Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

5 December 2013 *

(Taxation — VAT — Sixth Directive 77/388/EEC — Article 11(A)(1)(a), (2)(a) and (3)(c) — Directive 2006/112/EC — Article 73, point (a) of the first paragraph of Article 78 and point (c) of the first paragraph of Article 79 — Taxable amount for the VAT payable on commercial advertising screening services — Commercial advertising screening tax)

In Joined Cases C-618/11, C-637/11 and C-659/11,

REQUESTS for a preliminary ruling under Article 267 TFEU from the Supremo Tribunal Administrativo (Portugal), made by decisions of 12 October 2011, 2 November 2011 and 16 November 2011, received at the Court on 1 December 2011, 12 December 2011 and 27 December 2011, respectively, in the proceedings

TVI – Televisão Independente SA

v

Fazenda Pública,

Intervener:

Ministério Público,

THE COURT (Third Chamber),

composed of M. Ilešič, President of the Chamber, K. Lenaerts, Vice-President of the Court, acting as Judge of the Third Chamber, C.G. Fernlund, A. Ó Caoimh and E. Jarašiūnas (Rapporteur), Judges,

Advocate General: P. Cruz Villalón,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 31 January 2013,

after considering the observations submitted on behalf of:

— TVI – Televisão Independente SA, by N. Pena, advogado,

— the Portuguese Government, by L. Inez Fernandes and R. Laires, acting as Agents,

— the Greek Government, by M. Germani and I. Bakopoulos, acting as Agents,

* Language of the case: Portuguese.

— the European Commission, by P. Guerra e Andrade and L. Lozano Palacios, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 11 June 2013,

gives the following

Judgment

1 These requests for a preliminary ruling concern the interpretation of Article 11(A)(1)(a), (2)(a) and (3)(c) 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; 'the Sixth Directive') and of Article 73, point (a) of the first paragraph of Article 78 and point (c) of the first paragraph of Article 79 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1).

2 The requests have been made in three sets of proceedings between TVI – Televisão Independente SA ('TVI') and the Fazenda Pública (Portuguese Treasury) concerning the refusal of TVI's applications for review of the value added tax ('VAT') assessment notices relating to the months of February 2004, October 2004 and January 2007.

Legal context

European Union law

3 The Sixth Directive was replaced, with effect from 1 January 2007, by Directive 2006/112. As the disputes before the referring court concern the VAT for the months of February and October 2004 (Cases C-637/11 and C-618/11), and also the VAT for the month of January 2007 (Case C-659/11), the relevant legislation for the purposes of Cases C-637/11 and C-618/11 is the Sixth Directive and, for the purposes of Case C-659/11, Directive 2006/112.

4 Article 11(A) of the Sixth Directive, which concerns the taxable amount within the territory of the country, states:

'1. The taxable amount shall be:

(a) in respect of supplies of goods and services other than those referred to in (b), (c) and (d) below, everything which constitutes the consideration which has been or is to be obtained by the supplier from the purchaser, the customer or a third party for such supplies including subsidies directly linked to the price of such supplies;

…

2. The taxable amount shall include:

(a) taxes, duties, levies and charges, excluding the value added tax itself;

…

3. The taxable amount shall not include:

…

(c) the amounts received by a taxable person from his purchaser or customer as repayment for expenses paid out in the name and for the account of the latter and which are entered in his books in a suspense account. The taxable person must furnish proof of the actual amount of this expenditure and may not deduct any tax which may have been charged on these transactions.'

5 Article 73 of Directive 2006/112 provides:

'In respect of the supply of goods or services, other than as referred to in Articles 74 to 77, the taxable amount shall include everything which constitutes consideration obtained or to be obtained by the supplier, in return for the supply, from the customer or a third party, including subsidies directly linked to the price of the supply.'

6 Point (a) of the first paragraph of Article 78 of that directive states:

'The taxable amount shall include the following factors:

(a) taxes, duties, levies and charges, excluding the VAT itself;

…'

7 Point (c) of the first paragraph of Article 79 of Directive 2006/112 provides:

'The taxable amount shall not include the following factors:

…

(c) amounts received by a taxable person from the customer, as repayment of expenditure incurred in the name and on behalf of the customer, and entered in his books in a suspense account.'

Portuguese law

8 Article 16 of the Value Added Tax Code (Código do Imposto sobre o Valor Acrescentado; 'the CIVA') provides:

'1. Without prejudice to paragraph 2, the taxable amount in respect of the taxable supply of goods or services shall be equivalent to the value of the consideration received or to be received from the purchaser, the customer or a third party.

…

5. The taxable amount in respect of taxable supplies of goods or services shall include the following factors:

(a) taxes, duties, fees and charges, excluding the [VAT] itself;

…

6. The taxable amount referred to in the preceding paragraph shall not include the following factors:

…

(c) amounts paid in the name and on behalf of the purchaser of the goods or the customer of the services, duly registered in third party accounts by the taxpayer;

…’

9 In Law No 42/2004 on Cinematographic and Audiovisual Art (Lei No 42/2004 – Lei de Arte Cinematográfica e do Audiovisual) of 18 August 2004 (*Diário da República* I, series A, No 194, of 18 August 2004), Article 28, entitled ‘Screening tax’, provides:

‘1. Commercial advertising screened in cinemas and on television, that is to say, advertisements, advertising support, telesales, teletext, product placement, or included in electronic programming guides, shall be subject, whatever the broadcasting platform, to a screening tax, chargeable to the advertiser, of 4% of the price paid [“the screening tax”].

2. The assessment, collection and taxation of amounts to be recovered by way of screening tax shall be defined in a separate legal instrument.’

10 Article 50 of Decree-Law No 227/2006 of 15 November 2006 (*Diário da República* I, No 220, of 15 November 2006), is worded as follows:

‘1. Commercial advertising screened in cinemas, on television or included in electronic programming guides shall be subject, whatever the broadcasting platform, to a screening tax payable by advertisers; it shall constitute revenue for the [Instituto do Cinema, Audiovisual e Multimédia (“ICAM”)] and for the [Cinemateca Portuguesa – Museu do Cinema (“CP-MC”)].

2. The advertising referred to in the preceding paragraph shall include advertisements, advertising support, telesales, teletext and product placement.

3. The tax referred to in the preceding paragraphs shall be charged, by fiscal substitution, by the companies with concessions to operate the advertising slots in cinemas, by television operators or distributors that offer teletext services or electronic programming guides.’

11 Article 51 of Decree-Law No 227/2006 provides:

‘The screening tax shall be 4% of the price of the screening or broadcasting of the advertisement or of its inclusion in electronic programming guides, 3.2% of that price to accrue to ICAM and 0.8% to CP-MC.’

The actions in the main proceedings and the questions referred for a preliminary ruling

12 In the course of its audiovisual activities on the television market, TVI screened commercial advertising for various advertisers in the months of February 2004, October 2004 and January 2007.

13 TVI invoiced its clients for the supply of those services, adding 4% by way of screening tax to the price charged for the screening of the commercial advertising. In order to calculate the VAT payable, TVI applied the specified rate to the full amount invoiced – that is to say, inclusive of the screening tax – and paid the VAT assessed in respect of the periods concerned, entering it in the corresponding periodic VAT returns. TVI also entered the revenue accruing by way of screening tax in suspense accounts for the benefit of ICAM and CP-MC.

14 On the view that the taxable amount for VAT should not have included the amount payable by way of screening tax, TVI applied to the Portuguese tax authorities for a review of the VAT assessment notices relating to the months of February and October 2004 and January 2007. Those applications were refused.

15 The Tribunal Administrativo e Fiscal de Sintra (Administrative and Tax Court of Sintra) dismissed the actions by which TVI contested the decisions refusing the applications, on the ground that, pursuant to Article 16(1) and (5)(a) of the CIVA, the amount charged by TVI to advertisers as screening tax fell to be included in the taxable amount for VAT. That court found that the amounts paid by way of screening tax could not be regarded as amounts paid in the name and on behalf of the customers of the commercial advertising screening services. It also found that, in accordance with Article 28 of Law No 42/2004, there was a direct link between the screening tax and that supply of services because, as the screening tax covered those services, it was inherent in the services supplied.

16 TVI brought appeals against the judgments of the Tribunal Administrativo e Fiscal de Sintra before the Supremo Tribunal Administrativo (Supreme Administrative Court). Before the latter court, TVI raised the question whether the interpretation of Article 16(1) and (6)(c) of the CIVA adopted by the Portuguese tax authorities and confirmed by the judgments under appeal was consistent with Article 11(A)(1)(a) and (3)(c) of the Sixth Directive and the case-law of the Court of Justice. According to that interpretation, the screening tax is to be included in the taxable amount for the purposes of VAT, because it is inherent in the supply of those services and is not paid in the name and on behalf of the customers of the commercial advertising screening services, even though the amounts collected are entered in suspense accounts and are intended for public bodies.

17 TVI claimed before the Supremo Tribunal Administrativo, first, that the screening tax does not have a direct link with the supply of the commercial advertising screening service and should not be included in the amount of the consideration, because that tax does not constitute consideration for the service provided by TVI and is not directly linked to the supply of that service; and, secondly, that the screening tax falls within the Union law concept of 'acting in the name and on behalf of another' and accordingly the amount payable by way of screening tax has to be excluded from the taxable amount for the purposes of VAT.

18 In those circumstances, the Supremo Tribunal Administrativo decided to stay the proceedings and to refer the following questions, framed in identical terms in each of the cases before it, to the Court for a preliminary ruling:

'1. Is Article 16(1) of the CIVA, as interpreted in the judgment under appeal (to the effect that the commercial advertising *screening tax* is inherent in the supply of advertising services, so that it should be included in the taxable amount of the supply of services for the purposes of VAT), compatible with Article 11(A)(1)(a) of [the Sixth] Directive … (now Article 73 of … Directive 2006/112 …) and, in particular, with the concept of "consideration which has been or is to be obtained by the supplier … for such supplies"?

2. Is Article 16(6)(c) of the CIVA, as interpreted in the judgment under appeal (to the effect that the commercial advertising screening tax does not constitute an *amount paid in the name and on behalf of the customer of the services*, even though it is accounted for in … suspense accounts and is intended to be paid to public bodies, so that it is not excluded from the taxable amount for the purposes of VAT) compatible with Article 11(A)(3)(c) of [the Sixth] Directive … (now [point (c) of the first paragraph of] Article 79 … of … Directive 2006/112 …) and, in particular, with the concept of "amounts received by a taxable person from his purchaser or customer as repayment for expenses paid out in the name and for the account of the latter and which are entered in his books in a suspense account"?'

19 By order of the President of the Court of 18 January 2012, Cases C-618/11, C-637/11 and C-659/11 were joined for the purposes of the oral procedure and the judgment.

Consideration of the questions referred

Admissibility

20 The Portuguese Government expresses doubts as to the admissibility of the requests for a preliminary ruling. As regards the questions referred in Cases C-618/11 and C-637/11, it contends that the Portuguese legislation providing for the application of the screening tax was not applicable *ratione temporis* at the material time. In addition, it contends that the three orders for reference do not contain a precise and full description of the Portuguese law and the Union law applicable to the disputes in the main proceedings. In particular, the Portuguese Government states that the referring court in Case C-659/11 failed to mention Article 11(A)(2)(a) of the Sixth Directive and point (a) of the first paragraph of Article 78 of Directive 2006/112.

21 In this connection, it should be recalled, in the first place, that, in accordance with settled case-law, in proceedings under Article 267 TFEU, which are based on a clear separation of functions between the national courts and the Court, the national court alone has jurisdiction to find and assess the facts in the case before it and to interpret and apply national law. Similarly, it is solely for the national court, before which the dispute has been brought and which must assume responsibility for the judicial decision to be made, to determine, in the light of the particular circumstances of the case, both the need for and the relevance of the questions that it submits to the Court (Joined Cases C-182/11 and C-183/11 *Econord* [2012] ECR, paragraph 21 and the case-law cited). In particular, it is not for the Court to verify the accuracy of the legislative and factual context, which the national court is responsible for defining (see, to that effect, Case C-213/04 *Burtscher* [2005] ECR I-10309, paragraph 35 and the case-law cited). Consequently, where the questions referred concern the interpretation of Union law, the Court is, in principle, bound to give a ruling (*Econord*, paragraph 21).

22 The determination of the national legislation applicable *ratione temporis* in Cases C-618/11 and C-637/11 is therefore a question of interpretation of national law in respect of which the national court alone has jurisdiction.

23 In the second place, as regards the description of the applicable law in the orders for reference, it should be observed that, according to settled case-law of the Court, the need to provide an interpretation of Union law which will be of use to the national court makes it necessary for the national court to define the factual and legislative context of the questions referred or, at the very least, to explain the factual circumstances on which those questions are based (Case C-134/03 *Viacom Outdoor* [2005] ECR I-1167, paragraph 22, and Case C-94/07 *Raccanelli* [2008] ECR I-5939, paragraph 24).

24 In this connection, it should be borne in mind that the information provided in orders for reference serves not only to enable the Court to give useful answers but also to ensure that Member State governments and other interested parties have the opportunity to submit observations in accordance with Article 23 of the Statute of the Court of Justice of the European Union (Case C-370/12 *Pringle* [2012] ECR, paragraph 85 and the case-law cited).

25 In the present case, it is clear that the orders for reference contain not only a description of the background to the dispute, but also – in so far as they describe in detail TVI's position and the position reached by the court hearing the actions contesting the decisions refusing the applications for review of the assessment notices at issue – sufficient material to make it possible to establish the factual and legislative context of the questions referred. The orders for reference therefore enable the Court to give a useful answer to the referring court. In addition, the questions referred for a preliminary ruling clearly identify the provisions of Union law about which the referring court is inquiring.

26 Secondly, the observations submitted by TVI, by the Portuguese and Greek Governments and by the European Commission confirm that the matters of law and of fact as stated in the orders for reference were sufficient for the purposes of the case-law referred to in paragraph 24 above.

27 In the third place, as regards the failure by the referring court to mention all the provisions of Union law relevant to Case C-659/11, it should be observed that, even though, strictly speaking, that court has confined its questions to the interpretation of Article 11(A)(1)(a) and (3)(c) of the Sixth Directive and Article 73 and point (c) of the first paragraph of Article 79 of Directive 2006/112, that does not prevent the Court from considering, with a view to providing a useful answer to the referring court, provisions of Union law to which the national court has not referred in its questions (see, to that effect, CaseC-230/06 *Militzer & Münch* [2008] ECR I-1895, paragraph 19 and the case-law cited).

28 It follows from the foregoing that the Court has available to it sufficient factual and legal material to construe the provisions of Union law concerned and to provide useful answers to the questions referred.

29 Accordingly, the requests for a preliminary ruling must be held to be admissible.

Substance

30 By its questions, which it is appropriate to examine together, the referring court asks, in essence, whether, on a proper construction of Article 11(A)(1)(a), (2)(a) and (3)(c) of the Sixth Directive and Article 73, point (a) of the first paragraph of Article 78 and point (c) of the first paragraph of Article 79 of Directive 2006/112, a tax such as the 'screening tax' provided for under Portuguese legislation for the benefit of the cinematographic and audiovisual arts, which is owed by the advertisers, but which – by operation of a mechanism known as 'fiscal substitution' – is paid by the suppliers of commercial advertising screening services and entered in suspense accounts, has to be included in the taxable amount for the purposes of the VAT payable on services consisting in the screening of commercial advertising.

31 The Portuguese and Greek Governments argue, as does the Commission, that a tax such as the screening tax must be included in the taxable amount for the purposes of the VAT payable on the screening of commercial advertising since the chargeable event for such a tax is directly linked to the supply of the commercial advertising screening services and coincides with the chargeable event for the VAT payable on those services. In addition, according to the Greek Government, in view of the fact that the chargeable event for the screening tax is the supply of the commercial advertising screening services, desired by the two contracting parties, payment for which is not disbursed solely for the account of the customer of the supply, the exception provided for under Article 11(A)(3)(c) of the Sixth Directive and point (c) of the first paragraph of Article 79 of Directive 2006/112 cannot be applied.

32 TVI, on the other hand, argues that the screening tax must not be included in the taxable amount. According to TVI, the screening tax does not constitute the consideration for the supply of a service by TVI since that tax does not have a direct link with the supply of TVI's services. TVI maintains that the chargeable event for the screening tax is different from the chargeable event for VAT, the former being the screening of commercial advertising and the latter being any activity consisting in the supply of advertising services.

33 In that connection, it should be recalled that, under Article 11(A)(1)(a) of the Sixth Directive and Article 73 of Directive 2006/112, the taxable amount for VAT includes everything that constitutes the consideration which has been or is to be obtained by the supplier from the purchaser, the customer or a third party for such supplies. Article 11(A)(2) and (3) of the Sixth Directive and point (a) of the first paragraph of Article 78 and point (c) of the first paragraph of Article 79 of Directive 2006/112 list

certain items which are to be included in the taxable amount and other items which are to be excluded (see, to that effect, Case C-98/05 *De Danske Bilimportører* [2006] ECR I-4945, paragraph 15, and Case C-106/10 *Lidl & Companhia* [2011] ECR I-7235, paragraphs 30 and 31).

34 Article 11(A)(2)(a) of the Sixth Directive and point (a) of the first paragraph of Article 78 of Directive 2006/112 accordingly provide that taxes, duties, levies and charges – with the exception of the VAT itself – are to be included in the taxable amount.

35 Article 11(A)(3)(c) of the Sixth Directive and point (c) of the first paragraph of Article 79 of Directive 2006/112 provide, for their part, that amounts received by a taxable person from his purchaser or customer as repayment for expenses paid out in the name and for the account of the latter, and entered in his books in a suspense account, are to be excluded from the taxable amount.

36 In order to establish that a screening tax such as the tax at issue in the main proceedings falls to be included in the taxable amount for the purposes of the VAT payable on commercial advertising screening services – or, on the contrary, that it falls to be excluded from that amount – it is therefore necessary to determine at the outset whether it falls within the concept of 'taxes, duties, levies and charges' for the purposes of Article 11(A)(2)(a) of the Sixth Directive and point (a) of the first paragraph of Article 78 of Directive 2006/112.

37 In this connection, the Court has stated that, in order for taxes, duties, levies and charges to be included in the taxable amount for VAT, even though they do not represent any added value and do not constitute the financial consideration for the supply of services, they must have a direct link with that supply (see, to that effect, judgment of 20 May 2010 in Case C-228/09 *Commission* v *Poland*, paragraph 30, and *Lidl & Companhia*, paragraph 33).

38 The first point to be noted is that the screening tax does not constitute the financial consideration for the supply of commercial advertising screening services and does not represent any added value.

39 As for whether the screening tax has a direct link with the supply of commercial advertising screening services, the Court has consistently held that the question whether the chargeable event for the tax at issue coincides with that for VAT is a decisive factor for the purposes of establishing the existence of such a direct link (see, to that effect, *De Danske Bilimportører*, paragraphs 17 and 18, and *Commission* v *Poland*, paragraphs 30 to 32).

40 In the cases under consideration, it can be seen from the order for reference that, under Article 28(1) of Law No 42/2004, commercial advertising screened in cinemas and on television – more specifically, advertisements, advertising support, telesales, teletext, product placement – or included in electronic programming guides is to be subject, whatever the broadcasting platform, to a screening tax to be borne by advertisers, amounting to 4% of the price paid by them. It is apparent from Article 50(1) of Decree-Law No 227/2006 that the sums levied by way of screening tax constitute revenue for ICAM and CP-MC.

41 It thus follows from the Portuguese legislation – as the Portuguese Government argued, moreover, at the hearing before the Court – that the chargeable event for the screening tax coincides with that for the VAT payable on commercial advertising screening services. The screening tax becomes chargeable as soon as the services are provided and only becomes chargeable if such services are provided.

42 Consequently, a tax such as the screening tax has a direct link with the supply of commercial advertising screening services, since the chargeable events for the screening tax and for the VAT coincide. It therefore falls within the concept of 'taxes, duties, levies and charges' referred to in Article 11(A)(2)(a) of the Sixth Directive and point (a) of the first paragraph of Article 78 of Directive 2006/112.

43 That conclusion is not undermined by the fact that, under Article 50(3) of Decree-Law No 227/2006, the screening tax is paid – by operation of a 'fiscal substitution' mechanism – by the suppliers of the commercial advertising screening services.

44 The written and oral observations submitted to the Court make it clear that, under the mechanism, although it is the customers of commercial advertising screening services – namely, the advertisers – who owe the screening tax, it is the supplier of those services who pays the tax.

45 The parties to the main proceedings and those who have lodged observations with the Court disagree, however, as to the implications of the mechanism provided for under the Portuguese legislation. TVI submits that, by collecting the amounts owed by the customers of the commercial advertising screening services, by entering those amounts in its books in suspense accounts and by paying them over to the State, it is paying the screening tax in the name and on behalf of its clients. By contrast, the Portuguese Government contends, as does the Commission, that TVI is the tax debtor in relation to the screening tax, given that the customers of the commercial advertising screening services never enter into direct relations with the Portuguese tax authorities. It follows, they contend, that TVI pays the screening tax in its own name and on its own behalf.

46 Nevertheless, even supposing that TVI pays the screening tax in the name and on behalf of its clients, that would not mean that a fiscal substitution mechanism like the mechanism at issue in the main proceedings is akin to the repayment of expenses for the purposes of Article 11(A)(3)(c) of the Sixth Directive or point (c) of the first paragraph of Article 79 of Directive 2006/112.

47 Moreover, as the Advocate General stated in points 48, 50 and 51 of his Opinion, it is apparent in particular from the observations of the Portuguese Government and the Commission that they infer from Articles 18 and 20 of the General Tax Law (Lei Geral Tributária) that it is the person who pays the screening tax, in his capacity as 'fiscal substitute', who is to be regarded as the tax debtor; that TVI is required to pay that tax even if the advertisers have not paid for the commercial advertising screening services in question, and even if the tax is not reimbursed by the advertisers; and that the competent authorities are not able to claim the tax from the advertisers even if TVI becomes insolvent. It therefore appears to follow from the Portuguese legislation, the interpretation of which falls exclusively within the jurisdiction of the national court, that TVI pays that tax in its own name and on its own behalf.

48 In the light of all those considerations, the answer to the questions referred is that, on a proper construction of Article 11(A)(1)(a), (2)(a) and (3)(c) of the Sixth Directive and Article 73, point (a) of the first paragraph of Article 78 and point (c) of the first paragraph of Article 79 of Directive 2006/112, a tax such as the 'screening tax' provided for under Portuguese legislation for the benefit of the cinematographic and audiovisual arts must be included in the taxable amount for the purposes of the VAT payable on services consisting in the screening of commercial advertising.

Costs

49 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

On a proper construction of Article 11(A)(1)(a), (2)(a) and (3)(c) 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 and Article 73, point (a) of the first paragraph of Article 78 and point (c) of the first paragraph of

Article 79 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, a tax such as the 'screening tax' provided for under Portuguese legislation for the benefit of the cinematographic and audiovisual arts must be included in the taxable amount for the purposes of the VAT payable on services consisting in the screening of commercial advertising.

[Signatures]