



## Reports of Cases

OPINION OF ADVOCATE GENERAL  
KOKOTT  
delivered on 6 November 2014<sup>1</sup>

**Case C-499/13**

**Marian Macikowski — acting as court enforcement officer at the Sąd Rejonowy w Chojnicach  
(District Court, Chojnice)**

**v**

**Dyrektor Izby Skarbowej w Gdańsku (Director of the Tax Chamber, Gdańsk)**

(Request for a preliminary ruling from the Naczelny Sąd Administracyjny (Poland))

(Tax law — Value added tax — Articles 193, 199(1)(g) and 204 to 206 of Directive 2006/112/EC — Supply of immovable property by compulsory sale by auction — Obligation of the court enforcement officer acting to calculate, collect and pay value added tax — Liability for unpaid tax — Principle of proportionality — Principle of fiscal neutrality)

### **I – Introduction**

1. Any tax law is ineffective if its effective enforcement is not ensured. It is therefore no wonder that the Member States of the Union give this point special attention. Thus they have no shortage of ideas for imposing various obligations in order to ensure in practice that the tax authority receives tax due.
2. The present request for a preliminary ruling concerns a supply liable to value added tax (VAT) which was effected by a compulsory sale of immovable property by auction. Polish law imposes particular obligations on the court enforcement officer involved in this process in respect of the VAT arising, because in the case of a compulsory sale procedure the debtor is not trusted to pay the VAT himself. If the court enforcement officer does not perform these obligations, he is liable for the tax.
3. In the present proceedings the Court is required to clarify whether these obligations imposed on the court enforcement officer are compatible with EU law on VAT.

### **II – Legal framework**

#### *A – EU law*

4. At the relevant time for the present proceedings, VAT within the European Union was levied on the basis of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax<sup>2</sup> ('the VAT Directive').

<sup>1</sup> — Original language: German.

<sup>2</sup> — 2002 OJ L 347, p. 1.

5. Under Article 9(1) of the VAT Directive, ‘taxable person’ means ‘any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity’.

6. Title XI of the VAT Directive concerns ‘Obligations of taxable persons and certain non-taxable persons’. Chapter 1 (‘Obligation to pay’) contains Articles 192a to 205, which concern ‘persons liable for payment of VAT to the tax authorities’.

7. Article 193 of the VAT Directive provides:

‘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.’

8. Under Article 199(1) of the VAT Directive, the Member States may provide that ‘the person liable for payment of VAT is the taxable person to whom any of the following supplies are made:

...

(g) the supply of immovable property sold by a judgment debtor in a compulsory sale procedure.’

9. Article 204(1) of the VAT Directive provides:

‘Where, pursuant to Articles 193 to 197 and Articles 199 and 200, the person liable for payment of VAT is a taxable person who is not established in the Member State in which the VAT is due, Member States may allow that person to appoint a tax representative as the person liable for payment of the VAT.’

Furthermore, where the taxable transaction is carried out by a taxable person who is not established in the Member State in which the VAT is due and no legal instrument exists, with the country in which that taxable person is established or has his seat, relating to mutual assistance similar in scope to that provided for in Directive 76/308/EEC and Regulation (EC) No 1798/2003, Member States may take measures to provide that the person liable for payment of VAT is to be a tax representative appointed by the non-established taxable person.’

10. Article 205 of the VAT directive provides:

‘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.’

11. The following articles are concerned with ‘Payment arrangements’. They include Article 206 of the VAT Directive, which provides:

‘Any taxable person liable for payment of VAT must pay the net amount of the VAT when submitting the VAT return provided for in Article 250. Member States may, however, set a different date for payment of that amount or may require interim payments to be made.’

12. In Chapter 5 (‘Returns’) of Title XI, Article 250 of the VAT Directive provides inter alia:

‘1. Every taxable person shall submit a VAT return setting out all the information needed to calculate the tax that has become chargeable and the deductions to be made including, in so far as is necessary for the establishment of the basis of assessment, the total value of the transactions relating to such tax and deductions and the value of any exempt transactions.

...’

13. Article 252 of the VAT Directive provides:

‘1. The VAT return shall be submitted by a deadline to be determined by Member States. That deadline may not be more than two months after the end of each tax period.

2. The tax period shall be set by each Member State at one month, two months or three months.

Member States may, however, set different tax periods provided that those periods do not exceed one year.

14. Finally, in Chapter 7 (‘Miscellaneous provisions’) of Title XI, Article 273 of the VAT Directive provides:

‘Member States may impose other obligations which they deem necessary to ensure the correct collection of VAT and to prevent evasion, subject to the requirement of equal treatment as between domestic transactions and transactions carried out between Member States by taxable persons and provided that such obligations do not, in trade between Member States, give rise to formalities connected with the crossing of frontiers.

The option under the first paragraph may not be relied upon in order to impose additional invoicing obligations over and above those laid down in Chapter 3.’

#### B – *National law*

15. Article 18 of the Ustawa o podatku od towarów i usług of 11 March 2004 (‘the Polish VAT law’) provides:

‘... court enforcement officers carrying out enforcement action within the meaning of the Code of Civil Procedure shall be paying agents for tax collected on the supply, effected through enforcement, of goods which are owned by the debtor or in his possession in breach of existing law.’

16. Article 8 of the Ustawa Ordynacja podatkowa of 29 August 1997 (‘the Polish Tax Code’) defines a ‘paying agent’ as including ‘a natural person, a legal person or an organisational entity without legal personality who is required under tax law to calculate tax, collect tax from a taxable person and pay it to a tax authority in good time’.

17. Article 30 of the Polish Tax Code provides *inter alia*:

‘1. A paying agent who fails to fulfil the obligations laid down in Article 8 shall be liable for any uncollected tax or tax which has been collected but not paid.

...

3. A paying agent ... shall be liable in respect of his entire assets for due payments as referred to in [paragraph 1].

4. Where, in the course of tax proceedings, a tax authority establishes a circumstance referred to in [paragraph 1], it shall give a decision on the tax liability of the paying agent ... determining the amount due by way of tax which has not been collected or collected but not paid.’

### III – Main proceedings and proceedings before the Court

18. The main proceedings concern the liability of Mr Macikowski for VAT which arose on a compulsory sale by auction.

19. In February 2007 Mr Macikowski, acting in his capacity as court enforcement officer in enforcement proceedings against a company established in Poland, carried out a compulsory sale by auction of immovable property owned by the company. The purchasers paid the hammer price in full into the court's deposit account, and the transfer of ownership took effect in August 2007.

20. In June 2009 the tax authority, on the basis of Article 18 of the Polish VAT Law in conjunction with Articles 8 and 30(1), (3) and (4) of the Polish Tax Code, ruled that Mr Macikowski was liable as the paying agent, because he had not paid the VAT on the sale of the immovable property. According to the tax authority, he ought to have issued a VAT invoice for the transaction in November 2007 and then paid the tax on behalf of the taxable supplier of the immovable property. Mr Macikowski eventually notified the tax authority in September 2009 of the tax payment he had made.

21. Mr Macikowski appealed to the Director of the Tax Chamber, Gdańsk, against the decision on his liability as paying agent, after it had been confirmed notwithstanding an objection he made to the tax authority. He argued *inter alia* that he had not been able to dispose over the proceeds of the auction sale of the immovable property, as the proceeds had been in the court's deposit account. So long as the plan for dividing the proceeds he had put forward at the end of October 2008 had not been finally confirmed by the court, he had not been in a position to pay the tax.

22. The Naczelny Sąd Administracyjny (Supreme Administrative Court), which has since come to be hearing the dispute, doubts that the Polish provisions referred to above are compatible with EU law, and on 16 September 2013 referred the following questions to the Court for preliminary ruling, pursuant to Article 267 TFEU:

‘(1) In the light of the system of value added tax resulting from the VAT Directive, in particular Articles 9 and 193, in conjunction with Article 199(1)(g), is a provision of national law permissible, such as that in Article 18 of the Polish VAT Law, which introduces exceptions to the general rules on that tax, in particular with regard to the persons required to calculate and collect the tax, by establishing the concept of paying agent, that is to say, a person who is required, on behalf of the taxable person, to calculate the amount of tax, collect it from the taxable person, and pay it to the tax authority in good time?(2) If Question 1 is answered in the affirmative:

(2.1) In the light of the principle of proportionality, which is a general principle of EU law, is a provision of national law permissible, such as that in Article 18 of the Polish VAT Law, under which, *inter alia*, tax on the supply of immovable property effected through enforcement in respect of goods owned by the debtor or in his possession in breach of existing law is calculated, collected and paid by a court enforcement officer carrying out an enforcement action who, as paying agent, bears liability in the event of failure to fulfil that obligation?

(2.2) In the light of Articles 206, 250 and 252 of the VAT Directive and of the principle of neutrality arising therefrom, is a provision of national law permissible, such as that in Article 18 of the Polish VAT Law, under which a paying agent as referred to in that provision is required to calculate, collect and pay, within the tax period of the taxable person, an amount of VAT on a supply, effected through enforcement, of goods owned by that taxable person or in his possession in breach of the law in force, in an amount comprising the product of the proceeds from the sale of the goods, minus VAT, and the applicable rate of that tax, with no reduction of that amount by the amount of input tax from the beginning of the tax period to the date of the collection of that tax from the taxable person?’

23. In the proceedings before the Court, Mr Macikowski, the Republic of Poland and the Commission submitted written observations. The Director of the Tax Chamber, Gdańsk, the Republic of Poland and the Commission participated at the hearing on 4 September 2014.

#### IV – Legal analysis

24. To understand the present proceedings it is necessary to distinguish between two different duties of a court enforcement officer under the Polish provisions.

25. First, in the context of a compulsory sale by auction a court enforcement officer must, under Article 18 of the Polish VAT Law and Article 8 of the Polish Tax Code, calculate the amount of tax for the taxable person, collect it from the taxable person, and pay it to the tax authority within the applicable time-limit. Thus it is intended that the court enforcement officer uses the taxable person's money to ensure that his tax debt is paid ('duty of collection')

26. Secondly, in certain circumstances there is in addition a personal liability on the court enforcement officer for the tax. If the court enforcement officer does not fulfil his duty of collection, Article 30(1) and (3) of the Polish Tax Code require him to pay the VAT out of his own resources ('liability').

#### A – *Duty of collection*

27. By its first question the referring court asks for clarification as to whether the provisions of the VAT Directive preclude the imposition of the duty of collection on the court enforcement officer.

##### 1. Articles 193 and 199(1)(g) of the VAT Directive

28. The referring court's primary doubt is whether the Polish provisions in question are compatible with Articles 193 and 199(1)(g) of the VAT Directive.

29. According to the basic rule laid down by Article 193 of the VAT Directive, VAT is payable by the taxable person who carries out the taxable supply of goods. However, the provision also states that the tax may be payable 'by another person' under Articles 194 to 199 and 202 of the VAT Directive. One of these exceptions is Article 199(1)(g) of the VAT Directive. It permits the Member States to provide that in the case of a supply of immovable property in a compulsory sale procedure the person liable for payment of VAT is the person who acquires the immovable property, if he is a taxable person.

30. Mr Macikowski is of the view that Articles 193 to 205 of the VAT Directive make exhaustive provision for who must pay VAT. The Member States may only impose the obligation to pay VAT on the persons identified in those provisions. The court enforcement officer responsible for a compulsory sale by auction, however, is not within any of these provisions.

31. However, this view fails to understand that it is necessary to distinguish between a person liable for payment of tax and a person such as the 'paying agent' under Polish law who is liable only to collect the VAT due from the person liable for payment of it. Articles 193 to 205 provide only for who is liable for payment of the tax.

32. The Polish provisions imposing the duty of collection do not have the effect of making the court enforcement officer the person liable for payment of the tax. His obligation is only to pay the tax due in respect of a particular transaction by the debtor against whose assets enforcement action is being taken, using that debtor's money. In the case of a supply of immovable property by a compulsory sale

procedure the person liable for payment of the tax is still the judgment debtor, as he is the supplier — the information provided by the referring court does not suggest anything else. It follows that the Polish provisions concerning the court enforcement officer's duty of collection do not deviate from Articles 193 and 199(1)(g) of the VAT Directive.

33. Consequently, Article 193 in conjunction with Article 199(1)(g) of the VAT Directive does not preclude a national provision according to which, where there is a supply of immovable property in a compulsory sale by auction, an obligation is imposed on the court enforcement officer involved to calculate, collect and pay the VAT due on behalf of the person liable for payment of the tax.

## 2. Article 204 of the VAT Directive

34. However, Mr Macikowski also submits that the Polish provisions in question are precluded by Article 204 of the VAT Directive, as they turn the court enforcement officer into a statutory tax representative, without this being provided for by Article 204 of the VAT Directive.

35. The first subparagraph of Article 204(1) of the VAT Directive provides that where the person actually liable for payment of VAT is a taxable person who is not established in the Member State in which the VAT is due, Member States may allow that person to appoint a tax representative as the person liable for payment of the VAT. Under the second subparagraph of that provision, the person liable for payment of the tax can be *required* to appoint a tax representative only if there is no mutual assistance agreement with the country in which he has his seat, which is not the case within the European Union. As appears from recital 7 in the preamble to Directive 2000/65/EC,<sup>3</sup> on which Article 204 is based, the tax representative either acts in the stead of the non-established taxable person, or acts only as his agent. Thus, a tax representative serves as national correspondent of the tax authority, where the taxable person is resident abroad.<sup>4</sup>

36. Article 204 of the VAT Directive was enacted with the aim of simplifying the VAT system, in that by contrast with the previous legal position Member States are no longer able to require taxable persons resident in the internal market to appoint a tax representative.<sup>5</sup> This not least removed an obstacle to access to the market. Thus, Article 204 prevents economic operators resident within the European Union from not being able to meet their obligations to foreign tax authorities directly, and instead only through the appointment of a tax representative.<sup>6</sup>

37. In the present case, however, the duty of collection does not turn the court enforcement officer into a tax representative within the meaning of Article 204 of the VAT Directive. As set out above,<sup>7</sup> it neither turns him into the person liable for payment of the tax, nor treats him as a general mandatary of the taxable person. The duty of collection on the court enforcement officer relates only to an individual taxable transaction. By contrast, he does not represent the taxable person in all his VAT affairs vis-à-vis the domestic tax authorities. Moreover, it is not apparent how the court enforcement officer's duty of collection can be contrary to the purpose of Article 204, as it does not create any obligations specifically for foreign taxable persons.

3 — Council Directive 2000/65/EC of 17 October 2000 amending Directive 77/388/EEC as regards the determination of the person liable for payment of value added tax, OJ 2000 L 269, p. 44.

4 — See judgment in *Athesia Druck* (C-1/08, EU:C:2009:108, paragraph 34), on Article 2(3) of Thirteenth Council Directive 86/560/EEC of 17 November 1986 on the harmonisation of the laws of the Member States relating to turnover taxes — Arrangements for the refund of value added tax to taxable persons not established in Community (OJ 1986 L 326, p. 40).

5 — See recitals 4 and 7 in the preamble to Directive 2000/65/EC (cited in note 3).

6 — To this effect, see judgments in *Commission v Finland* (C-249/05, EU:C:2006:411, paragraph 46), and *Commission v France* (C-624/10, EU:C:2011:849, paragraph 36).

7 — See point 32 above.

38. Thus, in conclusion, Article 204 of the VAT Directive too does not preclude the court enforcement officer's duty of collection.

### 3. The need for power to be conferred by EU law

39. However, this does not yet demonstrate that the disputed provision is compatible with the VAT Directive. As the Commission correctly submitted, Polish law imposes VAT obligations on court enforcement officers that are not provided for in the VAT Directive.

40. There are certainly cases in which the tax debt — without any special legal basis for this either existing in the VAT Directive or indeed being required — is not strictly paid by the person liable for payment of the tax. Thus, for example, agents of a legal person, or administrators in insolvency proceedings, are required to pay the tax debt of a taxable person simply because of their representation and administration respectively. There is no doubt that it is not necessary to find authority for these obligations in the VAT Directive, as they concern civil law, which is not harmonised.

41. However, in the present case the court enforcement officer's duty of collection is based on a specific provision of tax law, according to which a tax debt is to be paid in respect of a particular transaction, and not on a generally applicable right of representation. In this regard, however, the first sentence of Article 206 of the VAT Directive provides that VAT is to be paid by the person liable for payment of it. If a Member State wishes, in the context of a duty of collection such as that in the present case, to make another person liable for payment of VAT as well as the debtor, it therefore requires an appropriate power in the VAT Directive.

#### a) Article 273 of the VAT Directive

42. Article 273 of the VAT Directive could constitute such a legal basis for the duty of collection in the present case. This provides that Member States have power to impose additional obligations over and above those laid down by the VAT Directive which they deem necessary to ensure the correct collection of VAT and to prevent evasion. According to the wording of that provision, however, the enactment of such obligations must not interfere with trade between Member States or give rise to unequal treatment as between domestic transactions and transactions carried out between Member States by taxable persons. Further, Article 273(2) provides that no additional invoicing obligations may be imposed over and above those laid down in the VAT Directive.

43. The court enforcement officer's duty of collection is an obligation within the meaning of Article 273(1) of the VAT Directive. It is intended to ensure payment of the tax on a supply of goods effected by a compulsory sale by auction. This serves the purposes specified in that provision of ensuring the correct collection of tax and the prevention of evasion, as the payment of the VAT by the person liable for payment of it, that is, by the supplier of the immovable property, is uncertain in that situation.

44. It is moreover not apparent that the activity of the court enforcement officer interferes with trade between the Member States or leads to unequal treatment of domestic and international transactions. In so far as the court enforcement officer is also to be required to issue a VAT invoice in respect of the supply of goods, this is moreover not to be regarded as an unlawful additional obligation within the meaning of Article 273(2) of the VAT Directive, as the existing obligation to issue an invoice is merely passed to the court enforcement officer, and is not being supplemented by additional obligations.

45. In *Federation of Technological Industries and Others*, the Court held in relation to the predecessor provision of Article 273 of the VAT Directive that it did not provide a basis for imposing further obligations on any person ‘who is neither liable for payment of VAT nor jointly and severally liable to pay it’<sup>8</sup> under the directive. According to that, Article 273 of the VAT Directive could not provide a basis for imposing additional obligations on a person such as the court enforcement officer who is not a person liable for payment of the tax. In subsequent judgments, however, the Court has defined this provision’s scope more broadly. Thus, it has since assessed obligations imposed on taxable persons who are only claiming a right to an input tax deduction, but who are not the persons liable for payment of the tax on the transactions in question, against this provision.<sup>9</sup> According to recent case-law, measures which may be required of taxable persons before taking up any effective economic activity can likewise fall within Article 273.<sup>10</sup>

46. Even if one wanted to lay down a condition that only taxable persons may be made liable to obligations under Article 273, this is met in the present case, as the court enforcement officer not only has a duty of collection in relation to the tax debt of the person making the supply of immovable property, but also, according to the information given by the referring court, is himself a taxable person within the meaning of Article 9(1) of the VAT Directive, in that he makes taxable supplies consisting of the carrying out of compulsory sales by auction.

47. Therefore, Article 273 of the VAT Directive is an adequate legal basis for the court enforcement officer’s duty of collection.

#### b) Proportionality

48. However, there remains to be considered whether the provision satisfies the principle of proportionality.

49. *In exercising a power conferred by EU law, in accordance with the principle of proportionality, the Member States must employ means which, while enabling them effectively to attain the objective pursued by their domestic laws, are the least detrimental to the objectives and the principles laid down by the relevant EU legislation.*<sup>11</sup> To that extent measures adopted under Article 273 of the VAT Directive must not go further than is necessary to attain the objectives of ensuring the correct collection of tax and preventing evasion.<sup>12</sup>

50. As regards the necessity of the duty of collection, in cases of the supply of immovable property by compulsory sale by auction Member States may in principle reverse the tax debt, pursuant to Article 199(1)(g) of the VAT Directive, and thus prevent the supplier avoiding the tax debt. However, this measure is in any event not equally suitable as a means to achieving the aims pursued by the duty of collection, as the provision’s application is restricted to supplies to taxable persons.

8 — See *Federation of Technological Industries and Others* (C-384/04, EU:C:2006:309, paragraph 44), in relation to Article 22(8) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — common system of value added tax: uniform basis of assessment, (OJ 1977 L 145, p. 1).

9 — See judgments in *Nidera Handelscompagnie* (C-385/09, EU:C:2010:627, paragraphs 49 to 51), *Klub* (C-153/11, EU:C:2012:163, paragraphs 34, 50 and 51), and *Mahag ében and Dávid* (C-80/11 and C-142/11, EU:C:2012:373, paragraphs 57 to 59). See also the earlier judgment in *Gabalfa and Others* (C-110/98 to C-147/98, EU:C:2000:145, paragraphs 52 to 54).

10 — See judgment in *Ablessio* (C-527/11, EU:C:2013:168, paragraphs 29 and 30).

11 — See judgments in *Molenheide and Others* (C-286/94, C-340/95, C-401/95 and C-47/96, EU:C:1997:623, paragraph 46), *Teleos and Others* (C-409/04, EU:C:2007:548, paragraph 52), *X* (C-84/09, EU:C:2010:693, paragraph 36) and *BDV Hungary Trading* (C-563/12, EU:C:2013:854, paragraph 30).

12 — See judgments in *Gabalfa and Others* (C-110/98 to C-147/98, EU:C:2000:145, paragraph 52), *Profaktor Kulesza, Frankowski, Jóźwiak, Orłowski* (C-188/09, EU:C:2010:454, paragraph 26), *Ablessio* (C-527/11, EU:C:2013:168, paragraph 30) and *Maks Pen* (C-18/13, EU:C:2014:69, paragraph 43).

51. However, the information given by the referring court makes proportionality appear questionable. According to it, the normal performance of the court enforcement officer's obligations is possible only in cooperation with the court having jurisdiction over the compulsory sale by auction. It must first make the proceeds available, but according to the information given by the referring court this does not always happen within the time-limit under tax law for the court enforcement officer to pay the tax. The court itself acts only according to the requirements of civil procedure law and is not required to take into account the court enforcement officer's obligations in connection with the payment of VAT.

52. The Republic of Poland emphatically disputes the exposition given by the referring court, according to which it is not always possible for the court enforcement officer to fulfil his obligations in time. However, it is not the Court's task to resolve this contradiction, which relates to national law. The Court must take account, under the division of jurisdiction between the judicature of the European Union and the national courts, of the factual and legal context, as described in the order for reference, in which the questions put to it are set.<sup>13</sup> Having regards to the national court's exposition, the imposition of the duty of collection can in any event be regarded as proportionate only to the extent that it is objectively possible for a court enforcement officer acting with reasonable care actually to be able to comply with his obligations. This is not the case if he is prevented from doing so by the act of a third party, such as the court, over which he has no influence. An obligation that is impossible to fulfil cannot be regarded as a suitable measure for achieving the aims it pursues.

53. Accordingly, on the basis of Article 273 of the VAT Directive Member States may impose a duty of collection such as that in the present case in so far as a court enforcement officer acting with reasonable care is actually able to perform that duty.

#### 4. Answer to the first question referred

54. It follows that the answer to the first question is that the VAT Directive does not preclude a domestic provision which provides that in the case of a supply of immovable property by means of a compulsory sale by auction an obligation is imposed on the court enforcement officer involved in the sale to calculate, collect and pay the VAT due, to the extent that the court enforcement officer is not prevented from fulfilling this obligation by the act of a third party over which he has no influence.

#### B – *Liability*

55. The second question (Question 2.1) concerns the liability of the court enforcement officer. If he does not fulfil his duty of collection, he is liable with his entire assets for payment of the tax. In essence, the referring court asks whether that provision satisfies the requirements of the principle of proportionality.

##### 1. Legal basis

56. In order to answer this question, it is necessary first to elucidate whether the liability imposed on the court enforcement officer is covered by a legal basis found within the VAT Directive.

57. The Republic of Poland and the Commission again regard Article 273 of the VAT Directive as the legal basis for this liability.

<sup>13</sup> — See judgment in *Oberbank and Others* (C-217/13 and C-218/13, EU:C:2014:2012, paragraph 52 and the case-law cited).

58. However, liability of a third party for another's tax debt is governed by Article 205 of the VAT Directive. According to it, Member States, in particular in the present situation falling within Article 193, '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'. Precisely this is the case if the court enforcement officer is liable with his own assets for the tax debt of the debtor whose assets are being taken in execution, where he does not perform his duty of collection.

59. At the hearing the Republic of Poland and the Commission submitted, on the other hand, that Article 205 of the VAT Directive did not apply, as this was not a situation in which the tax authority could pursue the court enforcement officer and the person liable for payment of the tax (that is, the taxable person who makes the supply) on an *alternative* basis. If the tax is not collected or paid within the applicable time-limit, the tax authority can pursue only the court enforcement officer.

60. This submission indicates that responsibility for the tax debt is transferred to the court enforcement officer alone. If this were the case, however, then Polish law would be in breach of Articles 193 to 205 of the VAT Directive. These provisions make exhaustive provision as regards who is liable for payment of the tax vis-à-vis the tax authority, and do not provide for any case in which a supplier is subsequently freed from his tax debt under Article 193 of the VAT Directive because a third party takes over the liability in an individual case. In the present case, therefore, the supplier *may not* be freed from his responsibility for the tax debt.

61. However, from the information provided by the referring court it does not by any means appear that under Polish law the tax debt due by the supplier is extinguished where liability is imposed on the court enforcement officer. Therefore, where the facts giving rise to that liability occur, the court enforcement officer is consequently to be regarded rather as an additional debtor for the tax.

62. Thus, in principle, the Polish provisions concerning liability of the court enforcement officer are authorised by Article 205 of the VAT Directive.

## 2. Proportionality

63. In exercising their power under Article 205 of the VAT Directive Member States are, however, required in particular to observe the principle of proportionality. It follows that, when enacting measures on the basis of that provision for the purpose of preserving the rights of the public exchequer as effectively as possible, they must not go beyond what is necessary to achieve that purpose.<sup>14</sup> To impose liability independently of fault falls foul of this framework,<sup>15</sup> because according to the case-law of the Court it is clearly disproportionate to hold a person unconditionally liable for the shortfall in tax revenue caused by acts of a third party over which he has no influence whatsoever.<sup>16</sup>

64. According to the submissions of the Republic of Poland, a court enforcement officer is a public official and is therefore a person in whom public trust is placed. He may therefore rightly be expected to exercise a particular degree of care when he collects tax for the tax authorities in the course of his activities. This also justifies imposing high requirements as to the court enforcement officer's responsibility and, in case of breach of his obligations, liability with his own assets.

14 — See judgments in *Federation of Technological Industries and Others* (C-384/04, EU:C:2006:309, paragraphs 29 and 30) and *Vlaamse Oliemaatschappij* (C-499/10, EU:C:2011:871, paragraphs 20 to 22).

15 — See judgments in *Federation of Technological Industries and Others* (C-384/04, EU:C:2006:309, paragraph 32) and *Mahag ében and Dávid* (C-80/11 and C-142/11, EU:C:2012:373, paragraph 48).

16 — See judgment in *Vlaamse Oliemaatschappij* (C-499/10, EU:C:2011:871, paragraph 24).

65. As, however, has already been explained above,<sup>17</sup> according to the referring court it is not impossible that a court enforcement officer is prevented by circumstances beyond his control from ensuring the punctual payment of tax. Liability can arise even in such cases. In that way, the court enforcement officer has to bear another person's obligation without any fault of his own. However, it is possible to regard the disputed Polish provisions as proportionate only if the court enforcement officer's liability is connected to some personally blameworthy conduct of his.

### 3. Answer to the second question

66. For those reasons, the answer to the second question is that the principle of proportionality does not preclude a domestic provision which provides that a court enforcement officer who is obliged to calculate, collect and pay the tax on a supply of immovable property by a compulsory sale by auction is, in case of failure in this duty, liable with his entire assets, unless the failure was caused by the act of a third party on which he had no influence.

### *C – Taking input tax into account*

67. Finally, by its third question (Question 2.2) the referring court seeks clarification as to whether the VAT Directive precludes imposing the duty of collection on a court enforcement officer where he is required to pay the tax on the supply of immovable property without being able to deduct the amount of input tax incurred by the supplier from the beginning of the tax period to the date of the collection of that tax.

68. As the referring court explains, it might be incompatible with Articles 206, 250 and 252 of the VAT Directive, and with the principle of fiscal neutrality, for input tax not to be taken into account.

69. It follows from Article 206 of the VAT Directive that a person liable for payment of the tax when submitting the tax return — which is provided for in more detail by Articles 250 and 252 — must pay only the taxable amount as reduced by input tax. After the court enforcement officer pays a third party's tax debt, it must in principle be equally possible for him to deduct input tax from the amount of tax due by him. It might be that, in effect, he would have to make a lower payment, or indeed no payment at all, and could thus reduce his liability by a corresponding amount.

70. The second sentence of Article 206 of the VAT Directive provides that Member States may, however, require interim payments of VAT to be made. In this regard I share the Republic of Poland's view that the tax paid by the court enforcement officer for a single transaction may be regarded as such an interim payment. This interim payment may then be taken into account in the tax return of the supplier for the relevant tax period.

71. In so far as Mr Macikowski argues against this that Member States are not free to establish the conditions for interim payments, and in that regard cites the judgment in *Balocchi*,<sup>18</sup> his argument should not be adopted. The application of the national provisions in question in that case could have given rise to a breach of EU law consisting in an obligation on taxable persons to pay VAT on future transactions.<sup>19</sup> In the present case, however, VAT is paid on the basis of a transaction which has already taken place, namely the supply of immovable property.

<sup>17</sup> — See point 51 above.

<sup>18</sup> — C-10/92, EU:C:1993:846.

<sup>19</sup> — Judgment in *Balocchi* (C-10/92, EU:C:1993:846, paragraph 27).

72. Moreover, not taking input tax into account is not incompatible with the principle of fiscal neutrality. According to this principle, the deduction scheme is meant to relieve every operator entirely of the burden of the VAT payable or paid in the course of his economic activities.<sup>20</sup> As the Court has clarified, however, this is an aid to interpretation which does not have any precedence over the wording of the law.<sup>21</sup> Yet the power of Member States to require interim payments is expressly conferred by the second sentence of Article 206 of the VAT Directive.

73. Accordingly, the answer to the third question is that Articles 206, 250 and 252 of the VAT Directive and the principle of fiscal neutrality do not preclude a national provision under which a court enforcement officer who is required to calculate, collect and pay the tax on a supply of immovable property made by means of a compulsory sale by auction has to pay that tax without deduction of the input tax incurred by the person liable for payment of the tax from the beginning of the tax period.

## V – Conclusion

74. In view of the foregoing, I propose that the Court reply as follows to the questions referred for a preliminary ruling by the Naczelny Sąd Administracyjny:

Council Directive 2006/112/EC of 28 November 2006 on the harmonised system of value added tax does not preclude a national provision under which, in the case of a supply of immovable property by means of a compulsory sale by auction, an obligation is imposed on the court enforcement officer involved in the sale to calculate, collect and pay the VAT due, without taking into account the input tax incurred by the person liable for payment of the tax from the beginning of the tax period, and, in the event of failure in this duty, he is liable with his entire assets, to the extent that the court enforcement officer is not prevented from fulfilling these obligations by the act of a third party over which he has no influence.

20 — See judgments in *Zimmermann* (C-174/11, EU:C:2012:716, paragraph 47) and *NCC Construction Danmark* (C-174/08, EU:C:2009:669, paragraph 27 and the case-law cited).

21 — Judgment in *Deutsche Bank* (C-44/11, EU:C:2012:484, paragraph 45).