substance and amount of the debt claimed against the applicant. In addition, the applicant does not have the possibility to familiarise him or herself on an ongoing basis with the evidence collected by the tax authority. At the present stage, the applicant is also deprived of the possibility to

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request the taking of evidence and the right to participate, for example, in the examination of witnesses. It is therefore questionable whether such a state of affairs allows one to say that 'equality of arms' between the applicant and the tax authorities is maintained. That in turn raises doubts as to whether the principle of proportionality has been complied with, since the present case requires a balancing of the public interest – which undoubtedly exists in proceedings aimed at determining a company's VAT debt – with the interest of the individual who may ultimately be held liable for that company's debt with his or her own personal assets. The referring court therefore doubts whether it is compatible with the principle of proportionality to establish the procedural position of a third party who may be liable for the company's VAT tax debt in such a way that the third party does not have the opportunity to effectively challenge the amount of the tax debt for which he or she is to be held jointly and severally liable with the company. Thus, it is also relevant that a former member of the Management Board of a company (that company being the taxable person for VAT purposes) is deprived of his or her right to be heard, since his or her arguments will remain unexamined.

17 Regard must also be had to the view expressed in this connection by the Court of Justice in the judgment of 16 October 2019, in Case C-189/18, that the VAT Directive, the principle of respect for the rights of the defence and Article 47 of the Charter must be interpreted as not precluding, in principle, legislation or a practice of a Member State according to which, during a check of the right to deduct VAT exercised by a taxable person, the tax authorities are bound by the findings of fact and the legal classifications which they have already made in the context of related administrative procedures initiated against suppliers of that taxable person, on which decisions which have become final finding the existence of VAT fraud committed by those suppliers are based, on condition, first, that it does not relieve the tax authorities of the obligation to disclose to the taxable person the evidence, including that originating in those related administrative procedures, on the basis of which they intend to take a decision, and that that taxable person is not thus deprived of the right effectively to challenge those findings of fact and legal classifications during the procedure brought against him or her; second, that the taxable person may have access during that procedure to all the evidence obtained during those related administrative procedures or any other procedure on which those authorities intend to base their decision or which may assist the exercise of the rights of the defence, unless objectives of public interest justify restricting that access; and, third, that the court hearing an action challenging that decision may check the legality of the way in which that evidence was obtained and used and the findings made in the administrative decisions taken with respect to those suppliers that are decisive for the outcome of the action.

18 Therefore, since it is necessary for an individual to be acquainted with the materials gathered in other proceedings – in the circumstances described in the aforementioned judgment of the Court – it must be assumed that the provisions of the VAT Directive, the principle of respect for the rights of the defence and Article 47 of the Charter do not preclude a third party, who may be jointly and

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severally liable for the company's debt, from having the status of a party in tax assessment proceedings against the company (in respect of the period in which he or she was a member of the Management Board representing the company), which implies that he or she has the right to acquaint him or herself with the evidence on the basis of which the tax authority is to determine the amount of the tax debt that may ultimately be imposed on that third party.

19 The referring court additionally refers to the questions referred by it for a preliminary ruling in Case C-278/24, which do not concern the applicant in the present case, but which raise related issues.

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