

JUDGMENT OF THE COURT (Seventh Chamber)

17 July 2014 (\*)

(VAT — Directive 2006/112/EC — Articles 16 and 18 — Financial leasing — Goods under a financial leasing contract — Non-recovery of those goods by the leasing company after the termination of the contract — Missing goods)

In Case C-438/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Curtea de Apel București (Romania), made by decision of 9 April 2013, received at the Court on 2 August 2013, in the proceedings

**SC BCR Leasing IFN SA**

v

**Agen ia Na ional de Administrare Fiscal — Direc ia general de administrare a marilor contribuabili,**

**Agen ia Na ional de Administrare Fiscal — Direc ia general de solu ionare a contesta iilor,**

THE COURT (Seventh Chamber),

composed of J.L. da Cruz Vilaça, President of the Chamber, G. Arestis and A. Arabadjiev (Rapporteur), Judges,

Advocate General: M. Szpunar,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- SC BCR Leasing IFN SA, by D. Dasc lu, avocat,
- the Romanian Government, by R.H. Radu, acting as Agent,
- the European Commission, by G.-D. Balan and L. Lozano Palacios, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

**Judgment**

1 This request for a preliminary ruling concerns the interpretation of Articles 16 and 18 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1; ‘the VAT Directive’).

2 The request has been made in the course of proceedings brought by SC BCR Leasing IFN SA (‘BCR Leasing’) against the Agen ia Na ional de Administrare Fiscal — Direc ia general de administrare a marilor contribuabili and the Agen ia Na ional de Administrare Fiscal — Direc ia general de solu ionare a contesta iilor (together, ‘the Agen ia’) concerning the payment of value added tax (‘VAT’) on goods leased under a financial leasing contract but deemed missing after not being returned to the leasing company.

### **Legal context**

#### *The VAT Directive*

3 Article 2(1) of the VAT Directive is worded as follows:

‘The following transactions shall be subject to VAT:

(a) the supply of goods for consideration within the territory of a Member State by a taxable person acting as such;

...’

4 Article 14 of the VAT Directive provides:

‘1. “Supply of goods” shall mean the transfer of the right to dispose of tangible property as owner.

2. In addition to the transaction referred to in paragraph 1, each of the following shall be regarded as a supply of goods:

...

(b) the actual handing over of goods pursuant to a contract for the hire of goods for a certain period, or for the sale of goods on deferred terms, which provides that in the normal course of events ownership is to pass at the latest upon payment of the final instalment;

...’

5 Article 16 of that directive provides:

‘The application by a taxable person of goods forming part of his business assets for his private use or for that of his staff, or their disposal free of charge or, more generally, their application for purposes other than those of his business, shall be treated as a supply of goods for consideration, where the VAT on those goods or the component parts thereof was wholly or partly deductible.

However, the application of goods for business use as samples or as gifts of small value shall not be treated as a supply of goods for consideration.’

6 Article 18 of the VAT Directive is worded as follows:

'Member States may treat each of the following transactions as a supply of goods for consideration:

- (a) the application by a taxable person for the purposes of his business of goods produced, constructed, extracted, processed, purchased or imported in the course of such business, where the VAT on such goods, had they been acquired from another taxable person, would not be wholly deductible;
- (b) the application of goods by a taxable person for the purposes of a non-taxable area of activity, where the VAT on such goods became wholly or partly deductible upon their acquisition or upon their application in accordance with point (a);
- (c) with the exception of the cases referred to in Article 19, the retention of goods by a taxable person, or by his successors, when he ceases to carry out a taxable economic activity, where the VAT on such goods became wholly or partly deductible upon their acquisition or upon their application in accordance with point (a).'

- 7 Articles 184 to 186 of the VAT Directive, set out in Chapter 5, entitled 'Adjustment of deductions', of Title X, entitled 'Deductions', are worded as follows:

'Article 184

The initial deduction shall be adjusted where it is higher or lower than that to which the taxable person was entitled.

Article 185

1. Adjustment shall, in particular, be made where, after the VAT return is made, some change occurs in the factors used to determine the amount to be deducted, for example where purchases are cancelled or price reductions are obtained.

2. By way of derogation from paragraph 1, no adjustment shall be made in the case of transactions remaining totally or partially unpaid or in the case of destruction, loss or theft of property duly proved or confirmed, or in the case of goods reserved for the purpose of making gifts of small value or of giving samples, as referred to in Article 16.

However, in the case of transactions remaining totally or partially unpaid or in the case of theft, Member States may require adjustment to be made.

Article 186

Member States shall lay down the detailed rules for applying Articles 184 and 185.'

*Romanian law*

The Fiscal Code

- 8 According to 125a(1)(16) of Law No 571/2003 establishing the Fiscal Code (*Monitorul Oficial al României*, Part I, No 927 of 23 December 2003), in the version applicable to the facts of the main proceedings ('the Fiscal Code'), 'self-supply has the meaning as provided for in Article 128(4)' of that code.

9 Article 128 of the code, entitled 'Supply of goods', provides:

1. "Supply of goods" shall mean the transfer of the right to dispose of goods as owner.

...

3. The following transactions shall likewise be considered supplies of goods within the meaning of paragraph 1:

(a) the actual supply of goods to another person, under a contract which provides for payment in instalments or any other type of contract which provides that ownership is acquired at the latest when the last amount falling due has been paid, with the exception of leasing contracts;

...

4. Each of the following transactions shall be treated as a supply of services for consideration:

(a) the application by a taxable person of movable property purchased or produced by him for use for purposes other than those of the economic activity carried on, where the tax on those goods or the component parts thereof was wholly or partly deductible;

(b) the application by a taxable person of movable property purchased or produced by him in order to be provided to other persons free of charge, where the tax on those goods or the component parts thereof was wholly or partly deductible;

(c) the application by a taxable person of tangible movable property purchased or produced by him, other than the capital goods referred to in Article 149(1)(a), for use in transactions not eligible for deduction of VAT in full, where the tax on those goods or the component parts thereof was wholly or partly deductible as at the date of purchase;

(d) goods deemed to be missing, with the exception of those referred to in paragraph 8(a) to (c);

...

8. The following do not constitute a supply of goods within the meaning of paragraph 1:

(a) goods destroyed as a result of natural catastrophes or any case of *force majeure* and lost or stolen goods, if duly proven in accordance with the relevant legislation;

(b) stocks whose quality has deteriorated to the point where they are no longer recoverable and tangible fixed assets that have been disposed of, under the conditions laid down in the relevant legislation;

(c) perishables, within the limits provided for by law.'

10 According to Article 129(3)(a) of the Fiscal Code, the 'hire of goods or making goods available for use under a leasing contract' constitutes a supply of services.

## The Implementing Rules for the Fiscal Code

- 11 The Implementing Rules for the Fiscal Code, approved by Government Decision No 44/2004 (*Monitorul Oficial al României*, Part I, No 112 of 6 February 2004) in the version applicable to the facts of the main proceedings, provides, in paragraph 6:

‘Paragraph 6

...

6. In case of termination of a financial leasing contract relating to tangible movable property, those goods shall be regarded as missing from the lessor, for the purposes of Article 128(4)(d) of the Fiscal Code, on the expiry of the time-limit provided for in the contract for the return of the goods by the lessee, which may not exceed 30 calendar days after the termination of the contract ...’

- 12 By Legislative Decree No 15/2012 (*Monitorul Oficial al României*, Part I, No 621 of 29 August 2012), the Romanian Government repealed Article 128(4)(d) and (8)(a) to (c) of the Fiscal Code, with effect from 1 January 2013. Similarly, by Government Decision No 1071/2012 (*Monitorul Oficial al României*, Part I, No 753 of 8 November 2012), the Romanian Government repealed Paragraph 6(6) of the Implementing Rules for the Fiscal Code, with effect from 1 January 2013.

### **The dispute in the main proceedings and the question referred for a preliminary ruling**

- 13 BCR Leasing is a limited company whose main activity is financial leasing. It acquires from various suppliers cars in respect of which it fully deducts the input VAT paid. In addition, the company concludes financial leasing contracts, relating to the purchased cars, with natural or legal persons that are users of those goods throughout the duration of the contract, BCR Leasing remaining the owner of those cars.
- 14 As a result of late or non-payments, BCR Leasing terminated some of the financial leasing contracts concluded with the defaulting lessees. Pursuant to those contracts, the lessees were required, within three days after the termination of the relevant contract, to return to BCR Leasing the goods covered by the contract. Since a number of the lessees refused to return the goods in question, BCR Leasing instituted enforcement proceedings against them. However, in spite of its efforts, some of the goods in question could not be recovered within the time-limits set.
- 15 Since it did not receive any payments in respect of the terminated contracts, BCR Leasing stopped issuing invoices relating to those contracts and collecting the corresponding VAT.
- 16 During an audit carried out in 2011, the Agenția found irregularities relating to the manner in which VAT was indicated, recorded and declared for the period between 1 September 2008 and 31 December 2010. By tax notice of 30 August 2011 and tax audit report of the same date, it imposed an additional payment of 19 266 551 Romanian lei (RON) on BCR Leasing in respect of VAT, as well as a sum of RON 9 502 774 by way of penalty for delay.

- 17 In the above tax notice, the Agenția stated that a financial lease must be treated, for the duration of the contract, as a supply of services that may be followed by a supply of goods upon the expiry of the contract, depending on whether or not the lessee exercises the option to purchase.
- 18 Moreover, the Agenția considered that, in the case of goods missing for reasons other than those set out in Article 128(8)(a) to (c) of the Fiscal Code, it consisted of a supply of goods subject to VAT, the transaction having to be defined as a 'self-supply', in accordance with Article 125a(1)(16) of the Fiscal Code.
- 19 Consequently, according to the Agenția, BCR Leasing was required, at the end of the period prescribed in the financial leasing contract for the return of the goods by the lessor, to apply the provisions of Article 128(4)(d) of the Fiscal Code on self-supplies and the collection of VAT, and also to issue invoices to itself in respect of those supplies.
- 20 Taking the view that the national legislation underlying the tax notice referred to in paragraph 16 above was not compatible with the system introduced by the VAT Directive, BCR Leasing filed an action for the annulment of that notice, which was heard, most recently, before the Curtea de Apel București.
- 21 In those circumstances, the Curtea de Apel București decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'May a situation involving goods under a financial leasing contract which, following termination of the contract as a result of the lessee's breach, have not been recovered from the lessee by the leasing company, even though that company has instituted and followed the statutory procedures for recovery and, after termination, has not received any further amount for the use of the goods, be considered a supply of goods for consideration within the meaning of Article 16 of [the VAT Directive] or, possibly, a supply of goods for consideration within the meaning of Article 18 of [the VAT Directive]?'

### **The question referred for a preliminary ruling**

- 22 By its question, the referring court is asking, in essence, whether Articles 16 and 18 of the VAT Directive must be interpreted as meaning that the impossibility, for a leasing company, of recovering from the lessee the goods let under a financial leasing contract following its termination as a result of the lessee's breach, despite the steps undertaken by that company to recover those goods and despite the lack of any consideration following such termination, may be treated as a supply of goods for consideration for the purposes of those articles.
- 23 It should be recalled, first of all, that under Article 16 of the VAT Directive certain transactions for which no real consideration is received by the taxable person are treated as supplies of goods effected for consideration subject to VAT. According to well-established case-law, the purpose of that provision is to ensure equal treatment as between a taxable person who applies goods for his own private use or for that of his staff, on the one hand, and a final consumer who acquires goods of the same type, on the other (see, to that effect, judgment in *EMI Group*, C-581/08, EU:C:2010:559, paragraph 17 and the case-law cited).

- 24 In order to attain that objective, Article 16 of the VAT Directive treats as a supply of goods for consideration the application, by a taxable person, of goods forming part of his business assets for his private use or for that of his staff, or their disposal free of charge or, more generally, their application for purposes other than those of his business, where the VAT on those goods or the component parts thereof was wholly or partly deductible.
- 25 It is clear that the impossibility of actually recovering the goods under the financial leasing contract in circumstances such as those of the case in the main proceedings, does not fall within any of those situations.
- 26 First, the goods in question cannot be regarded as being intended for the private use of the taxable person or of his staff, since they are not in their possession. Secondly, the fact that the lessee remains in possession of those goods without providing any form of consideration is the result of the lessee's allegedly wrongful conduct and not of the disposal free of charge of those goods by the lessor in favour of the lessee. Thirdly, the goods cannot be considered as being applied for purposes other than those of the business of the taxable person, since their hiring out and thus being made available for the use of the lessee constitute the very essence of the economic activity of the lessor. The fact that the lessor does not actually recover those goods after the termination of the financial leasing contract in no way means that he has applied them for purposes other than those of his business.
- 27 It follows that the impossibility, for a leasing company, of actually recovering the goods under a financial leasing contract following its termination, in circumstances such as those of the case in the main proceedings, cannot be treated as a supply of goods for consideration for the purposes of Article 16 of the VAT Directive.
- 28 Next, with regard to Article 18 of the VAT Directive, it must be held that that provision does not apply to circumstances such as those of the case in the main proceedings.
- 29 It is clear from the order for reference that BCR Leasing fully deducted the input VAT paid at the time of the purchase of the vehicles in question. Thus, the situation referred to in Article 18(a) of the VAT Directive, which only covers the situation where the prior acquisition gives no entitlement to the deduction in full of the VAT, is of no relevance to this case.
- 30 As regards the situations referred to in Article 18(b) and (c) of the VAT Directive, it suffices to state that, in the present case, the taxable person neither applied the goods at issue for the purposes of a non-taxable area of activity, within the meaning of Article 18(b), nor ceased to carry out a taxable economic activity, as is required by Article 18(c).
- 31 Therefore, Article 18 of the VAT Directive does not permit Member States to treat as a supply of goods for consideration transactions such as those of the case in the main proceedings.
- 32 Finally, in order that the referring court may be provided with a helpful answer, it should be made clear that the adjustment provided for in Articles 184 to 186 of the VAT Directive is an integral part of the VAT deduction scheme established by that directive (judgment in *TETS Haskovo*, C-234/11, EU:C:2012:644, paragraph 30). The foregoing considerations thus do not affect any right of the tax authorities to

require adjustment on the part of a taxable person under the conditions prescribed in that regard in the VAT Directive.

- 33 Having regard to the foregoing, the answer to the question asked is that Articles 16 and 18 of the VAT Directive must be interpreted as meaning that the impossibility, for a leasing company, of recovering from the lessee the goods let under a financial leasing contract following its termination as a result of the lessee's breach, despite the steps undertaken by that company to recover those goods and despite the lack of any consideration following such termination, may not be treated as a supply of goods for consideration for the purposes of those articles.

### **Costs**

- 34 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 (Seventh Chamber) hereby rules:

**Articles 16 and 18 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning that the impossibility, for a leasing company, of recovering from the lessee the goods let under a financial leasing contract following its termination as a result of the lessee's breach, despite the steps undertaken by that company to recover those goods and despite the lack of any consideration following such termination, may not be treated as a supply of goods for consideration for the purposes of those articles.**