JUDGMENT OF THE COURT (Second Chamber)

15 January 2009 *

In Case C-502/07,

REFERENCE for a preliminary ruling under Article 234 EC from the Naczelny Sąd Administracyjny (Poland), made by decision of 31 July 2007, received at the Court on 16 November 2007, in the proceedings

K-1 sp. z o.o.

v

Dyrektor Izby Skarbowej w Bydgoszczy,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, J.-C. Bonichot (Rapporteur), K. Schiemann, J. Makarczyk and C. Toader, Judges,

* Language of the case: Polish.

Advocate General: J. Mazák,
Registrar: K. Sztranc-Sławiczek, Administrator,

having regard to the written procedure and further to the hearing on 20 November 2008,

after considering the observations submitted on behalf of:

— K-1 sp. z o.o., by M. Łukasik and M. Złotopolska-Nowak, radcy prawni,

— the Polish Government, by M. Dowgielewicz, M. Jarosz and A. Rutkowska, acting as Agents,

— the Greek Government, by S. Spyropoulos, I. Bakopoulos and M. Tassopoulou, acting as Agents,

— the Cypriot Government, by I. Neofytou and E. Symeonidou, acting as Agents,

— the United Kingdom Government, by L. Seeboruth and C. Gibbs, acting as Agents, and R. Hill, Barrister,

— the Commission of the European Communities, by D. Triantafyllou and K. Herrmann, acting as Agents,

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

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of the first and second paragraphs of Article 2 of First Council Directive 67/227/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes (OJ, English Special Edition 1967, p. 14; 'the First VAT Directive') and of various articles of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1), as amended by Council Directive 2004/66/EC of 26 April 2004 (OJ 2004 L 168, p. 35), ('the Sixth VAT Directive').

2 The reference has been made in the context of proceedings between K-1 sp. z o.o. ('K-1') and the Dyrektor Izby Skarbowej w Bydgoszczy (Director of the Tax Chamber in Bydgoszcz) concerning the 'additional tax liability' imposed on the taxable person when, in its declaration, it indicated an amount of tax difference to be repaid in respect of value added tax ('VAT') or an amount of input tax to be repaid which was greater than the amount due.

Legal context

Community legislation

3 Under the first and second paragraphs of Article 2 of the First VAT Directive:

'The principle of the common system of [VAT] involves the application to goods and services of a general tax on consumption exactly proportional to the price of the goods and services, whatever the number of transactions which take place in the production and distribution process before the stage at which 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.'

4 Article 2 of the Sixth VAT Directive provides that:

'The following shall be subject to [VAT]:

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

2. the importation of goods.'

5 Article 10(1)(a) of the Sixth VAT Directive defines 'chargeable event' as 'the occurrence by virtue of which the legal conditions necessary for tax to become chargeable are fulfilled'. Article 10(2) states, inter alia, that:

'The chargeable event shall occur and the tax shall become chargeable when the goods are delivered or the services are performed. Deliveries of goods other than those referred to in Article 5(4)(b) and supplies of services which give rise to successive statements of account or payments shall be regarded as being completed at the time when the periods to which such statements of account or payments pertain expire. …'

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

'Without prejudice to the provisions to be adopted pursuant to Article 17(4), Member States may impose other obligations which they deem necessary for the correct levying and collection of the tax and for the prevention of fraud.'

7 Under Article 27(1) of the Sixth VAT Directive:

'1. The Council, acting unanimously on a proposal from the Commission, may authorise any Member State to introduce special measures for derogation from the

provisions of this Directive, in order to simplify the procedure for charging the tax or to prevent certain types of tax evasion or avoidance. Measures intended to simplify the procedure for charging the tax, except to a negligible extent, may not affect the overall amount of the tax revenue of the Member State collected at the stage of final consumption.'

8 Article 33(1) of the Sixth VAT Directive provides that:

'Without prejudice to other Community provisions, in particular those laid down in the Community provisions in force relating to the general arrangements for the holding, movement and monitoring of products subject to excise duty, this Directive shall not prevent a Member State from maintaining or introducing taxes on insurance contracts, taxes on betting and gambling, excise duties, stamp duties and, more generally, any taxes, duties or charges which cannot be characterised as turnover taxes, provided, however, that those taxes, duties or charges do not, in trade between Member States, give rise to formalities connected with the crossing of frontiers.'

National legislation

9 Under Article 109(5) and (6) of the Ustawa o podatku od towarów i usług (Law on the taxation of goods and services) of 11 March 2004 ('the Law on VAT'):

'5. In the event that it is established that the taxable person has indicated in the tax declaration submitted an amount of tax difference to be repaid or an amount of input tax to be repaid which is greater than the amount due, the head of the tax office or tax

inspection authority shall determine the correct amount to be repaid and fix an additional tax liability equivalent to 30% of the amount of the overstatement.

6. Paragraph 5 shall apply *mutatis mutandis* to a tax difference within the terms of Article 87(1).'

10 Article 87(1) of that Law provides that:

'Where the amount of input tax referred to in Article 86(2) is greater than the amount of tax due during an accounting period, the taxable person has the right to a reduction, by the difference, of the amount of input tax due for subsequent periods or to repayment of the difference to his or her bank account.'

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

11 By decision of 17 August 2005, the Director of the Pierwszy Urząd Skarbowy w Toruniu (First Tax Office, Toruń) found in respect of K-1 that VAT declared as input tax had exceeded output tax for May 2005 and fixed an additional tax liability for that month. The tax authority questioned the deduction of tax contained in an invoice of 29 April 2005 relating to the purchase of developed immovable property in Toruń. As that immovable property constituted second-hand goods, its purchase was exempt from VAT and the corresponding invoice could not therefore form the basis for a reduction of the tax due or for repayment of a tax difference in respect of VAT or an amount of tax

paid as input tax. As a result of the overstatement of input tax, an additional tax liability was imposed on the company pursuant to Article 109(5) and (6) of the Law on VAT.

12 K-1 appealed against that decision to the Dyrektor Izby Skarbowej w Bydgoszczy. In its appeal, K-1 claimed that the additional tax liability imposed by the contested decision was incompatible with Article 27 of the Sixth VAT Directive. By decision of 9 November 2005, the Dyrektor Izby Skarbowej w Bydgoszczy rejected K-1's arguments and upheld the contested decision.

13 K-1 thereupon brought an action contesting that decision before the Wojewódzki Sąd Administracyjny w Bydgoszczy (Administrative Court, Bydgoszcz Region). By judgment of 31 May 2006, that court held that Article 33(1) of the Sixth VAT Directive did not rule out the imposition of additional tax liability on the grounds laid down in the Law on VAT and dismissed K-1's action. It found that the additional tax lacked the fundamental characteristics of VAT and did not give rise, in trade between Member States, to formalities connected with the crossing of frontiers. The Wojewódzki Sąd Administracyjny w Bydgoszczy also did not accept the argument that the additional tax constituted a special measure within the meaning of the Sixth VAT Directive. It furthermore took the view that there had been no need to initiate the procedure provided for in Article 27 of that directive.

14 K-1 lodged an appeal on a point of law against that judgment. In the grounds of that appeal, K-1 argued that the mandatory imposition of additional tax liability under

Article 109(5) of the Law on VAT was incompatible with the provisions of Community law, more specifically with the provisions of the Sixth VAT Directive.

15 Against that background, the Naczelny Sąd Administracyjny decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Do the first and second paragraphs of Article 2 of [the First VAT Directive], in conjunction with Articles 2, 10(1)(a) and 10(2) of [the Sixth VAT Directive], rule out the possibility of imposing an obligation on a person liable to tax on goods and services to pay an additional tax within the terms of Article 109(5) and (6) of the [Law on VAT] in the event that it is established that the person liable to tax on goods and services indicated in the tax declaration submitted an amount of tax difference to be repaid in respect of VAT or input tax to be repaid which was greater than the amount due?

(2) Can "special measures" within the terms of Article 27(1) of [the Sixth VAT Directive], consist, having regard to their character and purpose, in the possibility of imposing on a person liable to tax on goods and services an additional tax liability fixed by a decision of the tax authority in the case where it is established that the taxable person has declared an overstated amount of the tax difference to be repaid in respect of VAT or an overstated amount of input tax to be repaid?

(3) Does the power provided for by Article 33 of [the Sixth VAT Directive] encompass the right to introduce the additional tax liability provided for in Article 109(5) and (6) of the [Law on VAT]?'

The questions referred for a preliminary ruling

The first question

16 By its first question, the national court seeks, essentially, to determine whether the common system of VAT, as defined in the first and second paragraphs of Article 2 of the First VAT Directive and Articles 2 and 10(1)(a) and (2) of the Sixth VAT Directive, allows a Member State to impose on those liable to VAT an 'additional tax liability' such as that provided for in Article 109(5) and (6) of the Law on VAT.

17 The Court has set out the essential characteristics of VAT, of which there are four: VAT applies generally to transactions relating to goods or services; it is proportional to the price charged by the taxable person in return for the goods and services which he has supplied; it is charged at each stage of the production and distribution process, including that of retail sale, irrespective of the number of transactions which have previously taken place; the amounts paid during the preceding stages of the process are deducted from the tax payable by a taxable person, with the result that the tax applies, at any given stage, only to the value added at that stage and the final burden of the tax rests ultimately on the consumer (see Case C-475/03 *Banca popolare di Cremona* [2006] ECR I-9373, paragraph 28).

18 An 'additional tax' such as that provided for in the national legislation at issue in the case in the main proceedings does not have those characteristics. Suffice it to note, in that

regard, that it arises not from any transaction but from a declaration error and, in addition, that the amount thereof is not proportional to the price charged by the taxable person.

19 It is not a tax but in fact an administrative penalty imposed where it is established that the taxable person has indicated an amount of tax difference to be repaid in respect of VAT or of input tax to be repaid which is greater than the amount due to that person.

20 The principle of a common system of VAT does not preclude the introduction by the Member States of measures penalising irregularities committed when declarations are made as to the amount of VAT due. On the contrary, Article 22(8) of the Sixth VAT Directive provides that Member States may impose other obligations which they deem necessary for the correct levying and collection of the tax.

21 In those circumstances, the answer to the first question is that the common system of VAT, as defined in the first and second paragraphs of Article 2 of the First VAT Directive and in Articles 2 and 10(1)(a) and (2) of the Sixth VAT Directive, does not preclude a Member State from providing in its legislation for an administrative penalty which may be imposed on persons liable to VAT, such as the 'additional tax' provided for in Article 109(5) and (6) of the Law on VAT.

The second question

22 By its second question, the national court seeks, essentially, to ascertain whether the provisions of Article 109(5) and (6) of the Law on VAT may be considered to be 'special measures for derogation' for preventing certain types of tax evasion or avoidance within the meaning of Article 27(1) of the Sixth VAT Directive.

23 Suffice it to state in that regard that an administrative penalty imposed where it is established that the taxable person has declared an overstated amount of tax difference to be repaid in respect of VAT or an overstated amount of input tax to be repaid, such as the penalty provided for in Article 109(5) and (6) of the Law on VAT, cannot constitute a special measure for derogation of the type envisaged in Article 27(1) of the Sixth VAT Directive but is, as has already been stated, a measure referred to in Article 22(8) of the Sixth VAT Directive.

24 Provisions such as those in Article 109(5) and (6) of the Law on VAT cannot therefore fall within the scope of Article 27(1).

25 Consequently, the answer to the second question is that provisions such as those in Article 109(5) and (6) of the Law on VAT do not constitute 'special measures for derogation' for preventing certain types of tax evasion or avoidance within the meaning of Article 27(1) of the Sixth VAT Directive.

The third question

26 By its question, the national court asks, essentially, whether Article 33 of the Sixth VAT Directive precludes the maintenance of provisions such as those in Article 109(5) and (6) of the Law on VAT.

27 Article 33 of the Sixth VAT Directive permits a Member State to maintain or introduce duties or charges on the supply of goods, the provision of services or imports only if they cannot be characterised as turnover taxes (see *Banca popolare di Cremona*, paragraph 24).

28 It is not, however, necessary to examine whether provisions such as those at issue in the dispute in the main proceedings introduce a tax, duty or charge which can be characterised as a turnover tax within the meaning of Article 33 of the Sixth VAT Directive. As is apparent from the answer to the first question, those provisions do not introduce a tax, a duty or a charge but provide for an administrative penalty which is liable to be imposed on a taxable person where it is established that that person has declared an amount of tax difference to be repaid in respect of VAT or of input tax to be repaid which is greater than the amount due to that person.

29 In those circumstances, the answer to the third question is that Article 33 of the Sixth VAT Directive does not preclude the maintenance of provisions such as those in Article 109(5) and (6) of the Law on VAT.

Costs

30 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 (Second Chamber) hereby rules:

1. **The common system of value added tax, as defined in the first and second paragraphs of Article 2 of First Council Directive 67/227/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes and in Articles 2 and 10(1)(a) and (2) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment, as amended by Council Directive 2004/66/EC of 26 April 2004, does not preclude a Member State from providing in its legislation for an administrative penalty which may be imposed on persons liable to value added tax, such as the 'additional tax' provided for in Article 109(5) and (6) of the Ustawa o podatku od towarów i usług (Law on the taxation of goods and services) of 11 March 2004.**

2. **Provisions such as those in Article 109(5) and (6) of the Law on the taxation of goods and services of 11 March 2004 do not constitute 'special measures for**

derogation' for preventing certain types of tax evasion or avoidance within the meaning of Article 27(1) of Sixth Directive 77/388, as amended.

3. **Article 33 of Sixth Directive 77/388, as amended, does not preclude the maintenance of provisions such as those in Article 109(5) and (6) of the Law on the taxation of goods and services of 11 March 2004.**

[Signatures]