Reports of Cases

JUDGMENT OF THE COURT (Ninth Chamber)

25 October 2018*

(Reference for a preliminary ruling — Value added tax (VAT) — Directive 2006/112/EC — Article 143(1)(d) — Exemption from import VAT — Importation followed by an intra-Community supply — Risk of tax evasion — Good faith of the taxable importer and supplier — Assessment — Duty of care of the taxable importer and supplier)

In Case C-528/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Vrhovno sodišče (Supreme Court, Slovenia), made by decision of 28 August 2017, received at the Court on 4 September 2017, in the proceedings

Milan Božičevič Ježovnik

v

Republika Slovenija,

THE COURT (Ninth Chamber),

composed of K. Jürimäe (Rapporteur), President of the Chamber, C. Lycourgos and C. Vajda, Judges,

Advocate General: P. Mengozzi,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Mr Božičevič Ježovnik, by J. Ahlin, odvetnik,

– the Slovenian Government, by A. Grum, acting as Agent,

– the Greek Government, by M. Tassopoulou, A. Dimitrakopoulou and I. Kotsoni, acting as Agents,

– the Spanish Government, by S. Jiménez García, acting as Agent,

– the European Commission, by J. Jokubauskaitė and M. Žebre, acting as Agents,

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

* Language of the case: Slovenian.

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 143 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 2009/69/EC of 25 June 2009 (OJ 2009 L 175, p. 12) ('the VAT Directive'), read in conjunction with Article 138 of the VAT Directive.

2 The request has been made in proceedings between Mr Milan Božičevič Ježovnik and the Republika Slovenija (Republic of Slovenia) concerning a post-clearance tax assessment relating to the value added tax (VAT) status of imports of bananas from third countries.

Legal context

EU law

The VAT Directive

3 Under Article 138(1) of the VAT Directive:

'Member States shall exempt the supply of goods dispatched or transported to a destination outside their respective territory but within the [European Union], by or on behalf of the vendor or the person acquiring the goods, for another taxable person, or for a non-taxable legal person acting as such in a Member State other than that in which dispatch or transport of the goods began.'

4 Article 143 of the VAT Directive provides as follows:

'1. Member States shall exempt the following transactions:

…

(d) the importation of goods dispatched or transported from a third territory or a third country into a Member State other than that in which the dispatch or transport of the goods ends, where the supply of such goods by the importer designated or recognised under Article 201 as liable for payment of VAT is exempt under Article 138;

…

2. The exemption provided for in paragraph 1(d) shall apply in cases when the importation of goods is followed by the supply of goods exempted under Article 138(1) and (2)(c) only if at the time of importation the importer has provided to the competent authorities of the Member State of importation at least the following information:

(a) his VAT identification number issued in the Member State of importation or the VAT identification number of his tax representative, liable for payment of the VAT, issued in the Member State of importation;

(b) the VAT identification number of the customer, to whom the goods are supplied in accordance with Article 138(1), issued in another Member State …;

(c) the evidence that the imported goods are intended to be transported or dispatched from the Member State of importation to another Member State.

However, Member States may provide that the evidence referred to in point (c) be indicated to the competent authorities only upon request.'

5 Article 143(2) of the VAT Directive was added to that directive by Directive 2009/69, and the time limit for its transposition expired on 1 January 2011. In view of the dates of the events at issue, the two successive versions of Article 143 apply to the main proceedings.

6 Article 201 of the VAT Directive contains the following provision:

'On importation, VAT shall be payable by any person or persons designated or recognised as liable by the Member State of importation.'

The Customs Code

7 Article 78 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1) ('the Customs Code') provides:

'1. The customs authorities may, on their own initiative or at the request of the declarant, amend the declaration after release of the goods.

2. The customs authorities may, after releasing the goods and in order to satisfy themselves as to the accuracy of the particulars contained in the declaration, inspect the commercial documents and data relating to the import or export operations in respect of the goods concerned or to subsequent commercial operations involving those goods. Such inspections may be carried out at the premises of the declarant, of any other person directly or indirectly involved in the said operations in a business capacity or of any other person in possession of the said document and data for business purposes. Those authorities may also examine the goods where it is still possible for them to be produced.

3. Where revision of the declaration or post-clearance examination indicates that the provisions governing the customs procedure concerned have been applied on the basis of incorrect or incomplete information, the customs authorities shall, in accordance with any provisions laid down, take the measures necessary to regularise the situation, taking account of the new information available to them.'

8 Articles 201 and 204 of the Customs Code set out various situations in which a customs debt is incurred.

Slovenian law

9 Under Article 46(1) of the Zakon o davku na dodano vrednost (Law on value added tax) (Uradni list RS, No 13/11, 'the Law on VAT'), 'supplies of goods dispatched or transported by the vendor or the person who receives the goods or another person acting on his behalf from the territory of Slovenia to another Member State, where the supplies are made in favour of another taxable person or a non-taxable legal person acting as such in that other Member State, are exempt from the payment of VAT.'

10 Article 50(1)(4) of the Law on VAT provides for an exemption from VAT for 'the importation of goods dispatched or transported from another territory or a third State and imported into a Member State which is not the Member State of destination, where the delivery of those goods by the importer, as defined by Article 76(1)(6) of that law, is exempt by virtue of Article 46 of that law.

11 In accordance with Article 50(2) of the Law on VAT:

'The importation of goods under subparagraph 4 above is exempt from VAT where the importation of the goods is followed by the exempt delivery of the goods by virtue of Article 46(1) and (4) of that law, but only if the importer, at the time of the importation, provides the competent customs authority with at least the following information:

(a) the importer's VAT identification number issued by the tax authority in Slovenia, or the VAT identification number issued by the tax authority in Slovenia of the importer's tax representative who is required to pay the VAT;

(b) the VAT identification number of the recipient of the goods to whom the goods are delivered pursuant to Article 46(1) of that law, issued in another Member State where the consignment or transportation terminates, if the goods are the subject of a transaction under Article 46(4) of that law;

(c) proof that the imported goods are to be dispatched or transported from Slovenian territory to another Member State.'

12 Article 50(2) of the Law on VAT applies with effect from 1 January 2011. Before that date, Article 80 of the regulation implementing that law, then in force, imposed requirements which are identical in substance.

13 Under Article 76(1)(6) of the Law on VAT, VAT is payable, on importation of the goods, 'by the customs debtor, as determined in accordance with the customs rules, or by the recipient of the goods'.

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

14 During the period of the material facts of the case, Mr Božičevič Ježovnik carried on a business, as a sole trader, importing and distributing bananas.

15 During the period relevant to the main proceedings, Mr Božičevič Ježovnik imported bananas from a third country into Slovenia. On the basis of 30 customs declarations lodged at the competent customs office in Koper (Slovenia) between 26 August 2009 and 26 January 2011, the imported bananas were placed under the procedure known as 'customs procedure 42' which allows their release for free circulation, with no import VAT payable. In order to demonstrate that those bananas were intended to be transported in another Member State, Mr Božičevič Ježovnik provided end-use and final destination declarations bearing the stamp of the declared recipients of the goods.

16 Mr Božičevič Ježovnik sold the imported bananas to customers established in Romania following negotiations conducted and orders made over the telephone. The invoices, including invoices for payment on account, and other documents were exchanged by email, fax and normal post. Before, the conclusion of the contracts, Mr Božičevič Ježovnik checked the Economic Operators Registration and Identification number ('EORI number') and the validity of the VAT identification numbers of the customers. He asked them to make a declaration to the effect that they would be responsible for the transport of the bananas in another Member State.

17 After receiving payment from the customers, Mr Božičevič Ježovnik brought the customs-cleared bananas to the port of Koper, thus transferring the ownership rights over the bananas to those customers. The customers then took charge of the transportation of the bananas to Romania and the cross-referencing of the CMR consignment notes which were validated after the goods were unloaded at their final destination.

18 During a post-clearance examination of the customs declarations of Mr Božičevič Ježovnik, the customs office discovered that a number of Romanian customers had been registered for VAT shortly before the first delivery and removed from the VAT system on the same day. According to that office, the CMR consignment notes presented by Mr Božičevič Ježovnik on request were barely legible and incomplete, and contained insufficient information about the date and place for unloading the goods. In addition, that office noted that the sales value of the bananas and the price for which they were purchased by Mr Božičevič Ježovnik were identical or deviated only marginally, that the weight of the bananas indicated in the sales invoices differed from the figures provided in the customs declarations and that the invoices registered in the accounts differed from those submitted, for the same goods, to the customs office and the tax authorities.

19 The customs office gathered information from the Romanian tax authorities. According to those authorities, some of the Romanian customers were 'missing traders' who did not conduct any business at the registered address, who did not answer their calls and whose directors were Turkish, Iraqi, Hungarian or Egyptian nationals. In addition, according to those authorities, some transporters confirmed that the bananas were transported to and unloaded at a wholesale centre in Romania. They stated that they had received the transport orders over the telephone and that payment had been made in cash. Other carriers questioned the authenticity of the signatures on the transport documents and the existence of any link with the customers.

20 In the light of that information, the customs office considered that Mr Božičevič Ježovnik had not demonstrated that the bananas at issue had left the territory of Slovenia and been delivered to the declared customers. In addition, that office considered that Mr Božičevič Ježovnik did not act with due care, failed to carry out the basic checks of the customers and disregarded the indications of VAT fraud.

21 Thus, by decision of 24 May 2013, the customs office of Ljubljana (Slovenia) ordered Mr Božičevič Ježovnik to pay VAT in the sum of EUR 242 949,04.

22 By decision of 30 September 2014, the Ministrstvo za finance (Ministry of Finances, Slovenia) rejected the complaint brought by Mr Božičevič Ježovnik against the decision of the customs office.

23 The Upravno sodišče Republike Slovenije (Administrative Court of the Republic of Slovenia) dismissed the action brought by Mr Božičevič Ježovnik challenging the decision of the Ministry of Finances. In particular, that court stated that, in the case of a failure to fulfil obligations relating to 'customs procedure 42', any good faith on the part of the taxable person does not affect the post-clearance payment of VAT.

24 Mr Božičevič Ježovnik submitted an application for review to the Vrhovno sodišče (Supreme Court, Slovenia).

25 That court is unsure as to the conditions under which an importer may be required to pay VAT in circumstances such as those in the main proceedings.

26 In that respect, the referring court explains that, pursuant to Article 201 of the VAT Directive, Slovenian law links the liability to pay import VAT to the provisions of the Customs Code on liability to pay import duties. In that context, it considers that it is necessary to determine whether the importer is liable for the customs debt under Article 201 or Article 204 of the Customs Code.

27 The referring court observes that in the judgment of 27 September 2007, *Teleos and Others* (C-409/04, EU:C:2007:548, paragraphs 56 and 57), the Court of Justice made a distinction between a taxable person's liability to pay VAT and an importer's liability to pay customs debts. The national court asks whether, in a case such as the one in the main proceedings, the importer is liable to pay VAT in the same way that he is liable for the customs debts, even if the customer was responsible for transporting the goods and the importer acted with the necessary diligence and in good faith.

28 If an importer's liability to pay VAT is different from the liability to pay the customs debts, the referring court wishes to know whether that liability is equivalent to the liability of a taxable person making an intra-Community delivery for the purposes of Article 138(1) of the VAT Directive and how it should assess, in that context, the good faith of the importer in a case of tax evasion committed by the customer.

29 In that regard, it states that, in the present case, the exemption was authorised by the customs office in the light of the information provided by the importer at the time of the importation in his declarations and following a prior examination. It states that it may follow from the judgment of 27 September 2007, *Teleos and Others* (C-409/04, EU:C:2007:548), that such an authorisation means that the importer should not be required to pay the VAT in the event that a post-clearance examination reveals irregularities. That being so, such an interpretation would, in its opinion, reduce the significance of the post-clearance examination laid down in Article 78 of the Customs Code.

30 In addition, the referring court asks whether the fact that the matter involves the first entry of goods into the customs territory of the European Union requires particular diligence on the part of the importer.

31 In those circumstances, the referring court decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is the importer (declarant), who, at the time of the import, requests exemption from payment of VAT (import in accordance with procedure 42), inasmuch as the goods are intended to be supplied in another Member State, liable for payment of the VAT (when it is subsequently found that the conditions necessary for exemption have not been satisfied) in the same way that he is liable for payment of the customs debt?

(2) If the answer is in the negative, is the liability of the importer (declarant) equal to that of a taxable person making an intra-Community supply of exempt goods pursuant to Article 138(1) of the VAT Directive?

(3) In the latter case, must the subjective element showing that the importer (declarant) intended to abuse the VAT scheme be assessed differently from a case of the supply of goods within the [European Union] referred to in Article 138(1) of the VAT Directive? Must that assessment be less strict, in the light of the fact that, in procedure 42, exemption from payment of VAT must be authorised in advance by the customs authority? Or must it be more strict, inasmuch as the transactions concerned are connected with the first entry into the European Union internal market of goods originating from third countries?'

Consideration of the questions referred

32 By its three questions, which should be examined together, the referring court asks, in essence, whether Article 143(1)(d) of the VAT Directive must be interpreted to the effect that it requires that, in circumstances where the taxable importer and supplier benefitted from an exemption from import VAT on the basis of an authorisation issued after a prior examination by the competent customs

authorities in the light of the evidence provided by that taxable person, the latter is nevertheless required to pay the VAT after the event where it is revealed, during a subsequent examination, that the substantive conditions for the exemption had not been met.

33 It follows from Article 143(1)(d) of the VAT Directive that the Member States are to exempt the importation of goods dispatched or transported from a third territory or a third country into a Member State other than that in which the dispatch or transport of the goods ends, where the supply of such goods by the importer designated or recognised under Article 201 of the directive as liable for payment of VAT is exempt under Article 138.

34 Exemption from VAT on importation is thus subject to the importer subsequently making an intra-Community supply which is itself exempt under Article 138 of the VAT Directive, and it therefore depends on compliance with the substantive conditions laid down in that article (judgment of 20 June 2018, *Enteco Baltic*, C-108/17, EU:C:2018:473, paragraph 47).

35 In that regard, it should be pointed out, in the first place, that, in the context of the exemption for intra-Community supplies pursuant to Article 138 of the VAT Directive, first, the Court has held that it is not contrary to EU law to require an operator to act in good faith and to take every step which could reasonably be asked of him to satisfy himself that the transaction which he is carrying out does not result in his participation in tax evasion (see, to that effect, judgments of 27 September 2007, *Teleos and Others*, C-409/04, EU:C:2007:548, paragraph 65, and of 6 September 2012, *Mecsek-Gabona*, C-273/11, EU:C:2012:547, paragraph 48 and the case-law cited). It follows that, if the taxable person concerned knew or ought to have known that the transaction which he carried out was involved in a tax evasion scheme of the purchaser and he did not take all reasonable steps in his power to prevent the evasion, he has to be refused the exemption (see, to that effect, judgment of 6 September 2012, *Mecsek-Gabona*, C-273/11, EU:C:2012:547, paragraph 54 and the case-law cited).

36 Secondly, it is clear, in essence, from the case-law of the Court that a supplier's liability to pay VAT after the event is assessed differently from an importer's liability to pay customs duties. Thus, an importer is required to pay customs duties payable on the importation of goods in respect of which the exporter has committed a customs offence, including where the importer is acting in good faith and has played no part in that offence (see, to that effect, judgment of 17 July 1997, *Pascoal & Filhos*, C-97/95, EU:C:1997:370, paragraph 61). By contrast, that case-law is not transposable to the assessment of whether the supplier, in an intra-Community transaction tainted by fraud, may be required to pay the VAT after the event (see, to that effect, judgment of 27 September 2007, *Teleos and Others*, C-409/04, EU:C:2007:548, paragraphs 54 to 57).

37 It follows that, in the context of the exemption for intra-Community supplies pursuant to Article 138 of the VAT Directive, a supplier who, in good faith and having taken every step which could reasonably be required of him, carried out a transaction which was, without his knowledge, connected with a fraud committed by the customer cannot be required to pay the VAT after the event (see, to that effect, judgment of 27 September 2007, *Teleos and Others*, C-409/04, EU:C:2007:548, paragraphs 65 to 67).

38 That case-law also applies to the scheme for exempting the importation of goods intended for intra-Community supply, laid down in Article 143(1)(d) of the VAT Directive (see, to that effect, judgment of 20 June 2018, *Enteco Baltic*, C-108/17, EU:C:2018:473, paragraph 94).

39 As is apparent from the case-law cited in paragraph 34 above, the import exemption is conditional upon the importer subsequently making an exempt intra-Community supply under Article 138 of the VAT Directive. Accordingly, both transactions must be treated consistently so as to ensure the inherent logic of the import exemption scheme laid down in Article 143(1)(d) of the VAT Directive.

40 Automatically denying a taxable importer and supplier, without regard to his diligence, the right to the exemption from import VAT in the case of fraud committed by a customer in the context of the subsequent intra-Community supply would have the effect of breaking the link between the import exemption and the exemption of the subsequent intra-Community supply. As is apparent from paragraph 37 above, a supplier may not be denied the latter exemption automatically in the case of fraud committed by the customer.

41 Accordingly, it cannot be inferred from the mere fact that, in customs matters, Article 78(3) of the Customs Code provides that, 'where revision of the declaration or post-clearance examination indicates that the provisions governing the customs procedure concerned have been applied on the basis of incorrect or incomplete information, the customs authorities shall, in accordance with any provisions laid down, take the measures necessary to regularise the situation, taking account of the new information available to them', those authorities may require the taxable importer to pay the import VAT after the event in all circumstances and without assessing the diligence and good faith of that importer.

42 In the second place, the referring court has particular doubts as to the effect on the dispute in the main proceedings of the fact that the competent customs authority, after a prior examination was carried out on the basis of information provided by the importer in his customs declarations, authorised the VAT exemption under Article 143(1)(d) of the VAT Directive for the importation of goods coming from a third State to the territory of the European Union.

43 In that regard, it should be pointed out that, in accordance with the Court's settled case-law, to which, incidentally, the referring court refers, the principle of legal certainty precludes a Member State which has initially accepted the documents submitted by the vendor as evidence establishing entitlement to an exemption for a supply from subsequently requiring that vendor to account for the VAT on that supply, because of fraud by the customer of which the vendor had and could have had no knowledge (see, to that effect, judgments of 27 September 2007, *Teleos and Others*, C-409/04, EU:C:2007:548, paragraph 50, and of 14 June 2017, *Santogal M-Comércio e Reparação de Automóveis*, C-26/16, EU:C:2017:453, paragraph 75).

44 However, the application of that case-law is limited to a situation where the taxable person acted in good faith and took every step which could reasonably be asked of him to avoid any participation in tax evasion. Accordingly, that case-law cannot be understood as meaning that the principle of legal certainty precludes the relevant national authorities from carrying out a further examination within the applicable time limits in order to ascertain whether the taxable person had not, and could not have, been aware of possible tax evasion (see, to that effect, judgment of 20 June 2018, *Enteco Baltic*, C-108/17, EU:C:2018:473, paragraphs 97 and 98).

45 Thus, the mere fact that, in the main proceedings, the import exemption was authorised by the relevant customs authority, after a prior examination was carried out on the basis of information provided by the importer in the customs declarations, cannot, in itself, be such as to preclude any possibility of demanding payment of the import VAT after the event if it appears that the importer participated in tax evasion or failed to act diligently in order to avoid that participation.

46 It is therefore for the referring court to carry out an overall assessment of all the facts and circumstances of the dispute in the main proceedings in order to determine whether Mr Božičevič Ježovnik acted in good faith and took every step which could reasonably be asked of him to satisfy himself that the transactions carried out would not result in his participation in tax evasion (see, to that effect, judgment of 6 September 2012, *Mecsek-Gabona*, C-273/11, EU:C:2012:547, paragraph 53). In that regard, it should be pointed out that, as the European Commission submitted, the mere fact that the goods concerned were imported beforehand from a third country does not justify a more stringent approach to the liability of Mr Božičevič Ježovnik than that which would be incurred in a mere intra-Community transaction, as referred to in Article 138(1) of the VAT Directive.

47 In the event that the referring court reaches the conclusion that, in the light of objective evidence, the taxable person concerned knew, or should have known, that the supplies subsequent to the imports at issue in the main proceedings were involved in fraud committed by the customer and that he did not take all reasonable steps in his power to avoid participation in the fraud, there would be no entitlement to an exemption from import VAT (see, by analogy, judgments of 6 September 2012, *Mecsek-Gabona*, C-273/11, EU:C:2012:547, paragraph 54, and of 9 October 2014, *Traum*, C-492/13, EU:C:2014:2267, paragraph 42).

48 On the other hand, if the referring court were to reach the conclusion that the taxable person concerned neither knew nor could have known that the supply subsequent to the imports was part of a fraud committed by the purchaser and that the taxable person had taken all reasonable steps in his power to prevent that fraud from being committed, it cannot refuse him the benefit of the import exemption.

49 In the light of the foregoing considerations, the answer to the questions referred for a preliminary ruling is that Article 143(1)(d) of the VAT Directive must be interpreted to the effect that, in circumstances where the taxable importer and supplier benefitted from an exemption from import VAT on the basis of an authorisation issued after a prior examination by the competent customs authorities in the light of the evidence provided by that taxable person, the latter is not required to pay VAT after the event where it is revealed, during a subsequent examination, that the substantive conditions for the exemption had not been met, except where it is established, in the light of objective evidence, that that taxable person knew, or should have known, that the supplies subsequent to the imports at issue were involved in fraud committed by the customer and that he did not take all reasonable steps in his power to avoid that fraud, which is a matter for the referring court to determine.

Costs

50 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 (Ninth Chamber) hereby rules:

Article 143(1)(d) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, as amended by Council Directive 2009/69/EC of 25 June 2009, must be interpreted to the effect that, in circumstances where the taxable importer and supplier benefitted from an exemption from import value added tax on the basis of an authorisation issued after a prior examination by the competent customs authorities in the light of the evidence provided by that taxable person, the latter is not required to pay value added tax after the event where it is revealed, during a subsequent examination, that the substantive conditions for the exemption had not been met, except where it is established, in the light of objective evidence, that that taxable person knew, or should have known, that the supplies subsequent to the imports at issue were involved in fraud committed by the customer and that he did not take all reasonable steps in his power to avoid that fraud, which is a matter for the referring court to determine.

[Signatures]