Reports of Cases

JUDGMENT OF THE COURT (Seventh Chamber)

21 March 2024*

(Reference for a preliminary ruling – Taxation – Value added tax (VAT) – Directive 2006/112/EC – Provision of recreational services and services to improve physical fitness – Sale of passes giving access to services whose existence is evidenced by a cash register and by cash register receipts – Taxable amount – Error in the tax rate – Principle of fiscal neutrality – Adjustment of the tax debt as a result of a change in the taxable amount – National practice that does not permit, in the absence of an invoice, a correction of the VAT and a refund of the overpaid VAT – No risk of loss of tax revenue – Plea of unjust enrichment)

In Case C-606/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland), made by decision of 23 June 2022, received at the Court on 20 September 2022, in the proceedings

Dyrektor Izby Administracji Skarbowej w Bydgoszczy

v

B. sp. z o.o., formerly B. sp.j.,

interested party:

Rzecznik Małych i Średnich Przedsiębiorców,

THE COURT (Seventh Chamber),

composed of N. Wahl (Rapporteur), acting as President of the Seventh Chamber, J. Passer and M.L. Arastey Sahún, Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

* Language of the case: Polish.

after considering the observations submitted on behalf of:

– the Dyrektor Izby Administracji Skarbowej w Bydgoszczy, by B. Kołodziej and T. Wojciechowski,

– B. sp. z o.o., by R. Baraniewicz, T. Pabiański and J. Tokarski, doradcy podatkowi, and by A. Zubik, radca prawny,

– the Rzecznik Małych i Średnich Przedsiębiorców, by P. Chrupek, radca prawny,

– the Polish Government, by B. Majczyna, acting as Agent,

– the European Commission, by J. Jokubauskaitė and M. Owsiany-Hornung, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 16 November 2023,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 1(2) and Article 73 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1), as amended by Council Directive 2010/45/EU of 13 July 2010 (OJ 2010 L 189, p. 1) ('Directive 2006/112'), in the light of the principles of fiscal neutrality, proportionality and equal treatment.

2 The request has been made in proceedings between the Dyrektor Izby Administracji Skarbowej w Bydgoszczy (Director of the Tax Administration Chamber, Bydgoszcz, Poland) and B. sp.j., which became, after that request was made, B. sp. z o.o., concerning the refusal of the tax authorities to find, after B. filed amended VAT returns, that B. overpaid value added tax (VAT), given that no invoices had been issued.

Legal context

European Union law

3 Article 1(2) of Directive 2006/112 provides:

'The principle of the common system of VAT entails the application to goods and services of a general tax on consumption exactly proportional to the price of the goods and services, however many transactions take place in the production and distribution process before the stage at which the tax is charged.

On each transaction, VAT, calculated on the price of the goods or services at the rate applicable to such goods or services, shall be chargeable after deduction of the amount of VAT borne directly by the various cost components.

The common system of VAT shall be applied up to and including the retail trade stage.'

4 Under Article 73 of that directive:

‘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.’

5 Article 78 of that directive provides:

‘The taxable amount shall include the following factors:

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

…’

6 Article 220(1) of that directive provides:

‘Every taxable person shall ensure that, in respect of the following, an invoice is issued, either by himself or by his customer or, in his name and on his behalf, by a third party:

(1) supplies of goods or services which he has made to another taxable person or to a non-taxable legal person;

…’

7 Article 226 of Directive 2006/112 is worded as follows:

‘Without prejudice to the particular provisions laid down in this Directive, only the following details are required for VAT purposes on invoices issued pursuant to Articles 220 and 221:

…

(6) the quantity and nature of the goods supplied or the extent and nature of the services rendered;

(7) the date on which the supply of goods or services was made or completed …, in so far as that date can be determined and differs from the date of issue of the invoice;

…

(8) the taxable amount per rate or exemption, the unit price exclusive of VAT and any discounts or rebates if they are not included in the unit price;

(9) the VAT rate applied;

(10) the VAT amount payable, except where a special arrangement is applied under which, in accordance with this Directive, such a detail is excluded;

…’

8 Article 226b of that directive, introduced by Directive 2010/45 and applicable on 1 January 2013, provides:

'As regards simplified invoices issued pursuant to Article 220a and Article 221(1) and (2), Member States shall require at least the following details:

(a) the date of issue;

(b) identification of the taxable person supplying the goods or services;

(c) identification of the type of goods or services supplied;

(d) the VAT amount payable or the information needed to calculate it;

(e) where the invoice issued is a document or message treated as an invoice pursuant to Article 219, specific and unambiguous reference to that initial invoice and the specific details which are being amended.

They may not require details on invoices other than those referred to in Articles 226, 227 and 230.'

Polish law

9 Article 29 of the ustawa o podatku od towarów i usług (Law on the tax on goods and services) of 11 March 2004 (Dz. U. No 54, item 535), in the version in force until 31 December 2013 (Dz. U. No 177, item 1054), provided:

'(4a) If the taxable amount is reduced in relation to that set out in the invoice issued, the taxable person may reduce the taxable amount as set out in the invoice on condition that, before the expiry of the time limit for submitting the tax return for the tax period during which the purchaser of the goods or services received the correcting invoice, that taxable person is in possession of an acknowledgement of receipt of that invoice from the purchaser. Obtaining an acknowledgement of receipt of the correcting invoice from the purchaser of the product or service after the time limit for submitting a tax return for the tax period concerned has expired entitles that taxable person to take account of the correcting invoice in respect of the tax period during which he or she obtained that acknowledgement.

…

(4c) Paragraph 4a shall apply *mutatis mutandis* in the case where an error is identified in the amount of tax shown on the invoice and where an invoice correcting an invoice showing an amount of tax greater than the amount due is issued.'

10 That law, in the version in force from 1 January 2014 (Dz. U. of 2016, item 710), includes Article 29a, paragraphs 13 and 14 of which are worded as follows:

'(13) In the cases [provided for], the reduction of the taxable amount, in relation to the taxable amount set out in the invoice issued with the tax shown, shall be conditional upon the taxable person being in possession of an acknowledgement of receipt of the correcting invoice from the purchaser of the goods or services to whom the invoice was issued, obtained before the expiry of

the time limit for submitting a tax return for the tax period during which the purchaser of the goods or services received the correcting invoice. Obtaining an acknowledgement of receipt of the correcting invoice from the purchaser of the goods or services after the time limit for submitting a tax return for the tax period concerned has expired entitles that taxable person to take account of the correcting invoice in respect of the tax period during which he or she obtained that acknowledgement.

(14) Paragraph 13 shall apply *mutatis mutandis* in the case where an error is identified in the amount of tax shown on the invoice and where an invoice correcting the invoice showing an amount of tax greater than the amount due is issued.'

11 Paragraph 3 of the rozporządzenie Ministra Finansów w sprawie kas rejestrujących (Regulation of the Minister for Finance on cash registers) of 14 March 2013 (Dz. U., item 363) provides:

'…

5. If there is an obvious error in the records, the taxable person shall correct it without delay by including in a separate record:

(1) the incorrectly recorded sale (gross value of the sale and tax payable);

(2) a brief description of the reason for the error and the circumstances under which it was made, attaching the original cash register receipt documenting the sale with respect to which the obvious error occurred.

6. In the case referred to in subparagraph 5, the taxable person shall record the sales in the correct amount using the cash register.'

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

12 B. is active in the provision of recreational services and services to improve physical fitness, namely the sale of passes giving access to the premises of a sports club as well as unrestricted use of the facilities of that club. In 2016, it decided, in accordance with the new Polish tax doctrine in that area, to apply a reduced rate of VAT (8% instead of 23%) to those supplies of services.

13 On 27 January 2016, B. therefore submitted amended VAT returns for the months of January to March, June to October and December 2012, January, February, November and December 2013, and January, February, April and May 2014.

14 By a decision of 22 June 2017, the Naczelnik Drugiego Urzędu Skarbowego w T. (Head of the Second Tax Office, T., Poland) refused to find that B. had overpaid VAT in respect of the abovementioned tax periods, stating, in particular, that, as long as the document confirming that a taxable activity had taken place was not corrected in accordance with the Law on the tax on goods and services, the taxable person was not entitled to correct its records or returns.

15 By a decision of 24 November 2017, the Director of the Tax Administration Chamber, Bydgoszcz, upheld that decision, stating that there were no legal provisions governing the possibility of adjusting the taxable amount and the tax payable as indicated in the VAT return, in respect of the tax periods covered by the application for a declaration that VAT had been overpaid, in the

case of sales of tickets or access passes allowing use of the facilities concerned that were not evidenced by invoices. B. could not issue corrected invoices because no invoices had been issued at the time of those sales. Therefore, B. was required to pay to the Polish Treasury, after account was taken of the deduction scheme, the full amount received from final consumers, by way of tax due.

16 The Wojewódzki Sąd Administracyjny w Bydgoszczy (Regional Administrative Court, Bydgoszcz, Poland), before which B. brought an action against that decision, set aside that decision by a judgment of 7 March 2018, holding, in particular, that Paragraph 3(3) to (6) of the Regulation of the Minister for Finance on cash registers did not cover all events capable of constituting a ground for adjustment, with the result that such an adjustment was possible also in other situations. It therefore found that the taxable person was entitled to adjust the amount of tax payable on sales whose existence is evidenced by cash register receipts. According to that court, the absence of the original cash register receipt issued to the purchaser does not constitute an obstacle in that regard, since the cash register allows the data recorded on it to be read multiple times. Thus, consulting the memory of that cash register is a reliable means of obtaining evidence of the transaction that is to be corrected due to an error made by the taxable person.

17 The Director of the Tax Administration Chamber, Bydgoszcz, brought an appeal on a point of law against the judgment of the Wojewódzki Sąd Administracyjny w Bydgoszczy (Regional Administrative Court, Bydgoszcz) before the Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland), which is the referring court.

18 In those circumstances the Naczelny Sąd Administracyjny (Supreme Administrative Court) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Must [Article 1(2) and Article] 73 of [Directive 2006/112] and the principles of neutrality, proportionality and equal treatment be interpreted as precluding a practice on the part of the national tax authorities, in so far as that practice does not allow – on the grounds of lack of a domestic legal basis and unjust enrichment – an adjustment of the VAT taxable amount and output tax if sales of goods and services to consumers at an inflated rate of VAT were registered using a cash register and evidenced by cash register receipts rather than by VAT invoices, with the price (gross sales value) remaining unchanged as a result of that adjustment?’

Consideration of the question referred

19 As a preliminary point, it should be noted that, in the context of the procedure established by Article 267 TFEU providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to determine the case before it. With this in mind, the Court of Justice may have to reformulate the question referred to it (see, to that effect, judgment of 27 March 2014, *Le Rayon d’Or*, C-151/13, EU:C:2014:185, paragraph 25 and the case-law cited).

20 To that end, the Court may extract from all the information provided by the national court, in particular from the grounds of the decision to make the reference, the legislation and the principles of EU law that require interpretation in view of the subject matter of the dispute in the main proceedings (judgment of 27 March 2014, *Le Rayon d’Or*, C-151/13, EU:C:2014:185, paragraph 26 and the case-law cited).

21 In the present case, it is apparent from the order for reference that the referring court correctly referred to Article 78(a) of Directive 2006/112 as forming part of the legal framework applicable to the dispute in the main proceedings, since that provision specifies the elements to be included in the taxable amount referred to in Article 73 of that directive, to which the referring court points in its question.

22 That question must therefore be understood as seeking, in essence, to ascertain whether Article 1(2) and Article 73 of that directive, read in conjunction with Article 78(a) thereof, must be interpreted, in the light of the principles of fiscal neutrality, proportionality and equal treatment, as precluding a practice on the part of the tax authorities of a Member State pursuant to which an adjustment of VAT due, made by way of a tax return, is prohibited where goods and services have been supplied subject to a VAT rate that is too high, on the ground that cash register receipts rather than invoices were issued in respect of those transactions.

23 In that regard, it must be pointed out that the common system of VAT ensures neutrality of taxation of all economic activities, whatever their purpose or results, provided that they are themselves, in principle, subject to VAT (judgment of 21 October 2021, *CHEP Equipment Pooling*, C-396/20, EU:C:2021:867, paragraph 36 and the case-law cited).

24 It follows that the tax authorities of a Member State would disproportionately breach the principle of VAT neutrality by leaving the taxable person liable to pay the VAT in respect of which he or she is entitled to obtain a refund, whereas the common system of VAT is intended to relieve the operator entirely of the burden of the VAT due or paid in the course of all his or her economic activities (judgment of 21 October 2021, *CHEP Equipment Pooling*, C-396/20, EU:C:2021:867, paragraph 55).

25 It is therefore necessary, first of all, to determine whether, where a taxable person has erred in applying to his or her transactions that are subject to VAT – this being, however, in line with the guidance initially provided by the tax authorities of the Member State concerned – the standard rate of VAT, in the present case 23%, whereas the correct rate was the reduced rate of 8%, that person is entitled to claim a refund.

26 Given that, in accordance with the principle of VAT neutrality recalled in paragraphs 23 and 24 above, the VAT system is aimed at taxing only the end consumer (judgment of 7 November 2013, *Tulică and Plavoşin*, C-249/12 and C-250/12, EU:C:2013:722, paragraph 34 and the case-law cited), the price agreed between the end consumer and the supplier of goods or services must be deemed to include the VAT charged on those transactions, whether or not those transactions have been invoiced (see, to that effect, judgment of 1 July 2021, *Tribunal Económico Administrativo Regional de Galicia*, C-521/19, EU:C:2021:527, paragraph 34).

27 That interpretation follows from Article 78(a) of Directive 2006/112, according to which VAT itself is not included in the taxable amount, the corollary of which is that VAT is always automatically included in the agreed price, even if the taxable person errs in determining the applicable rate.

28 Nevertheless, it is apparent from the case-law that that consideration does not necessarily deprive the taxable person of a right to a refund, from the tax authorities of the Member State concerned, of all or part of the excess VAT which that person wrongly collected from end consumers and paid to those authorities. That is the case in particular where that taxable person suffered, as a result of the application of an incorrect VAT rate, a fall in the volume of his or her sales (see, to that effect,

judgment of 10 April 2008, *Marks & Spencer*, C-309/06, EU:C:2008:211, paragraph 42 and the case-law cited). In other words, it is not necessarily the corollary of the VAT being passed on in full to the final consumer that there is no financial loss or disadvantage, since, even in that situation, the trader may have suffered a loss as a result of a fall in the volume of his or her sales (judgment of 10 April 2008, *Marks & Spencer*, C-309/06, EU:C:2008:211, paragraph 56).

29 Next, since the right of the taxable person to a refund of all or part of the excess VAT at issue has been established in principle, it is appropriate to examine whether that right may be made subject, by the tax authorities of the Member State concerned, to the prior requirement that invoices setting out the incorrect VAT rate be corrected, with the result that there is a systematic refusal to refund where the taxable person's economic transactions, given their nature and amount, did not lead to the issue of invoices, which cannot therefore be corrected, but to the issue of cash register receipts.

30 In that regard, it is important to note that Directive 2006/112 does not address the matter of corrections of taxable persons' tax returns where an incorrect rate of VAT was applied. It is therefore for the Member States to provide, in their national legal systems, in compliance with the principles of effectiveness and equivalence, for the possibility of adjusting tax that has been improperly applied.

31 By making that correction impossible where the taxable person's economic activity does not lead to invoicing but merely to the issue of cash register receipts, without taking into consideration the possibility of making a comprehensive and accurate correction of the VAT returns relating to the transactions at issue by means, in particular, of data in that cash register's memory, a practice such as that of the tax authorities of the Member State concerned fails to observe the principle of effectiveness.

32 Regarding the principle of equal treatment, it is apparent from the Court's case-law that, although infringement of the principle of fiscal neutrality – which is the reflection, in matters relating to VAT, of the principle of equal treatment – may be envisaged only as between competing traders, infringement of the general principle of equal treatment may be established, in matters relating to tax, by other kinds of discrimination which affect traders who are not necessarily in competition with each other but who are nevertheless in a similar situation in other respects (judgment of 14 June 2017, *Compass Contract Services*, C-38/16, EU:C:2017:454, paragraph 24 and the case-law cited).

33 It is sufficient to note that, in the present case, since the taxable person applied, in accordance with the interpretation initially advocated by the tax authorities of the Member State concerned, the VAT rate of 23%, it was necessarily placed at a disadvantage as compared to its direct competitors that applied the reduced VAT rate of 8%, be it because that rate was passed on, in part or in full, in its prices, thus affecting its competitiveness as compared to the competitors in question and thus, possibly, the volume of its sales, or because of the decrease in its profit margin in order to maintain competitive prices. A practice on the part of the tax authorities of a Member State such as that described by the referring court therefore also fails to observe the principle of fiscal neutrality.

34 Lastly, it is apparent from the Court's case-law that under EU law it is possible to disallow, in a national legal system, repayment of charges which have been levied but were not due, where to allow such repayment leads to unjust enrichment of the persons concerned (see, to that effect, judgment of 18 June 2009, *Stadeco*, C-566/07, EU:C:2009:380, paragraph 48).

35 Thus, the protection of the rights so guaranteed by the legal order of the European Union does not require repayment of taxes, charges and duties levied in breach of European Union law where it is established that the person required to pay such charges has actually passed them on to other persons (judgment of 16 May 2013, *Alakor Gabonatermelő és Forgalmazó*, C-191/12, EU:C:2013:315, paragraph 25 and the case-law cited).

36 In the absence of EU rules governing claims for the repayment of taxes, it is for the domestic legal system of each Member State to lay down the conditions under which those claims may be made; subject, nevertheless, to observance of the principles of equivalence and effectiveness (judgment of 16 May 2013, *Alakor Gabonatermelő és Forgalmazó*, C-191/12, EU:C:2013:315, paragraph 26 and the case-law cited).

37 Therefore, it is on condition that the economic burden that the tax levied though not due imposed on the taxable person has been completely neutralised that a Member State may refuse to refund excess VAT that has been unlawfully applied, on the ground that such repayment would give rise to unjust enrichment for the benefit of the taxable person (see, to that effect, judgment of 16 May 2013, *Alakor Gabonatermelő és Forgalmazó*, C-191/12, EU:C:2013:315, paragraph 28), which it will be for the referring court to ascertain.

38 The Court has stated, in that regard, that the existence and the measure of unjust enrichment which repayment of a charge levied though not due from the point of view of EU law would entail for a taxable person constitute questions of fact, which fall within the jurisdiction of the national court, which is free to assess the evidence submitted to it following an economic analysis which takes account of all the relevant circumstances (see, to that effect, judgment of 16 May 2013, *Alakor Gabonatermelő és Forgalmazó*, C-191/12, EU:C:2013:315, paragraph 30 and the case-law cited).

39 In the light of the foregoing considerations, the answer to the question referred is that Article 1(2) and Article 73 of Directive 2006/112, read in conjunction with Article 78(a) thereof, must be interpreted, in the light of the principles of fiscal neutrality, effectiveness and equal treatment, as precluding a practice on the part of the tax authorities of a Member State pursuant to which an adjustment of VAT due, made by way of a tax return, is prohibited where goods and services have been supplied subject to a VAT rate that is too high, on the ground that cash register receipts rather than invoices were issued in respect of those transactions. Even in those circumstances, a taxable person that erred in applying a VAT rate that is too high is entitled to submit an application for a refund to the tax authorities of the Member State concerned, since those authorities may rely on unjust enrichment on the part of that taxable person only if they have established, following an economic analysis which takes account of all the relevant circumstances, that the economic burden that the tax levied though not due imposed on that taxable person has been completely neutralised.

Costs

40 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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:

Article 1(2) and Article 73 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, as amended by Council Directive 2010/45/EU of 13 July 2010, read in conjunction with Article 78(a) thereof,

must be interpreted, in the light of the principles of fiscal neutrality, effectiveness and equal treatment, as precluding a practice on the part of the tax authorities of a Member State pursuant to which an adjustment of VAT due, made by way of a tax return, is prohibited where goods and services have been supplied subject to a VAT rate that is too high, on the ground that cash register receipts rather than invoices were issued in respect of those transactions. Even in those circumstances, a taxable person that erred in applying a VAT rate that is too high is entitled to submit an application for a refund to the tax authorities of the Member State concerned, since those authorities may rely on unjust enrichment on the part of that taxable person only if they have established, following an economic analysis which takes account of all the relevant circumstances, that the economic burden that the tax levied though not due imposed on that taxable person has been completely neutralised.

[Signatures]