Reports of Cases

JUDGMENT OF THE COURT (Sixth Chamber)

23 April 2015 *

(Common system of value added tax — Directive 2006/112/EC — Principle of fiscal neutrality — Person liable for payment of VAT — Erroneous payment of VAT by the person to whom the supply is made — Liability to VAT of the supplier of services — Refusal to grant the supplier of services a refund of the VAT)

In Case C-111/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Varhoven administrativen sad (Bulgaria), made by decision of 24 February 2014, received at the Court on 7 March 2014, in the proceedings

GST — Sarviz AG Germania

v

Direktor na Direktsia 'Obzhalvane i danachno-osiguritelna praktika' Plovdiv pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite,

THE COURT (Sixth Chamber),

composed of S. Rodin, President of the Chamber, A. Borg Barthet (Rapporteur) and E. Levits, Judges,

Advocate General: M. Szpunar,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— the Direktor na Direktsia 'Obzhalvane i danachno-osiguritelna praktika' Plovdiv pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite, by G. Arnaudov, acting as Agent,

— the Bulgarian Government, by E. Petranova and M. Georgieva, acting as Agents,

— the Greek Government, by K. Georgiadis and I. Kotsoni, acting as Agents,

— the European Commission, by S. Petrova and C. Soulay, acting as Agents,

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

* Language of the case: Bulgarian.

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 193 and 194 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 2010/88/EU of 7 December 2010 (OJ 2010 L 326, p. 1; 'the VAT Directive'), and the principle of the neutrality of value added tax ('VAT').

2 The request has been made in proceedings between GST — Sarviz AG Germania ('GST-Sarviz') and the Direktor na Direktsia 'Obzhalvane i danachno-osiguritelna praktika' Plovdiv pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite (Director of the 'Appeals and Tax/Social security' directorate, Plovdiv, at the Central Administration of the National Revenue Agency; 'the Director') concerning the latter's refusal to refund VAT to GST-Sarviz.

Legal context

EU law

3 Article 193 of the VAT Directive provides:

'VAT shall be payable by any taxable person carrying out a taxable supply of goods or services, except where it is payable by another person in the cases referred to in Articles 194 to 199 and Article 202.'

4 Article 194 of the VAT Directive provides:

'1. Where the taxable supply of goods or services is carried out by a taxable person who is not established in the Member State in which the VAT is due, Member States may provide that the person liable for payment of VAT is the person to whom the goods or services are supplied.

2. Member States shall lay down the conditions for implementation of paragraph 1.'

Bulgarian law

5 Article 82 of the Bulgarian Law on VAT (Zakon za danak varhu dobavena stoynost, DV No 63, of 4 August 2006), as applicable to the case in the main proceedings ('the ZDDS'), determines the person liable for VAT in the case of a taxable transaction.

6 Article 82(1) of the ZDDS provides:

'The tax shall be payable by the supplier/provider of the taxable goods/service who is registered for VAT in accordance with the present law, save in the cases referred to in paragraphs 4 and 5'.

7 In accordance with Article 82(2) of the ZDDS, '[w]here the supplier/provider is a taxable person who is not established in the territory of the Republic of Bulgaria and the supply is effected in that territory and is subject to tax, the tax shall be payable by the recipient in the following cases:

...

(3) supply of services, where the recipient is a taxable person under Article 3(1), (5) and (6).'

8 In accordance with Article 71(1)(1) of the ZDDS, 'the taxable person shall exercise his right of deduction where the following conditions are satisfied: … he is in possession of a tax document issued in accordance with the requirements set out in Articles 114 and 115, in which the VAT is stated separately in respect of the supply of goods or services of which he is the purchaser or recipient ...'

9 Article 102(1) of the ZDDS provides:

'Where the tax authorities conclude that a person has not fulfilled his obligation to apply for registration within the prescribed period, it shall register that person by way of a registration decision if the conditions for registration are satisfied.'

10 Article 129(1), (5) and (7) of the Code of Tax and Social Security Procedures (danachno osiguritelen protsesualen kodeks) provides:

'1. The offset or refund may be made by the tax authorities on their own initiative or on the written application of the person concerned. The application for offset or refund shall be examined if it has been made within a period of five years from 1 January of the year following the year in which the ground for the refund arose, unless the law otherwise provides.

...

5. The tax authorities must, in accordance with paragraph 2, point 2, within a period of 30 days from the date on which a binding judicial decision or final administrative act is presented to them, fully refund or offset the amounts set out therein, including interest accrued under paragraph 6, where, by virtue of that decision or administrative act, a right is granted in favour of the taxable person to payment of: (1) wrongly or unduly paid or collected amounts relating to taxes, compulsory insurance contributions, fees, fines, pecuniary penalties established, collected or imposed by the tax authorities, including amounts paid on the basis of a written order or written opinion; (2) refunds unlawfully denied; (3) amounts and compensation awarded and costs incurred.

...

7. An appeal shall lie from decisions concerning offsets or refunds in accordance with the rules on appeals against notices of adjustment.'

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

11 In the period from 15 February to 29 December 2010, GST-Sarviz, established in Germany, provided technical and consultancy services to GST Skafolding Bulgaria EOOD ('GST Skafolding'), which is established in Bulgaria. Proceeding on the basis that GST-Sarviz did not have a fixed establishment in Bulgaria when it supplied its services during the period at issue, GST Skafolding paid the VAT due on the supply of those services under the reverse charge procedure provided for in Article 82(2) of the ZDDS. In that respect, in accordance with Article 117(1) of the ZDDS, GST Skafolding issued protocols relating to the invoices issued by GST-Sarviz, and those protocols were entered in the sales ledger.

12 By a tax adjustment notice of 12 March 2012, the Bulgarian tax authorities found that GST-Sarviz had a fixed establishment within the meaning of paragraph 1(10) of the additional provisions of the ZDDS throughout the period during which it supplied its services to GST Skafolding, and that GST-Sarviz was liable for payment of the VAT in respect of those services. It concluded that GST-Sarviz should have applied to be registered for VAT by 15 February 2010 at the latest. Consequently, the tax

authorities considered that GST-Sarviz was liable for the payment of VAT of BGN 224914.89, together with interest on late payment, for the services supplied from 15 February to 29 December 2010.

13 GST-Sarviz paid the sum claimed by the tax authorities on 26 March 2012 and, on 5 September 2012, submitted an application for the tax paid to be offset or refunded on the basis of Article 129(1) of the Code of Tax and Social Security Procedures.

14 In their decision concerning offsets or refunds of 1 October 2012, the tax authorities refused the refund on the ground that the legal conditions for a refund of the VAT were not satisfied in the present case. According to them, since the tax adjustment notice is a valid administrative act, and in the absence of an enforceable court order or relevant administrative decision for the purposes of Article 129(5) of the Code of Tax and Social Security Procedures, the tax paid could not be regarded as being not due and be repaid.

15 GST-Sarviz challenged that decision before the Director. By decision of 21 December 2012, the Director dismissed that challenge, finding that the contested act was lawful on the grounds on which it had been adopted. An action against that decision was brought before the Administrativen sad Plovdiv (Administrative Court, Plovdiv). It too was dismissed for the same reasons as those relied on by the tax authorities. GST-Sarviz lodged an appeal on a point of law with the Varhoven administrativen sad (Supreme Administrative Court).

16 The referring court points out that the tax authorities refused GST Skafolding the right of deduction in respect of the VAT which it had paid, because it did not have the corresponding tax document required by Article 71(1)(1) of the ZDDS. Under Bulgarian legislation, the existence of a tax adjustment notice such as that at issue, dated 12 March 2012, makes any adjustment of tax documents impossible. GST Skafolding thus found itself without the valid tax document that would confer the right of deduction.

17 The referring court also notes that the fact that the VAT was paid twice, once by the supplier and once by the recipient, and that the supplier was denied a refund, and the recipient, a deduction of that tax, is contrary to the principle of the neutrality of VAT. According to the referring court, the refusal of a refund has the effect of transferring the fiscal burden to the supplier.

18 Although it notes that there has been no interpretation of Articles 193 and 194 of the VAT Directive that might be useful in the circumstances of the present case, the referring court refers to the judgment in *ADV Allround* (C-218/10, EU:C:2012:35), according to which, in the absence of procedural rules in the national legal order, the right of the supplier of a service and that of the recipient in a transaction to be treated identically with regard to taxability of that service and to liability to VAT in respect of it would in practice be rendered totally ineffective. As regards the principle of fiscal neutrality, the referring court refers to the interpretation given by the Court of Justice in its judgment in *Rusedespred* (C-138/12, EU:C:2013:233).

19 In those circumstances, the Varhoven administrativen sad decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Must Article 193 of [the VAT Directive] be interpreted as meaning that either the taxable person who makes taxable supplies of goods or services, or the person who purchases the goods or receives the services, is exclusively liable for the VAT, where the taxable supply of goods or services is carried out by a taxable person who is not established in the Member State in which the VAT is payable, in so far as that is provided for by the Member State concerned, but not that both persons are simultaneously liable for that tax?

(2) In so far as it is to be assumed that only one of the two persons is liable for the VAT — either the supplier/service provider or the purchaser/recipient — where that is provided for by the Member State concerned, is the rule in Article 194 of the [VAT Directive] also applicable to cases in which the recipient of the services wrongly applied the reverse charge procedure because it assumed that the service provider had not created a fixed establishment for the purposes of VAT in the territory of the Republic of Bulgaria, although the service provider had in fact created a fixed establishment in relation to the services supplied?

(3) Must the principle of fiscal neutrality, which is of fundamental importance for the establishment and functioning of the common system of VAT, be interpreted as meaning that it permits a tax audit practice, such as that in the main proceedings, in accordance with which the VAT was also payable by the service provider despite the reverse charge procedure applied by the recipient of the supply of services, where account is taken of the fact that the recipient had already calculated the tax for the supply of services, that there is no risk of any loss of tax revenue and that the system for correction of tax documents provided for under national law is not applicable?

(4) Must the principle of VAT neutrality be interpreted as meaning that it does not permit the tax authorities, on the basis of a national provision, to refuse to grant the provider of a service, in respect of which the recipient has calculated the VAT in accordance with Article 82(2) of the ZDDS, a refund of the VAT that has been paid twice, where the tax authorities have refused to grant the recipient the right to deduct the VAT paid twice on account of the absence of the corresponding tax document, but the system for correction provided for under national law on the basis of the present binding tax adjustment notice is no longer applicable?'

Consideration of the questions referred

The first question

20 By its first question, the referring court asks, in essence, whether Article 193 of the VAT Directive must be interpreted as meaning that the only person liable to pay VAT is either the taxable person supplying services or the recipient of that supply where those services were supplied from a fixed establishment located in the Member State in which the VAT is payable.

21 In accordance with Article 193 of the VAT Directive, VAT is to be payable by any taxable person carrying out a taxable supply of services, except where it is payable by another person in the cases referred to, inter alia, in Article 194 of that directive. Under Article 194, where the taxable supply of services is carried out by a taxable person who is not established in the Member State in which the VAT is due, Member States may provide that, in that case, the person liable for payment of VAT is the person to whom the services are supplied.

22 It follows from this that, under the VAT Directive, only the supplier of services is, in principle, liable for payment of VAT, except where the supplier is not established in the Member State in which the VAT is due and where that State has provided that the person liable for payment of VAT is the person to whom the services are supplied.

23 In the present case, it is apparent from the order for reference that, after an audit, the Bulgarian tax authorities issued a tax adjustment notice on 12 March 2012 by which they found that the supplier, GST-Sarviz, had a fixed establishment in Bulgaria from which the technical and consultancy services were supplied to GST Skafolding.

24 In those circumstances, it follows that, in accordance with the VAT Directive, it is for the supplier of services, such as GST-Sarviz, alone to pay to the Bulgarian tax authorities the VAT due on the services it supplied in Bulgaria from 15 February to 29 December 2010.

25 Consequently, the answer to the first question is that Article 193 of the VAT Directive must be interpreted as meaning that the only person liable to pay the VAT is the taxable person supplying services, where those services were supplied from a fixed establishment located in the Member State in which the VAT is payable.

The second question

26 By its second question, the referring court asks, in essence, whether Article 194 of the VAT Directive must be interpreted as permitting the tax authorities of a Member State to regard as liable for the payment of VAT the recipient of services supplied from a fixed establishment of the supplier, where both the latter and the recipient of those services are established in the territory of the same Member State, even if that recipient has already paid that tax on the mistaken assumption that the supplier did not have a fixed establishment in that State.

27 As has been noted in paragraph 21 of the present judgment, the possibility of the Member States providing for the application of the reverse charge procedure is limited, by virtue of Article 194 of the VAT Directive, solely to situations in which the supplier of services is not established in the Member State in which the VAT is due.

28 It follows from this that where those services have been supplied from a fixed establishment of the supplier located in the territory of the Member State in which the VAT is due, the recipient of those services cannot be regarded as being liable for payment of the VAT.

29 In that regard, the fact that the recipient of those services has paid the VAT on the mistaken assumption that the supplier did not have a fixed establishment within the meaning of the VAT Directive cannot authorise the tax authorities to derogate from that rule by finding that the person liable to pay the VAT is not the supplier but the recipient.

30 Consequently, the answer to the second question is that Article 194 of the VAT Directive must be interpreted as not permitting the tax authorities of a Member State to regard as liable for the payment of VAT the recipient of services supplied from a fixed establishment of the supplier, where both the latter and the recipient of those services are established in the territory of the same Member State, even if that recipient has already paid that tax on the mistaken assumption that the supplier did not have a fixed establishment in that State.

The third and fourth questions

31 By its third and fourth questions, which it is appropriate to examine together, the referring court asks, in essence, whether the principle of the neutrality of VAT must be interpreted as precluding a national provision which permits the tax authorities to refuse to grant the supplier of services a refund of the VAT which the supplier has paid, when the recipient of those services, who has also paid the VAT in respect of the same services, is refused the right of deduction on the ground that that recipient did not have the corresponding tax document, any adjustment of tax documents being precluded under national law where a definitive tax adjustment notice exists.

32 It should, first of all, be borne in mind that the Court has repeatedly held that the principle of the neutrality of VAT manifests itself through the deduction system which is meant to relieve the taxable person entirely of the burden of the VAT payable or paid in the course of all his economic activities.

The common system of VAT therefore ensures that all economic activities, whatever their purpose or results, provided that they are, in principle, themselves subject to VAT, are taxed in a neutral way (judgment in *Malburg*, C-204/13, EU:C:2014:147, paragraph 41 and the case-law cited).

33 Secondly, the Court has also held that, in order to ensure the neutrality of VAT, it is for the Member States to provide, in their domestic legal systems, for the possibility of adjusting any tax improperly invoiced where the person who issued the invoice shows that he acted in good faith. However, where the issuer of the invoice has, in sufficient time, wholly eliminated the risk of any loss of tax revenue, the principle of the neutrality of VAT requires that VAT which has been improperly invoiced can be corrected without such adjustment being made conditional by the Member States upon the good faith of the issuer of the relevant invoice. The adjustment cannot be dependent upon the discretion of the tax authority (judgment in *Rusedespred*, C-138/12, EU:C:2013:233, paragraphs 26 and 27 and the case-law cited).

34 Thirdly, it should be borne in mind that the measures which the Member States may adopt in order to ensure the correct levying and collection of the tax and for the prevention of fraud must not go further than is necessary to attain such objectives. They may not, therefore, be used in such a way that they would have the effect of undermining the neutrality of VAT, which is a fundamental principle of the common system of VAT established by the relevant EU law (judgment in *Rusedespred*, C-138/12, EU:C:2013:233, paragraphs 28 and 29 and the case-law cited).

35 As regards the case in the main proceedings, it is apparent from the order for reference that, under the national law applicable, it was no longer possible for the supplier of services to adjust the invoices issued, once the tax authorities had issued it with a definitive tax adjustment notice on 12 March 2012. Moreover, it is not disputed that that supplier duly paid the VAT claimed in that notice, by payment order dated 26 March 2012.

36 In addition, as the referring court notes, since the tax authorities definitively denied the recipient of those invoices the right to deduct the VAT which it had paid under the reverse charge procedure, the risk of any loss of tax in connection with the exercise of that right has been wholly eliminated.

37 In such circumstances, since the supplier of services cannot adjust those invoices and cannot therefore claim payment of the VAT from the recipient of the supply of those services, the tax authorities' refusal to refund that VAT to the supplier means that the supplier effectively bears the fiscal burden of that tax, which is thus contrary to the principle of the neutrality of VAT.

38 The position would be different, however, if, having duly paid the VAT which it was liable to pay following the definitive tax adjustment notice, the supplier of services could, under national legislation, have adjusted the invoices issued and recovered that VAT from the recipient of the services, who would have applied to the tax authorities for its deduction.

39 Furthermore, the inability to adjust the tax documents in the circumstances of the case in the main proceedings, in which the risk of any loss of tax revenue has been definitively eliminated, is not necessary in order to ensure the collection of VAT and for the prevention of fraud.

40 Lastly, it is also important to bear in mind that the principle of the common system of VAT entails the application to goods and services of a general tax on consumption exactly proportional to their price, so that the tax authorities may not charge a VAT amount exceeding the amount thus calculated (see, to that effect, judgment in *Tulică and Plavoşin*, C-249/12 and C-250/12, EU:C:2013:722, paragraphs 32 and 36 and the case-law cited).

41 In circumstances such as those of the case at issue in the main proceedings, to refuse the supplier of services a VAT refund is tantamount to requiring both the supplier of services and the recipient of those services to bear the fiscal burden of that tax, and results in the tax authorities collecting a VAT

amount exceeding the amount which the supplier would normally have had to collect from the recipient if the supplier had been able to adjust the invoices issued, since the tax authorities have collected the VAT twice: first, from the recipient of the supply of services and, secondly, from the supplier of those services.

42 It follows from the foregoing considerations that the answer to the third and fourth questions referred is that the principle of the neutrality of VAT must be interpreted as precluding a national provision which permits the tax authorities to refuse to grant the supplier of services a refund of the VAT which the supplier has paid, when the recipient of those services, who has also paid the VAT in respect of the same services, is refused the right of deduction on the ground that that recipient did not have the corresponding tax document, any adjustment of tax documents being precluded under national law where a definitive tax adjustment notice exists.

Costs

43 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 (Sixth Chamber) hereby rules:

1. **Article 193 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, as amended by Council Directive 2010/88/EU of 7 December 2010, must be interpreted as meaning that the only person liable to pay the value added tax is the taxable person supplying services, where those services were supplied from a fixed establishment located in the Member State in which the value added tax is payable.**

2. **Article 194 of Directive 2006/112, as amended by Directive 2010/88, must be interpreted as not permitting the tax authorities of a Member State to regard as liable for the payment of value added tax the recipient of services supplied from a fixed establishment of the supplier, where both the latter and the recipient of those services are established in the territory of the same Member State, even if that recipient has already paid that tax on the mistaken assumption that the supplier did not have a fixed establishment in that State.**

3. **The principle of the neutrality of value added tax must be interpreted as precluding a national provision which permits the tax authorities to refuse to grant the supplier of services a refund of the value added tax which the supplier has paid, when the recipient of those services, who has also paid the value added tax in respect of the same services, is refused the right of deduction on the ground that that recipient did not have the corresponding tax document, any adjustment of tax documents being precluded under national law where a definitive tax adjustment notice exists.**

[Signatures]