JUDGMENT OF THE COURT (Third Chamber)

22 December 2010 *

In Case C-438/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Naczelny Sąd Administracyjny (Poland), made by decision of 14 July 2009, received at the Court on 9 November 2009, in the proceedings

Bogusław Juliusz Dankowski

v

Dyrektor Izby Skarbowej w Łodzi,

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, D. Šváby, R. Silva de Lapuerta (Rapporteur), E. Juhász and T. von Danwitz, Judges,

* Language of the case: Polish.

Advocate General: P. Mengozzi,
Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 11 November 2010,

after considering the observations submitted on behalf of:

— Bogusław Juliusz Dankowski, by R. Grzejszczak, J. Skrzydło, T. Grzejszczak and A. Kania, adwokaci,

— the Polish Government, by A. Kramarczyk, M. Szpunar and B. Majczyna, acting as Agents,

— the German Government, by C. Blaschke and J. Möller, acting as Agents,

— the Greek Government, by Z. Chatzipavlou, D. Tsagkaraki and K. Georgiadis, acting as Agents,

— the European Commission, by D. Triantafyllou, A. Stobiecka-Kuik and K. Herrmann, acting as Agents,

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

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 17(2) and (6) and Articles 18 and 22 of the 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), in the version in force at the material time.

2 The reference has been made in proceedings between Mr Dankowski and the Dyrektor Izby Skarbowej w Łodzi (the Director of the Łodź tax chamber) concerning a restriction imposed on the right to deduct value added tax ('VAT').

Legal context

European Union law

3 Under Article 2 of the Sixth Directive:

'The following shall be subject to value added tax:

1. the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such;

…'

4 Article 4 of that Directive provides:

'1 "Taxable person" shall mean any person who independently carries out in any place any economic activity specified in paragraph 2, whatever the purpose or results of that activity.

2. The economic activities referred to in paragraph 1 shall comprise all activities of producers, traders and persons supplying services including mining and agricultural activities and activities of the professions. …

…'

5 Under Article 17 of the Sixth Directive:

'1. The right to deduct shall arise at the time when the deductible tax becomes chargeable.

2. In so far as the goods and services are used for the purposes of his taxable transactions, the taxable person shall be entitled to deduct from the tax which he is liable to pay:

(a) [VAT] due or paid within the territory of the country in respect of goods or services supplied or to be supplied to him by another taxable person;

…

6. Before a period of four years at the latest has elapsed from the date of entry into force of this Directive, the Council, acting unanimously on a proposal from the Commission, shall decide what expenditure shall not be eligible for a deduction of value added tax. Value added tax shall in no circumstances be deductible on expenditure

which is not strictly business expenditure, such as that on luxuries, amusements or entertainment.

Until the above rules come into force, Member States may retain all the exclusions provided for under their national laws when this Directive comes into force.

…'

6 Article 18(1)(a) of the Sixth Directive provides:

'To exercise his right to deduct, the taxable person must:

(a) in respect of deductions under Article 17(2)(a), hold an invoice drawn up in accordance with Article 22(3) …'

7 In accordance with Article 22(1) of that directive:

'(a) Every taxable person shall state when his activity as a taxable person commences, changes or ceases. …

…

(c) Member States shall take the measures necessary to identify by means of an individual number:

— Every taxable person … who, within the territory of the country, effects supplies of goods or of services giving him the right of deduction, other than supplies of goods or of services for which tax is payable solely by the customer or the recipient …'

8 Article 22(3) of the Sixth Directive is worded as follows:

'(a) Every taxable person shall ensure that an invoice is issued … in respect of … services which he has supplied or rendered to another taxable person …

(b) Without prejudice to the specific arrangements laid down by this Directive, only the following details are required for VAT purposes on invoices issued under … point (a) …:

— the date of issue;

— a sequential number …;

— the VAT identification number referred to in paragraph 1(c) under which the taxable person supplied the … services;

— [where the customer is liable to pay tax on goods supplied or services rendered]… the [customer's] VAT identification number referred to in paragraph 1(c) under which the …..services [were] rendered to him …,

— the full name and address of the taxable person and of his customer,

— the quantity and nature … of the services rendered,

— the date on which the supply … of services was made or completed …,

…'

9 Article 22(8) of the Sixth VAT Directive provides:

'Member States may impose other obligations which they deem necessary for the correct collection of the tax and for the prevention of evasion …

The option provided for in the first subparagraph cannot be used to impose additional obligations over and above those laid down in paragraph 3.'

National legislation

10 Article 96 of the Law of 11 March 2004 on the tax on goods and services (ustawa o podatku od towarów i usług), in the version applicable to the facts of the main proceedings, provides that taxable persons are required, before commencing their activity, to submit to the competent tax authority, an application for registration.

11 Article 88(3)(1)(a) of that Law provides that invoices cannot form the basis for the right to deduct tax payable and for a refund of the tax difference or for a refund of input tax, where the sale is supported by invoices issued by a trader who does not exist or is not entitled to issue invoices.

12 The order for the implementation of that Law, adopted by the Minister for Finance, provides that taxable persons registered as active taxable persons for the purposes of VAT who hold a tax identification number are to issue invoices marked with the words 'VAT invoice'.

13 Article 48(4)(1)(a) of that order provides that, where the sale of goods or services is supported by invoices issued by a trader who does not exist or is not entitled to issue invoices, such invoices cannot serve as the basis for the right to deduct tax payable and for a refund of the tax difference or for a refund of input tax.

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

14 Mr Dankowski, the applicant in the main proceedings, is the owner of an undertaking named Dan-Trak. Between 2004 and 2006, a Mr Płacek, the manager of an undertaking named Artem-Studio, supplied him with a number of taxable marketing services. However, Mr Płacek had neither complied with the requirement to register for the tax on goods and services, nor paid VAT, although he had issued invoices documenting the services provided and specifying the tax payable.

15 By decision of 23 March 2007 the Dyrektor Izby Skarbowej w Łodzi, while not questioning that the services concerned had been provided, refused Mr Dankowski the right to deduct the input VAT, as detailed on the invoices drawn up by Mr Płacek.

16 The stated grounds for that decision were that the person who had issued the invoices concerned was not registered as a taxable person for VAT and that, because of the failure to comply with the requirement of registration imposed by the relevant provisions of national law, the invoices issued by that trader did not give rise to a right to deduct the input VAT.

17 Mr Dankowski then brought before the Wojewódzki Sąd Administracyjny w Łodzi (the Łódź administrative court) an action for annulment of that decision. In support of his action, Mr Dankowski claimed, inter alia, that the registration of a trader as a taxable person liable to pay VAT is no more than a technicality which can have no effect on the right to deduct input tax.

18 By judgment of 4 December 2007 the Wojewódzki Sąd Administracyjny w Łodzi dismissed the action.

19 In an appeal on a point of law brought before the Naczelny Sąd Administracyjny, Mr Dankowski relied, inter alia, on the fact that the application of the provisions of Polish tax law was not compatible with European Union law, and he claimed that Article 17(6) of the Sixth Directive had been interpreted incorrectly.

20 In those circumstances, the Naczelny Sąd Administracyjny decided to stay the proceedings and to refer to the Court the following questions for a preliminary ruling:

'(1) Do the rules of the [VAT] system, in particular Article 17(6) of the Sixth Directive … preclude legislation of a Member State under which a taxable person does not acquire the right to deduct input tax arising from a VAT invoice issued by a trader who is not registered as a taxable person for the purposes of the tax on goods and services?

(2) Is it relevant to the answer to the first question that:

(a) there is no doubt that the transactions indicated on the VAT invoice are subject to VAT and that they have actually been carried out;

(b) the invoice contained all the details required under Community legislation;

(c) the restriction on the taxable person's right to deduct input tax arising from an invoice issued by an unregistered trader operated in national law prior to the date on which the Republic of Poland acceded to the Community?

(3) Does the answer to the first question depend on additional criteria being satisfied (for example, proof that the taxable person acted in good faith)?'

Consideration of the questions referred for a preliminary ruling

21 By the three questions referred, which can be examined together, the referring court asks, in essence, whether, in the circumstances of the main proceedings and taking into consideration Articles 18(1)(a) and 22(3)(b) of the Sixth Directive, a taxable person has the right of deduction in respect of VAT paid on services supplied by another taxable person who is not registered for VAT purposes and, if the answer is that he does, whether Article 17(6) of that directive precludes national legislation which excludes the right of deduction where services have been supplied by such a taxable person.

The first part of the questions referred for a preliminary ruling

22 It must be borne in mind, first, that, the right of deduction provided for in Article 17(2) of the Sixth Directive is an integral part of the VAT scheme and in principle may not be limited (see Case C-409/99 *Metropol and Stadler* [2002] ECR I-81, paragraph 42, and Case C-465/03 *Kretztechnik* [2005] ECR I-4357, paragraph 33).

23 The right to deduct is exercisable immediately in respect of all the taxes charged on input transactions (see Case C-437/06 *Securenta* [2008] ECR I-1597, paragraph 24; Case C-102/08 *SALIX Grundstücks-Vermietungsgesellschaft* [2009] ECR I-4629, paragraph 70, and Case C-29/08 *SKF* [2009] ECR I-10413, paragraph 55).

24 The deduction system thus established is intended to relieve the trader entirely of the burden of the VAT payable or paid in the course of all his economic activities. The common system of VAT consequently ensures neutrality of taxation of all economic activities, whatever their purpose or results, provided that they are themselves subject in principle to VAT (see Case C-137/02 *Faxworld* [2004] ECR I-5547, paragraph 37, and *SKF*, paragraph 56).

25 As regards the dispute in the main proceedings, it is common ground that the services concerned were provided by a trader as input transactions and that those services were used by the applicant in the main proceedings for the purposes of his taxed output transactions.

26 Consequently, the substantive conditions governing the origin of the right of deduction, provided for in Article 17(2) of the Sixth Directive, are satisfied.

27 As regards the rules governing the exercise of the right of deduction, Article 18(1)(a) of the Sixth Directive provides that the taxable person must hold an invoice drawn up in accordance with Article 22(3) of that directive.

28 Article 22(3)(b) lists the details which are required, for the purposes of VAT, on invoices issued in accordance with the provisions of Article 22(3)(a) of the Sixth Directive, the latter provision stating that every taxable person must ensure that an invoice is issued in respect of services supplied by him to another taxable person.

29 As regards the details listed in Article 22(3)(b) of the Sixth Directive, the referring court has found that the invoices submitted by the applicant in the main proceedings contain all the information required by that provision. It is apparent in particular from the documents submitted to the Court, and from the information provided by the Polish Government at the hearing, that those invoices contained the tax identification number of the person providing the services concerned, that number being automatically allocated to traders by the Polish tax authorities, irrespective of whether an application for registration has been submitted by them.

30 Even though that provision refers to the 'VAT identification number', it is clear that the tax identification number allocated in this particular case ensures that the taxable person concerned can be identified and therefore is such as to meet the requirements of the third indent of Article 22(3)(b) of the Sixth Directive.

31 However, as observed by the referring court, although that service provider issued invoices relating to the services supplied to the applicant in the main proceedings, he had not applied for registration with the competent authority for the purposes of VAT.

32 Article 22(1) of the Sixth Directive provides that every taxable person is to declare when his taxable activity is to commence.

33 However, notwithstanding the importance of such registration if the VAT system is to operate properly, a failure on the part of a taxable person to meet that requirement cannot impinge on the right of deduction conferred on another taxable person by Article 17(2) of the Sixth Directive.

34 Article 22(1) of the Sixth Directive provides only that there is an obligation on taxable persons to state when their activity commences, changes or ceases, but that provision in no way authorises Member States, in the event of such a declaration not being submitted, to defer the exercise of the right to deduct until the time at which taxable transactions actually begin to be carried out on a regular basis, or to deprive the taxable person of that right (see Joined Cases C-110/98 to C-147/98 *Gabalfrisa and Others* [2000] ECR I-1577, paragraph 51, and Case C-385/09 *Nidera Handelscompagnie* [2010] ECR I-10385, paragraph 48).

35 Therefore, where the competent tax authority has the information necessary to establish that the taxable person is, as the recipient of marketing services, liable to VAT, it cannot impose, in relation to the right of that taxable person to deduct input tax, additional conditions which may have the effect of rendering that right ineffective for practical purposes (see Joined Cases C-95/07 and C-96/07 *Ecotrade* [2008] ECR I-3457, paragraph 64, and Case C-392/09 *Uszodaépítő* [2010] ECR I-8791, paragraph 40).

36 Accordingly, any failure by the service provider to meet the requirement stated in Article 22(1) of the Sixth Directive cannot call in question the right of deduction to which the recipient of those services is entitled under Article 17(2) of that directive.

37 The same is true of Article 22(8) of the Sixth Directive, pursuant to which the Member States may impose other obligations which they deem necessary for the correct collection of the tax and for the prevention of evasion. Although that provision allows Member States to take certain measures, those measures must not however go further than is necessary to attain that objective and may not therefore be used in such a way that they would have the effect of systematically undermining the right to deduct VAT, which is a fundamental principle of the common system of VAT (see Joined Cases C-286/94, C-340/95, C-401/95 and C-47/96 *Molenheide and Others* [1997] ECR I-7281, paragraph 47, *Gabalfrisa and Others*, paragraph 52 and *Ecotrade*, paragraphs 65 and 66).

38 It follows from the foregoing that Articles 18(1)(a) and 22(3)(b) of the Sixth Directive must be interpreted as meaning that a taxable person has the right to deduct VAT paid in respect of services supplied by another taxable person who is not registered for VAT, where the relevant invoices contain all the information required by Article 22(3)(b), in particular the information needed to identify the person who drew up those invoices and to ascertain the nature of the services provided.

The second part of the questions referred for a preliminary ruling

39 Consequently, since, pursuant to the Sixth Directive, the applicant in the main proceedings has the right of deduction, the referring court seeks to ascertain whether Article 17(6) of the Sixth Directive must be interpreted as precluding national legislation which excludes the right to deduct VAT paid by a taxable person to another taxable person, who has provided services, where the latter is not registered for VAT.

40 In that regard, it must be borne in mind that that provision is a derogation which enables, in certain circumstances, Member States to retain their existing legislation in respect of exclusion from the right of deduction, as at the date of entry into force of the Sixth Directive for the Member State concerned, until such time as the Council has adopted the provisions envisaged by that article (see Case C-371/07 *Danfoss and AstraZeneca* [2008] ECR I-9549, paragraph 28, and Joined Cases C-538/08 and C-33/09 *X Holding and Oracle Nederland* [2010] ECR I-3129, paragraph 38).

41 As regards the scope of that provision, the Court has held that the power granted to the Member States in Article 17(6) of the Sixth Directive does not constitute an unfettered discretion to exclude all, or virtually all, goods and services from the right to deduct VAT, and thus to render meaningless the system established in Article 11(1) of that Directive. That power does not therefore apply to general exclusions and does not release Member States from the obligation sufficiently to define the goods and services in relation to which the right to deduct is excluded (see Case C-305/97 *Royscot and Others* [1999] ECR I-6671 paragraphs 22 and 24; Case C-434/03 *Charles and Charles-Tijmens* [2005] ECR I-7037, paragraphs 33 and 35, and Case C-395/09 *Oasis East* [2010] ECR I-8811, paragraph 23).

42 Furthermore, as the scheme here involves a derogation from the principle of the right to deduct VAT, it must be interpreted strictly (see Case C-414/07 *Magoora* [2008] ECR I-10921, paragraph 28, and *Oasis East*, paragraph 24).

43 So far as concerns the main proceedings and the possible applicability of the derogation provided for in Article 17(6) of the Sixth Directive to the present case, it must be noted that that directive entered into force in Poland on the date of the accession of that Member State to the European Union, namely 1 May 2004. Therefore, that is the material date for the purposes of the application of the abovementioned provision in respect of that Member State (*Oasis East*, paragraph 25).

44 For the purposes of assessing the national legislation at issue in the main proceedings in the light of Article 17(6) of the Sixth Directive and the abovementioned case-law, it is clear that that legislation constitutes a general measure which excludes the right to deduct input VAT in relation to any transaction carried out by a taxable person who has not complied with the requirement of registration for the purposes of VAT.

45 However, such legislation entails a restriction on the right to deduct VAT which goes beyond what is authorised by Article 17(6) of the Sixth Directive.

46 The Court has ruled that the Member States are not empowered to maintain exclusions from the right to deduct VAT which apply in a general manner to any expenditure related to the acquisition of goods or services (Case C-74/08 *PARAT Automotive Cabrio* [2009] ECR I-3459, paragraphs 28 and 29, and *Oasis East*, paragraph 30).

47 It follows from all of the foregoing that Article 17(6) of the Sixth Directive must be interpreted as precluding national legislation which excludes the right to deduct VAT paid by a taxable person to another taxable person, who has provided services, where the latter has not registered for the purposes of that tax.

Costs

48 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:

1. **Articles 18(1)(a) and 22(3)(b) of the 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, as amended by Council Directive 2006/18/EC of 14 February 2006, must be interpreted as meaning that a taxable person has the right to deduct value added tax paid in respect of services supplied by another taxable person who is not registered for that tax, where the relevant invoices contain all the information required by Article 22(3)(b), in particular the information needed to identify the person who drew up those invoices and to ascertain the nature of the services provided.**

2. **Article 17(6) of the Sixth Directive 77/388 as amended by Directive 2006/18 must be interpreted as precluding national legislation which excludes the right to deduct value added tax paid by a taxable person to another taxable person, who has provided services, where the latter has not registered for the purposes of that tax.**

[Signatures]