Reports of Cases

JUDGMENT OF THE COURT (Sixth Chamber)

18 March 2021 *

(Reference for a preliminary ruling – Taxation – Common system of value added tax (VAT) – Directive 2006/112/EC – Article 203 – Taxes improperly invoiced – Good faith on the part of the issuer of the invoice – Risk of loss of tax revenue – Obligations of the Member States to provide for the possibility of adjusting tax improperly invoiced – Principles of fiscal neutrality and proportionality)

In Case C-48/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland), made by decision of 15 November 2019, received at the Court on 28 January 2020, in the proceedings

UAB 'P.'

v

Dyrektor Izby Skarbowej w B.,

THE COURT (Sixth Chamber),

composed of L. Bay Larsen, President of the Chamber, R. Silva de Lapuerta (Rapporteur), Vice-President of the Court, and M. Safjan, Judge,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– UAB 'P.', by D. Kosacka, doradca podatkowy,

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

– the European Commission, by N. Gossement and J. Szczodrowski, acting as Agents,

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

gives the following

* Language of the case: Polish.

Judgment

1 This request for a preliminary ruling primarily concerns the interpretation of Article 203 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1) and the principle of proportionality.

2 The request has been made in proceedings between UAB 'P.' ('P.') and the Dyrektor Izby Skarbowej w B. (Director of the Tax Chamber, B., Poland), concerning the payment of value added tax (VAT) which has been improperly invoiced.

Legal context

European Union law

3 Article 203 of Directive 2006/112 provides:

'VAT shall be payable by any person who enters the VAT on an invoice.'

Polish law

4 Article 108(1) of the ustawa o podatku od towarów i usług (Law on the tax on goods and services), of 11 March 2004 (Dz. U, of 2004, No 54, item 535), in the version applicable to the dispute in the main proceedings (Dz. U of 2016, item 710) ('the Law on VAT') provides as follows:

'Where a legal person, an organisational unit without legal personality or a natural person issues an invoice in which the amount of tax is indicated, that person or entity shall be obliged to pay that tax.'

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

5 P. is a company established in Lithuania which made fuel cards available to Lithuanian transport companies allowing those transport companies to fill up with fuel at certain service stations located in Polish territory.

6 Taking the view that its commercial activity consisted of purchasing fuel from Polish service stations for the purpose of subsequently reselling it to Lithuanian transport companies, by means of fuel cards, P. issued invoices for the supply of fuel to those transport companies, indicating an amount of VAT.

7 By decision of 27 June 2014, the Naczelnik Urzędu Skarbowego w Białymstoku (Director of the Tax Office, Białystok, Poland) determined the following: (i) that P. owed a debt in respect of VAT concerning the period from March to December 2011, (ii) an overpayment of tax for the periods between March and June 2011 and (iii) an amount of VAT payable under Article 108 of the Law on VAT. In addition, he took the view that P. was not entitled to benefit from the right to deduct the input VAT paid in respect of the invoices issued by the service stations for the purchase of fuel.

8 P. brought an administrative appeal against that decision before the Dyrektor Izby Skarbowej w B. (Director of the Tax Chamber, B., Poland).

9 By decision of 2 October 2014, the Director of the Tax Chamber, B., annulled the decision of the Director of the Tax Office, B., of 27 June 2014, on the ground that he had determined the place of taxation of the applicant's activities in breach of the provisions of the Law on VAT. The Director of the Tax Chamber also ruled on the substance of the case, determining P's VAT liability.

10 In the decision of 2 October 2014, the Director of the Tax Chamber, B., confirmed, in accordance with the view of the Director of the Tax Office, B., that P. had neither purchased nor supplied fuel in Polish territory. In his view, the fuel was supplied directly by Polish service stations to Lithuanian transport companies, which, by means of fuel cards purchased from P., refuelled at those service stations and enjoyed complete freedom of choice, in particular as regards the quantity and type of fuel. P's actual activity was thus to finance the purchase of fuel at those service stations by Lithuanian transport companies using fuel cards. That activity constitutes a financial service exempt from VAT in Poland under the Law on VAT.

11 Furthermore, in so far as the invoices issued by P. did not reflect the actual course of its activities, the Director of the Tax Chamber, B., also confirmed that the applicant in the main proceedings was not entitled to benefit from the right to deduct input VAT in respect of the invoices issued by the service stations. He also considered that the sales invoices issued by P. gave rise to an obligation on the part of that company, under the Law on VAT, to pay the amount of VAT indicated.

12 P. brought an action against the decision of the Director of the Tax Chamber, B., before the Wojewódzki Sąd Administracyjny w Białymstoku (Regional Administrative Court, Białystok, Poland), which, by judgment of 7 April 2015, annulled that decision.

13 The Director of the Tax Chamber, B., brought an appeal on a point of law against that judgment before the Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland).

14 By judgment of 17 February 2017, that court, first, set aside the judgment of the Wojewódzki Sąd Administracyjny w Białymstoku (Regional Administrative Court, Białystok) of 7 April 2015, holding that that court was required to assess, on the basis of the file sent to it, whether the tax authorities had been entitled to take the view that the issue of the invoices by P. had led to a risk of loss of tax revenue for the State and, second, referred the case back for re-examination.

15 By judgment of 19 July 2017, the Wojewódzki Sąd Administracyjny w Białymstoku (Regional Administrative Court, Białystok) dismissed P.'s action on the ground that there was a risk of a loss of tax revenue for the State.

16 P. brought an appeal against that judgment before the referring court. Relying on the judgments of 6 February 2003, *Auto Lease Holland* (C-185/01, EU:C:2003:73), and of 15 May 2019, *Vega International Car Transport and Logistic* (C-235/18, EU:C:2019:412), that court notes that P.'s actual activity consisted of financing the purchase of fuel by its Lithuanian customers in service stations using fuel cards and that, consequently, it merely provided financial services to Lithuanian entities, which are not subject to VAT in Poland.

17 That court notes, however, that it has not been established that the conduct of P. and its contractual partners amounted to fraud or abuse. It was because of a practice on the part of the Polish tax authorities that transactions such as those carried out by P. were regarded as chain transactions for the supply of fuel to transport companies. According to that practice, each of the operators involved in the fuel supply chain carried out a supply of goods for consideration, namely fuel, even though there was in practice only one physical supply of goods.

18 Thus, the referring court states that, on the basis of that practice, P. was entitled to regard itself as participating in a chain transaction, that is to say, as acquiring fuel from service stations in order to resell it to Lithuanian transport companies. Those companies received invoices from P. indicating VAT relating to that fuel and could apply for its refund in Poland.

19 The referring court also states that, in so far as the dispute in the main proceedings concerns P.'s VAT returns relating to periods during which the Polish tax authorities followed the national practice in question, P. could legitimately rely on the interpretation of the provisions of the Law on VAT adopted by those authorities in the context of tax rulings.

20 That court notes that, even though P. acted in good faith, in 2011, however, it sent non-compliant invoices to Lithuanian transport companies, indicating VAT and that, therefore, the conditions for the application of Article 108(1) of the Law on VAT, which implements Article 203 of Directive 2006/112, are formally satisfied.

21 It points out, however, that, in accordance with the Court's case-law, in order to ensure the neutrality of VAT, the issuer of an invoice who has acted in good faith must be able to adjust the tax improperly mentioned on the invoice, in accordance with a procedure laid down by the Member State concerned. Since Polish law does not provide for such a procedure where tax proceedings have been initiated against the person concerned, the referring court notes that P. did not have the opportunity to correct the tax improperly indicated in the invoices addressed to the Lithuanian transport companies.

22 Furthermore, the referring court observes that if the transactions between the service stations, P. and the Lithuanian transport companies had been correctly subject to VAT, those transport companies would not have received invoices issued by P., improperly indicating VAT, but rather invoices issued by the service stations for the supply of fuel indicating an amount of VAT close to that shown in the invoices issued by P.

23 Thus, according to that court, the correct declaration of those transactions by the interveners would have also enabled Lithuanian transport companies to claim reimbursement of the VAT indicated in the invoices issued by the service stations, which shows that P.'s issuing of invoices improperly indicating VAT does not present a risk of loss of tax revenue for the State. By contrast, that court points out that the application of Article 108 of the Law on VAT to the invoices issued by P., where the supply of fuel by service stations must also be subject to VAT, has the effect of making the same transaction subject to double taxation.

24 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 203 of [Directive 2006/112] and the principle of proportionality be interpreted as precluding the application, in a situation such as that in the main proceedings, of a national provision such as Article 108(1) of the [Law on VAT] to invoices with VAT incorrectly indicated that were issued by a taxable person acting in good faith, if:

– the taxable person's actions did not involve tax fraud, but resulted from an erroneous interpretation of the law by the parties to the transaction, based on an interpretation given by the tax authorities and a common practice in that respect at the time of the transaction, which incorrectly assumed that the issuer of the invoice was supplying goods when in fact it was providing a VAT-exempt financial intermediation service; and

– the recipient of the invoice incorrectly indicating VAT would have been entitled to claim a refund of the tax if the taxable person who had actually supplied the goods to him had duly invoiced the transaction?'

Consideration of the question referred

25 By its question, the referring court asks, in essence, whether Article 203 of Directive 2006/112 and the principles of proportionality and neutrality of VAT must be interpreted as precluding national legislation which does not allow a taxable person acting in good faith to adjust invoices improperly indicating VAT following the initiation of a tax investigation procedure, even though the recipient of those invoices would have been entitled to reimbursement of that tax if the transactions which were the subject of those invoices had been duly declared.

26 Under Article 203 of Directive 2006/112, any person who enters VAT on an invoice is liable to pay the tax indicated on that invoice. In that regard, the Court has stated that the VAT indicated on an invoice is payable by the issuer of the invoice even in the absence of an actual taxable transaction (see, to that effect, judgment of 8 May 2019, *EN.SA.*, C-712/17, EU:C:2019:374,, paragraph 26).

27 The Court has held that that provision is intended to eliminate the risk of loss of tax revenue to which the right to deduction provided for by that directive might entail (judgment of 11 April 2013, *Rusedespred*, C-138/12, EU:C:2013:233, paragraph 24).

28 In that context, it should be recalled that although the Member States may adopt measures in order to ensure the correct levying and collection of the tax and the prevention of tax evasion', those measures must not go further than is necessary to attain the objectives thereby pursued and 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 of 11 April 2013, *Rusedespred*, C-138/12, EU:C:2013:233, paragraphs 28 and 29 and the case-law cited).

29 The principle of VAT neutrality seeks to relieve the taxable person entirely of the burden of VAT in the course of his or her economic activities. That system 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 wholly neutral way (judgment of 2 July 2020, *Terracult*, C-835/18, EU:C:2020:520, paragraph 25 and the case-law cited).

30 As regards, more particularly, the refund of VAT invoiced in error, the Court has held that Directive 2006/112 does not lay down any provisions relating to the adjustment, by the issuer of the invoice, of VAT which has been improperly invoiced and that, in those circumstances, it is, in principle, for the Member States to lay down the conditions in which improperly invoiced VAT may be adjusted (judgment of 2 July 2020, *Terracult*, C-835/18, EU:C:2020:520, paragraph 26 and the case-law cited).

31 In order to ensure 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 (judgment of 2 July 2020, *Terracult*, C-835/18, EU:C:2020:520, paragraph 27 and the case-law cited).

32 That solution is applicable, inter alia, in a situation in which the taxable person acted in good faith when issuing invoices incorrectly indicating VAT, in so far as it considered that the provision of fuel cards to operators enabling them to fill up with fuel at service stations did not constitute a financial service exempt from VAT in Poland, but a supply of goods subject to that tax in that Member State on the basis of a consistent practice of the Polish tax authorities.

33 It is apparent from the order for reference that, although Polish law provides, in principle, for a procedure for adjustment of VAT improperly invoiced by a taxable person acting in good faith, that procedure is not applicable where a tax inspection is initiated against the person concerned.

34 In that context, it must be held that the refusal to allow for the possibility of adjusting the fuel invoices improperly indicating VAT issued to transport companies, where the supplies of fuel carried out by service stations to those transport companies are also subject to VAT, would amount to imposing on the applicant in the main proceedings a tax burden in breach of the principle of neutrality of VAT.

35 In those circumstances, the answer to the question referred is that Article 203 of Directive 2006/112 and the principles of proportionality and neutrality of VAT must be interpreted as precluding national legislation which does not allow a taxable person acting in good faith to adjust invoices improperly indicating VAT following the initiation of a tax investigation procedure, even though the recipient of those invoices would have been entitled to reimbursement of that tax if the transactions which were the subject of those invoices had been duly declared.

Costs

36 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:

Article 203 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax and the principles of proportionality and neutrality of VAT must be interpreted as precluding national legislation which does not allow a taxable person acting in good faith to adjust invoices improperly indicating VAT following the initiation of a tax investigation procedure, even though the recipient of those invoices would have been entitled to reimbursement of that tax if the transactions which were the subject of those invoices had been duly declared.

[Signatures]