

## Case C-188/09

**Dyrektor Izby Skarbowej w Białymstoku**

**v**

**Profaktor Kulesza, Frankowski, Józwiak, Orłowski sp. j,  
formerly Profaktor Kulesza, Frankowski, Trzaska sp. j**

(Reference for a preliminary ruling from the  
Naczelny Sąd Administracyjny (Poland))

(Reference for a preliminary ruling — VAT — Right to deduct —  
Reduction of the extent of the right to deduct in the event of breach of the  
obligation to use a cash register)

Judgment of the Court (Fourth Chamber), 29 July 2010 . . . . . I - 7643

### Summary of the Judgment

1. *Tax provisions — Harmonisation of laws — Turnover taxes — Common system of value added tax — Deduction of input tax*  
(Council Directives 67/227, Art. 2(1) and (2), and 77/388, Arts 2, 10(1) and (2), and 17(1) and (2))

2. *Tax provisions — Harmonisation of laws — Turnover taxes — Common system of value added tax — Directive 77/388 — National measures derogating therefrom — Meaning (Council Directive 77/388, Art. 27(1))*
  
3. *Tax provisions — Harmonisation of laws — Turnover taxes — Common system of value added tax — Prohibition on the levying of other domestic taxes that can be characterised as turnover taxes — Meaning of ‘turnover taxes’ — Scope (Council Directive 77/388, Art. 33)*

1. The common system of value added tax, as defined in Article 2(1) and (2) of First Directive 67/227 on the harmonisation of legislation of Member States concerning turnover taxes and in Articles 2, 10(1) and (2) and 17(1) and (2) of Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes, as amended by Directive 2004/7, does not preclude a Member State from imposing a temporary restriction on the extent of the right of taxable persons who have not complied with a formal requirement to keep accounting records of their sales to deduct input tax paid, on condition that the sanction thus

provided for comply with the principle of proportionality.

In so far as it seeks to ensure that the tax is levied accurately and to prevent tax evasion, such an obligation is among the measures which Member States may adopt on the basis of Article 22(8) of the Sixth Directive. In that context, by providing that, in cases where that accounting obligation is not complied with, the proportion of the tax which the taxable person may deduct is reduced by 30%, that measure must be regarded as constituting an administrative sanction, the

deterrent effect of which is intended to ensure compliance with that obligation. It is, however, for the referring court to check that the detailed rules for determining the amount of the sanction and the conditions in which the facts relied on by the tax authorities are recorded, investigated and, as the case may be, adjudicated upon to implement that sanction, do not render the right to deduct value added tax meaningless or, therefore, adversely affect the principle that the tax burden must be neutral in relation to all economic activities. In that regard, a withholding rate limited to 30%, which thus preserves the greater part of the input tax paid, appears neither excessive nor inadequate for ensuring that the sanction in question is deterrent and, therefore, effective. Moreover, such a reduction on the basis of the amount of tax paid by the taxable person is not manifestly without any link to the level of the economic activity of the person concerned. Furthermore, in so far as the purpose of that sanction is not to correct accounting errors but to prevent them, its flat-rate nature, resulting from the application of the fixed rate of 30%, and, consequently, the lack of any correspondence between the amount of that sanction and the extent of any errors which may have been made by the taxable person cannot be taken into account in the assessment of whether that sanction is proportionate.

(see paras 27, 28, 34-37, 39, operative part 1)

2. National provisions, which provide that an administrative sanction be imposed on persons taxable for the purposes of value added tax where it is found that they have not complied with the obligation to keep accounting records of turnover and the amount of tax due through the use of a cash register, do not constitute 'special measures for derogation' intended to prevent certain types of tax evasion or avoidance within the meaning of Article 27(1) of Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes, as amended by Directive 2004/7. Such a measure cannot fall within the scope of Article 27(1), since it constitutes a measure referred to in Article 22(8) of the Sixth Directive, by virtue of which 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.

(see paras 41-43, operative part 2)

3. Article 33 of Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes,

as amended by Directive 2004/7, does not preclude the maintenance of provisions such as those of the Polish Law on the Tax on Goods and Services, which provide that an administrative sanction may be imposed on persons taxable for the purposes of value added tax if it is established that they have failed to use a cash register to record turnover and the

amount of the tax due in their accounting documents.

(see para. 49, operative part 3)