Reports of Cases

JUDGMENT OF THE COURT (Sixth Chamber)

15 November 2017 * [i]

(Reference for a preliminary ruling — Taxation — Directive 2006/112/EC — Article 168(a), Article 169(a), Article 214(1)(d) and (e), and Articles 289 and 290 — Deductibility of input value added tax (VAT) due or paid — Output transactions carried out in other Member States — Tax exemption scheme in the Member State in which the right to deduct is exercised)

In Case C-507/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Administrativen sad Sofia-grad (Administrative Court of the City of Sofia, Bulgaria), made by decision of 12 September 2016, received at the Court on 26 September 2016, in the proceedings

Entertainment Bulgaria System EOOD

v

Direktor na Direktsia 'Obzhalvane i danachno-osiguritelna praktika', Sofia,

THE COURT (Sixth Chamber),

composed of J.-C. Bonichot (Rapporteur), acting as President of the Chamber, S. Rodin and E. Regan, Judges,

Advocate General: P. Mengozzi,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Entertainment Bulgaria System EOOD, by S. Georgieva, acting as Agent,

– Direktor na Direktsia 'Obzhalvane i danachno-osiguritelna praktika', Sofia, by A. Georgiev, acting as Agent,

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

– the European Commission, by L. Lozano Palacios and P. Mihaylova, 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 Article 168(a) and (b), Article 169(a) and Article 214 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 2009/162/EU of 22 December 2009 (OJ 2010 L 10, p. 14) ('Directive 2006/112').

2 The request has been made in proceedings between Entertainment Bulgaria System EOOD ('EBS') and Direktor na Direktsia 'Obzhalvane i danachno-osiguritelna praktika', Sofia (Director of the 'Appeals and Tax and Social Security' Directorate, Sofia, Bulgaria), regarding a tax assessment notice imposing on that company an additional assessment to value added tax (VAT) and default interest.

Legal context

EU legislation

3 Article 168 of Directive 2006/112 provides:

'In so far as the goods and services are used for the purposes of the taxed transactions of a taxable person, the taxable person shall be entitled, in the Member State in which he carries out these transactions, to deduct the following from the VAT which he is liable to pay:

(a) the VAT due or paid in that Member State in respect of supplies to him of goods or services, carried out or to be carried out by another taxable person;

…'

4 Article 169 of that directive provides:

'In addition to the deduction referred to in Article 168, the taxable person shall be entitled to deduct the VAT referred to therein in so far as the goods and services are used for the purposes of the following:

(a) transactions relating to the activities referred to in the second subparagraph of Article 9(1), carried out outside the Member State in which that tax is due or paid, in respect of which VAT would be deductible if they had been carried out within that Member State;

…'

5 Article 214 of that directive states:

'1. Member States shall take the measures necessary to ensure that the following persons are identified by means of an individual number:

(a) every taxable person, with the exception of those referred to in Article 9(2), who within their respective territory carries out supplies of goods or services in respect of which VAT is deductible, other than supplies of goods or services in respect of which VAT is payable solely by the customer or the person for whom the goods or services are intended, in accordance with Articles 194 to 197 and Article 199;

…

(d) every taxable person who within their respective territory receives services for which he is liable to pay VAT pursuant to Article 196;

(e) every taxable person, established within their respective territory, who supplies services within the territory of another Member State for which VAT is payable solely by the recipient pursuant to Article 196.

…’

6 Article 196 of that directive provides:

‘VAT shall be payable by any taxable person, or non-taxable legal person identified for VAT purposes, to whom the services referred to in Article 44 are supplied, if the services are supplied by a taxable person not established within the territory of the Member State.’

7 Under Article 282 of Directive 2006/112, the exemptions and graduated tax relief provided for in Section 2 of that directive are to apply to the supply of goods and services by small enterprises.

8 Article 287 of that directive provides:

‘Member States which acceded after 1 January 1978 may exempt taxable persons whose annual turnover is no higher than the equivalent in national currency of the following amounts at the conversion rate on the day of their accession:

…

(17) Bulgaria: EUR 25 600

…’

9 Article 289 of that directive provides:

‘Taxable persons exempt from VAT shall not be entitled to deduct VAT in accordance with Articles 167 to 171 and Articles 173 to 177, and may not show the VAT on their invoices.’

10 Article 290 of Directive 2006/112 provides:

‘Taxable persons who are entitled to exemption from VAT may opt either for the normal VAT arrangements or for the simplified procedures provided for in Article 281. In this case, they shall be entitled to any graduated tax relief provided for under national legislation.’

Bulgarian law

11 Article 70(4) of the Zakon za danak varhu dobavenata stoynost (Law on value added tax, DV No 63 of 4 August 2006) (‘ZDDS’) provides that a person registered in accordance with Article 97a of the ZDDS is not entitled to deduct input tax.

12 Article 94(3) of the ZDDS provides that registration for VAT purposes shall be either mandatory or voluntary.

13 Article 96(1) of the ZDDS provides that any taxable person with a taxable turnover of BGN 50 000 (approximately EUR 25 600) or more in a period not exceeding 12 consecutive months preceding the current month is required to submit an application for registration for the purposes of that law within 14 days from the end of the financial year in which that turnover was achieved.

14 Article 97a of the ZDDS provides:

'1. Any taxable person established in Bulgaria under Article 3(1), (5) and (6) who receives taxable services supplied in Bulgaria and for which the recipient is liable to tax under Article 82(2) shall be subject to registration under this law.

2. Any taxable person established in Bulgaria under Article 3(1), (5) and (6) who supplies services within the meaning of Article 21(2) within the territory of another Member State shall be subject to registration under this law.

3. Any taxable person registered pursuant to paragraph 1 shall be considered registered within the meaning of paragraph 2 and vice versa.

…'

15 Under Article 100(1) of the ZDDS:

'Any taxable person for whom the conditions for mandatory registration under Article 96(1) are not satisfied shall be entitled to registration under this law.'

16 Article 113(9) of the ZDDS provides:

'Any taxable persons who are not registered under this law or are registered pursuant to Article 97a(1) and (2) … shall not be entitled to indicate tax in invoices issued by them.'

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

17 It is apparent from the decision to refer that EBS is a company established in Bulgaria that provides internet services, such as website design, multimedia development and graphic design.

18 From 21 December 2010, EBS was identified for VAT purposes pursuant to Article 97a(2) of the ZDDS, which provides for the registration of taxable persons established in Bulgaria who supply services provided in the territory of another Member State.

19 According to the decision to refer, EBS received services supplied by taxable persons established in the territory of Member States other than the Republic of Bulgaria, which it used to provide services in other Member States and in Switzerland.

20 EBS proceeded to deduct the input VAT relating to the services received, in the context of the reverse charge regime.

21 During a tax inspection, the Natsionalnata agentsia za prihodite (National Revenue Agency, Bulgaria) established that on 30 November 2013 EBS had reached the turnover threshold beyond which undertakings no longer benefit from VAT exemption in that Member State and must, under national law, register for VAT in accordance with Article 96(1) of the ZDDS.

22 By a tax assessment notice of 16 September 2015, the National Revenue Agency, first, found that EBS had improperly exercised its right to deduct the input VAT relating to the services received, on the ground that Article 70(4) of the ZDDS forbids the exercise of that right for those taxable persons identified pursuant to Article 97a of the ZDDS and, second, imposed an additional assessment to VAT and default interest on EBS (the 'tax assessment notice').

23 By decision of 30 November 2015, the Director of the 'Appeals and Tax and Social Security' Directorate of Sofia granted in part a rectification request in respect of the tax assessment notice, finding that EBS could not be prohibited from deducting input VAT due or paid until it had been identified for VAT purposes pursuant to Article 96(1) of ZDDS, but only until the date on which the conditions for lodging a request for registration pursuant to that provision were fulfilled.

24 Being obliged to pay the amount of BGN 2 094 196 (around EUR 1 070 741) in VAT, together with default interest, EBS lodged a request for annulment of the revised tax assessment notice before the Administrativen sad Sofia-grad (Administrative Court of the City of Sofia, Bulgaria).

25 That court is considering the question whether Article 70(4) of the ZDDS is compatible with Directive 2006/112.

26 That court notes that, if the taxable persons identified for VAT pursuant to Article 97a of the ZDDS, as referred to in Article 70(4) of the ZDDS, cannot indicate VAT in invoices issued by them for goods or services supplied in Bulgaria, they should, however, be able to invoice that tax for goods and services supplied outside of the territory of that Member State. The court points out that those taxable persons may, as a result, deduct input VAT due or paid for services provided to them by taxable persons established in the territory of other Member States.

27 That is the context in which the Administrativen sad Sofia-grad (Administrative Court of the City of Sofia) decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is Article 214 of Directive 2006/112 to be interpreted as meaning that, in connection with the right to deduct input tax, different weight is to be attached to the cases of registration for the purposes of value added tax, or does Article 214 of that directive preclude the Member States from attaching differing weight to the cases of registration, as is the position under Articles 97a and 70(4) of the ZDDS?

(2) Are Article 168(a) and Article 169(a) of Directive 2006/112 to be interpreted as meaning that a taxable person who has been registered pursuant to Article 214(1)(e) of that directive is not entitled to deduct input tax declared by him in respect of supplies to him of services carried out by other taxable persons if he uses those supplies in order to provide services in other Member States and the other substantive and procedural conditions for the exercise of the right to deduct are satisfied?

(3) Are Article 168(a) and Article 169(a) of Directive 2006/112 to be interpreted as precluding national legislation, such as Article 70(4) of the ZDDS, under which a taxable person who has been registered for purposes of value added tax pursuant to Article 214(1)(d) or (e) of that directive, and not pursuant to Article 214(1)(a) thereof, has in no circumstances the right to deduct input tax?'

Consideration of the questions referred

28 By its three questions, which it is appropriate to consider together, the referring court asks, in essence, whether it is contrary to Article 168(a) and Article 169(a) of Directive 2006/112 for legislation of a Member State to prevent a taxable person, established in the territory of that Member State, from deducting input VAT due or paid in that Member State in respect of services provided by taxable persons established in other Member States and used to provide services in other Member States other than the Member State in which that taxable person is established, on the ground that that taxable person is identified for VAT purposes pursuant to one of the two circumstances referred to in Article 214(1)(d) and (e) of Directive 2006/112.

29 First, it is appropriate to point out that subparagraphs (d) and (e) of Article 214(1) of Directive 2006/112 refer, respectively, to the case in which the taxable person receives, in the territory of a Member State, services in respect of which it is liable for VAT pursuant to Article 196 of that directive and to the case in which the taxable person is established in the territory of a Member State and provides, in the territory of another Member State, services in respect of which solely the person to whom those services are provided is liable for VAT pursuant to Article 196. It follows from the decision to refer that that provision was transposed into Bulgarian law in paragraphs 1 and 2 of Article 97a of the ZDDS.

30 Second, it must be noted that, pursuant to the settled case-law of the Court, the fundamental principle of VAT neutrality requires that deduction of input VAT due or paid be allowed if the substantive requirements are satisfied, even if the taxable person has failed to comply with some of the formal requirements (see judgment of 9 July 2015, *Salomie and Oltean*, C-183/14, EU:C:2015:454, paragraph 58 and the case-law cited).

31 The Court has also held that identification for VAT purposes, provided for in Article 214 of Directive 2006/112, is only a formal requirement for the purposes of control, and cannot undermine, inter alia, the right to deduct VAT in the case where the substantive conditions that give rise to that right are satisfied (judgment of 9 July 2015, *Salomie and Oltean*, C-183/14, EU:C:2015:454, paragraph 60 and the case-law cited).

32 It follows, in particular, that a taxable person for VAT purposes cannot be prevented from exercising his right of deduction in respect of input VAT due or paid on the ground that he was not identified as a taxable person for those purposes before using the goods purchased in the context of his taxed activity (judgment of 9 July 2015, *Salomie and Oltean*, C-183/14, EU:C:2015:454, paragraph 61 and the case-law cited).

33 It also follows, a fortiori, that national legislation cannot prevent a taxable person from exercising its right to deduct input VAT due or paid on the ground that it is identified for VAT purposes pursuant to one of the cases referred to in Article 214(1)(d) and (e) of Directive 2006/112.

34 Taking into account the foregoing, the answer to the questions referred is that Directive 2006/112 must be interpreted as precluding legislation of a Member State that prevents a taxable person, established in the territory of that Member State, deducting input VAT due or paid in that Member State in respect of services provided by taxable persons established in other Member States and used to provide services in Member States other than the Member State in which that taxable person is established, on the ground that that taxable person is identified for VAT purposes pursuant to one of the two circumstances referred to in Article 214(1)(d) and (e) of Directive 2006/112.

35 However, it follows from the decision to refer that the national legislation could equally be interpreted differently.

36 It follows from the decision to refer that, since EBS was no longer eligible for the tax exemption scheme in Bulgaria, given the amount of its turnover, it could no longer be identified for VAT purposes under paragraphs 1 and 2 of Article 97a of the ZDDS, but had, on the other hand, to fall within the 'mandatory' registration scheme in accordance with Article 96 of the ZDDS.

37 It appears, therefore, to follow from the foregoing that only taxable persons subject to the tax exemption scheme in Bulgaria can be identified for VAT under paragraphs 1 and 2 of Article 97a of the ZDDS.

38 If that is the case, which it is for the referring court to determine, it alone having jurisdiction to interpret national law, it would be appropriate to reformulate the questions referred and find that they relate, in essence, to the question whether Article 168(a) and Article 169(a) of Directive 2006/112 preclude legislation of a Member State that prevents a taxable person, established in a territory of that Member State and eligible there for a tax exemption scheme, exercising its right to deduct input VAT due or paid in that Member State for services provided by taxable persons established in other Member States and used to provide services in Member States other than the Member State in which that taxable person is established.

39 In that regard, it must be pointed out that Article 168(a) of Directive 2006/112 provides that, in so far as the goods and services are used for the purposes of the taxed transactions of a taxable person, the taxable person is to be entitled, in the Member State in which he carries out those transactions, to deduct, from the VAT which he is liable to pay, the VAT due or paid in that Member State in respect of supplies to him of goods or services, carried out or to be carried out by another taxable person.

40 However, an undertaking established in the territory of a Member State and eligible for a tax exemption scheme in that Member State could not rely on a right to deduct input VAT due or paid under that provision. Article 289 of Directive 2006/112 provides that taxable persons subject to that tax exemption scheme 'shall not be entitled to deduct VAT in accordance with Articles 167 to 171 … and may not show the VAT on their invoices.'

41 Further, Article 169(a) of Directive 2006/112 states that, in addition to the deduction referred to in Article 168 of that directive, the taxable person is to be entitled to deduct the VAT referred to therein in so far as the goods and services are used for transactions relating to the activities referred to in the second subparagraph of Article 9(1) of the same directive, carried out outside the Member State in which that tax is due or paid, in respect of which VAT would be deductible if those transactions had been carried out within that Member State.

42 Pursuant to Article 169(a) of Directive 2006/112, the right to deduct therefore depends on whether that right exists where all of those transactions are carried out within the territory of the same Member State (see, by analogy, judgment of 22 December 2010, *RBS Deutschland Holdings*, C-277/09, EU:C:2010:810, paragraph 32). The Court has held, in that regard, that the right to deduct may be applied regardless of whether or not the output transaction is subject to a payment of VAT in other Member States (see also, by analogy, judgment of 22 December 2010, *RBS Deutschland Holdings*, C-277/09, EU:C:2010:810, paragraph 41).

43 However, as an undertaking eligible for the benefit of a tax exemption scheme in Bulgaria could not rely, in that Member State, on a right to deduct input VAT due or paid for services provided in that Member State, one of the conditions set out in Article 169(a) of Directive 2006/112 for eligibility for the right to deduct input VAT due or paid for services provided outside that Member State would not be fulfilled either.

44 It therefore must be held that Article 168(a) and Article 169(a) of Directive 2006/112 must be interpreted as meaning that they do not preclude legislation of a Member State that prevents a taxable person, established in the territory of a Member State and eligible for a tax exemption scheme there,

exercising its right to deduct input VAT due or paid in that Member State for services provided by taxable persons established in other Member States and used to provide services in Member States other than the Member State in which that taxable person is established.

45 Taking into account all of the considerations set out above, the answer to the questions referred is that Directive 2006/112 must be interpreted as meaning that it does preclude Member State legislation that prevents a taxable person, established in the territory of that Member State, deducting input VAT due or paid in that Member State in respect of services provided by taxable persons established in other Member States and used to provide services in Member States other than the Member State in which that taxable person is established, on the ground that that taxable person is identified for VAT purposes by virtue of one of the two cases referred to in Article 214(1)(d) and (e) of Directive 2006/112. However, Article 168(a) and Article 169(a) of Directive 2006/112 must be interpreted as meaning that they do not preclude legislation of a Member State that prevents a taxable person, established in the territory of that Member State and eligible there for a tax exemption scheme, exercising its right to deduct input VAT due or paid in that Member State for services provided by taxable persons established in other Member States and used to provide services in Member States other than the Member State in which that taxable person is established.

Costs

46 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:

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, as amended by Council Directive 2009/162/EU of 22 December 2009, must be interpreted as meaning that it does preclude Member State legislation that prevents a taxable person, established in the territory of that Member State, deducting input value added tax due or paid in that Member State in respect of services provided by taxable persons established in other Member States and used to provide services in Member States other than the Member State in which that taxable person is established, on the ground that that taxable person is identified for value added tax purposes by virtue of one of the two cases referred to in Article 214(1)(d) and (e) of Directive 2006/112, as amended by Directive 2009/162. However, Article 168(a) and Article 169(a) of Directive 2006/112, as amended by Directive 2009/162, must be interpreted as meaning that they do not preclude legislation of a Member State that prevents a taxable person, established in the territory of that Member State and eligible there for a tax exemption scheme, exercising its right to deduct input value added tax due or paid in that Member State for services provided by taxable persons established in other Member States and used to provide services in Member States other than the Member State in which that taxable person is established.

[Signatures]

i — The wording of the headwords, paragraphs 36, 37, 38, 40, 43, 44 and 45 and the operative part of this document has been modified after it was first put online.