Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

31 January 2013*

(Taxation — VAT — Directive 2006/112/EC — Principle of fiscal neutrality — Right of deduction — Refusal — Article 203 — Entry of the VAT on the invoice — Chargeability — Existence of a taxable transaction — Identical determination in respect of the issuer of the invoice and its recipient — Necessity)

In Case C-642/11,

REQUEST for a preliminary ruling under Article 267 TFEU from the Administrativen sad Varna (Bulgaria), made by decision of 2 December 2011, received at the Court on 15 December 2011, in the proceedings

Stroy trans EOOD

v

Direktor na Direktsia 'Obzhalvane i upravlenie na izpalnenieto' – Varna pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite,

THE COURT (Third Chamber),

composed of R. Silva de Lapuerta, acting as President of the Third Chamber, K. Lenaerts, G. Arestis, J. Malenovský and T. von Danwitz (Rapporteur), Judges,

Advocate General: P. Cruz Villalón,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— Direktor na Direktsia 'Obzhalvane i upravlenie na izpalnenieto' – Varna pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite, by S. Zlateva, acting as Agent,

— the Bulgarian Government, by T. Ivanov and D. Drambozova, acting as Agents,

— the European Commission, by L. Lozano Palacios and D. Roussanov, acting as Agents,

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

gives the following

* Language of the case: Bulgarian.

Judgment

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

2 The request has been made in proceedings between Stroy trans EOOD ('Stroy trans') and the Direktor na Direktsia 'Obzhalvane i upravlenie na izpalnenieto' – Varna pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite (Director of the Appeals and Enforcement Management Directorate, Varna, at the Central Administration of the National Revenue Agency) concerning the latter's refusal to allow the right to deduct value added tax ('VAT') on the ground that it was not established that the input transactions actually took place.

Legal context

European Union law

3 Under Article 2(1)(a) and (c) of Directive 2006/112, the supply of goods and services for consideration within the territory of a Member State by a taxable person acting as such is to be subject to VAT.

4 Article 62 of Directive 2006/112 provides:

'For the purposes of this Directive:

(1) "chargeable event" shall mean the occurrence by virtue of which the legal conditions necessary for VAT to become chargeable are fulfilled;

(2) VAT shall become "chargeable" when the tax authority becomes entitled under the law, at a given moment, to claim the tax from the person liable to pay, even though the time of payment may be deferred.'

5 Article 63 of the directive provides that '[t]he chargeable event shall occur and VAT shall become chargeable when the goods or the services are supplied'.

6 Under Article 167 of the directive, '[a] right of deduction shall arise at the time the deductible tax becomes chargeable'.

7 Article 168(a) of the directive states:

'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.'

8 Article 178 of that directive provides:

'In order to exercise the right of deduction, a taxable person must meet the following conditions:

(a) for the purposes of deductions pursuant to Article 168(a), in respect of the supply of goods or services, he must hold an invoice drawn up in accordance with Articles 220 to 236 and Articles 238, 239 and 240;

…’

9 In Section 1 (‘Persons liable for payment of VAT to the tax authorities’) of Chapter 1 (‘Obligation to pay’) of Title XI (‘Obligations of taxable persons and certain non-taxable persons’), Article 203 of the directive states:

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

Bulgarian law

10 Under Article 70(5) of the Law on value added tax (Zakon za danak varhu dobavenata stoynost, DV No 63 of 4 August 2006), in the version applicable to the dispute in the main proceedings (‘the ZDDS’), ‘[a] right to deduct input VAT cannot be claimed if that VAT has been improperly invoiced’.

11 Article 82(1) of the ZDDS provides that the ‘tax shall be payable by a taxable person registered in accordance with this Law who is the supplier of a taxable supply …’.

12 Under Article 85 of the ZDDS, VAT is payable by any person who enters the VAT on an invoice.

13 Article 113(1) and (2) of the ZDDS states:

‘(1) Any taxable supplier who carries out a supply of goods or services or who receives a payment in advance to that end shall issue an invoice corresponding to that transaction …

(2) The invoice shall be issued at least in duplicate, for the supplier and for the recipient.’

14 According to Article 115(1) of the ZDDS, the supplier is obliged to issue a note in relation to the invoice in the event of amendment of the taxable amount of a transaction or of cancellation of a transaction for which an invoice has been issued.

15 Article 116 of the ZDDS states:

‘(1) Corrections and additions in invoices and notes relating thereto are not permitted. Documents containing errors or corrections must be cancelled and new documents must be issued.

…

(3) Invoices issued and notes relating thereto on which tax has been entered, although it should not have been, shall also be considered to be documents containing an error.

(4) If documents containing errors or corrections are included in the accounts of the supplier or the recipient of supplies, a statement regarding its cancellation must also be drawn up for each of the parties, which includes the following:

1. the reason for the cancellation;

2. the number and date of the cancelled document;

3. the number and date of the new document issued;

4. the signatures of the persons who have drawn up the statement for each of the parties.

…’

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

16 Stroy trans was registered under the ZDDS and its main activities were road freight transport and the provision of mechanised services with special equipment. In 2009 it deducted the input VAT resulting from a number of invoices concerning the supply of diesel fuel, which were issued by Hadzhi 98 EOOD and Dieseltrans-73 EOOD ('Dieseltrans-73') respectively.

17 The tax authorities carried out audits of those two companies and of their upstream suppliers. In the course of those audits a number of the documents requested were produced.

18 Following the audits, the tax authorities took the view that the documents produced did not enable the route of the fuel to be retraced and that there was no actual supply of goods in the case of the invoices at issue, so that the conditions necessary for the right to deduct input VAT to arise were not fulfilled. The tax authorities therefore sent Story trans a tax adjustment notice refusing the deduction of VAT in respect of a total amount of BGN 42759,22 and imposing interest for late payment ('the disputed tax adjustment notice').

19 After the disputed tax adjustment notice was confirmed by the Direktor na Direktsia 'Obzhalvane i upravlenie na izpalnenieto' – Varna pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite by decision of 28 February 2011, Stroy trans brought an action before the Administrativen sad Varna (Administrative Court, Varna), submitting that the invoices at issue corresponded to actual supplies of goods and that there was thus no basis for refusing the right of deduction.

20 In the course of the main proceedings, the conclusions of an expert report on accounting that had been requested were accepted, according to which, in the light of the accounting data of Dieseltrans-73, the quantities of fuel sold were available at the time of each sale.

21 Also, Stroy trans adduced a tax audit report concerning its supplier Dieseltrans-73 and a tax adjustment notice addressed to the latter, which were drawn up before the disputed tax adjustment notice. According to the documents adduced, Dieseltrans-73 was refused the right to deduct input VAT for the acquisition of fuel, in part on the ground that the respective vendors had not submitted any evidence, so that it had to be concluded that there had been no supply to Dieseltrans-73, and in part on the ground that the original invoices for the purchases had not been submitted. As regards, on the other hand, the output VAT declared by Dieseltrans-73 concerning the sale of fuel, the view was taken that, 'in the course of the tax audit, no grounds have been established for an adjustment of the taxable amount for the transactions effected and the VAT entered on the invoices'.

22 Stroy trans contends that the tax adjustment notice addressed to its supplier Dieseltrans-73 proves that the supplies relied upon to establish its right of deduction took place inasmuch as in that notice the tax authorities did not adjust the output tax declared by that supplier.

23 According to the referring court, the case-law of the Varhoven administrativen sad (Supreme Administrative Court) is not homogenous on the question of proving by means of a tax adjustment notice addressed to the supplier of the taxable person wishing to exercise the right of deduction that a supply has actually taken place. Some of that court's chambers take the view that such a notice is just one of the pieces of evidence and cannot alone prove that there was actually a supply of goods. According to other chambers, the fact that such a notice does not contain any adjustment of the VAT invoiced by the supplier means that the tax authorities themselves have issued an official document testifying that the transaction actually took place and that the corresponding VAT was invoiced correctly.

24 The referring court states that it interprets Article 85 of the ZDDS, which transposed Article 203 of Directive 2006/112, as imposing a special requirement that VAT entered on an invoice is chargeable, whether or not there is a justification for the invoice and the entry of the VAT on it. It also considers

that, since the national provisions lay down that correction and cancellation of invoices are to be carried out by the issuer of the invoices and provide for no possibility of correction by the tax authorities, the VAT entered on an invoice is payable in itself and the assessment office is not entitled to correct this tax.

25 In those circumstances, the Administrativen sad Varna decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘1. Must Article 203 of [Directive 2006/112] be interpreted as meaning that VAT entered by a person on an invoice is payable regardless of whether there are grounds for entering it on the invoice (lack of a supply or a payment), and as meaning that the authorities who supervise the application of the [ZDDS] do not have the power to correct the [VAT] entered on the invoice by a person in the light of a national provision pursuant to which an invoice may be corrected only by its issuer?

2. Are the principles of fiscal neutrality, proportionality and the protection of legitimate expectations infringed by a practice in the administration and in the courts, under which one party (the recipient of the invoice) is refused the right to deduct input VAT by means of a tax adjustment notice, whilst in relation to the other party (the issuer of the invoice) no adjustment of the VAT entered on the invoice is carried out, again by means of a tax adjustment notice, specifically in the following cases:

— the issuer of the invoice did not submit any documents for the purposes of the tax audit conducted in relation to him;

— the issuer of the invoice submitted documents during the tax audit procedure but his suppliers did not submit any evidence or, on the basis of the evidence submitted, it is not possible to establish that the goods or services were actually supplied;

— during the tax audit procedure in respect of the issuer of the invoices, the supplies at issue in the chain were not reviewed?’

Consideration of the questions referred

Question 1

26 By its first question, the referring court asks, in essence, whether Article 203 of Directive 2006/112 must be interpreted as meaning that the VAT entered by a person on an invoice is payable by him regardless of whether a taxable transaction actually exists, and whether it can be inferred from the mere fact that the tax authorities did not correct, in a tax adjustment notice addressed to the issuer of that invoice, the VAT declared by the latter that those authorities have acknowledged that the invoice corresponded to an actual taxable transaction.

27 It should be noted first of all that, whilst relating to the existence of a tax debt owed to the tax authorities by the issuer of an invoice, the question is raised in proceedings between those authorities and the recipient of the contested invoices. Those proceedings relate to the latter’s right to deduct the VAT entered on the invoices submitted, which was refused on the ground that the invoices did not correspond to actual taxable transactions, a fact which is disputed by the taxable person.

28 In those proceedings, to which the issuer of the contested invoices is not a party, the obligations owed by the issuer to the tax authorities are relevant only indirectly, in that a tax adjustment notice addressed to it was adduced as evidence that the taxable transactions actually existed.

29 The Court has held in relation to the provision that was the predecessor of Article 203 of Directive 2006/112, namely Article 21(1)(c) 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 91/680/EEC of 16 December 1991 (OJ 1991 L 376, p. 1), that, according to that provision, any person who mentions VAT on an invoice or other document serving as invoice is liable to pay that tax. In particular, those persons are liable to pay VAT mentioned on an invoice independently of any obligation to pay it on account of there being a transaction subject to VAT (see Case C-566/07 *Stadeco* [2009] ECR I-5295, paragraph 26 and the case-law cited).

30 It is true that, in accordance with Articles 167 and 63 of Directive 2006/112, the right to deduct VAT invoiced is linked, as a general rule, to the actual performance of a taxable transaction (see Case C-536/03 *António Jorge* [2005] ECR I-4463, paragraphs 24 and 25) and the exercise of that right does not extend to VAT which is payable, under Article 203 of the directive, solely because it is entered on the invoice (see, inter alia, Case C-342/87 *Genius* [1989] ECR 4227, paragraphs 13 and 19, and Case C-35/05 *Reemtsma Cigarettenfabriken* [2007] ECR I-2425, paragraph 23).

31 However, the risk of loss of tax revenue is not in principle completely eliminated as long as the recipient of an invoice incorrectly showing VAT could still use it for the purposes of such deduction under Article 178(a) of Directive 2006/112 (see, to that effect, *Stadeco*, paragraph 29).

32 Accordingly, the obligation under Article 203 of that directive seeks to eliminate the risk of loss of tax revenue which the right of deduction provided for in Article 167 et seq. of the directive might entail (see *Stadeco*, paragraph 28).

33 Having regard to that objective, the aforesaid obligation is limited by the possibility, to be provided for by the Member States in their national legal systems, of correcting any tax improperly invoiced where the issuer of the invoice shows that he acted in good faith or where he has, in sufficient time, wholly eliminated the risk of any loss of tax revenue (see, to that effect, *Genius*, paragraph 18; Case C-454/98 *Schmeink & Cofreth and Strobel* [2000] ECR I-6973, paragraphs 56 to 61 and 63; and Joined Cases C-78/02 to C-80/02 *Karageorgou and Others* [2003] ECR I-13295, paragraph 50).

34 In the light, first, of that possibility of correction and, second, of the risk that the invoice incorrectly showing VAT could be used for the purpose of exercising the right of deduction, the obligation provided for in Article 203 of Directive 2006/112 cannot be regarded as conferring on the payment due the character of a penalty.

35 Moreover, it follows from the foregoing that, to the extent that the issuer of an invoice does not rely on one of the cases in which improperly invoiced VAT can be corrected, referred to in paragraph 33 above, the tax authorities are not obliged, in the context of a tax audit of that person, to determine whether the VAT invoiced and declared corresponds to taxable transactions which were actually carried out by him.

36 In the absence of such an obligation, it cannot be inferred from the mere fact that the tax authorities did not correct the VAT declared by the issuer of the invoice that they have acknowledged that the invoices issued by him corresponded to actual taxable transactions.

37 However, European Union law does not preclude the competent authority from checking the existence of the transactions invoiced by a taxable person and rectifying, where necessary, the tax debt resulting from the declarations made by the taxable person. The outcome of such a check is, like the declaration and the payment, by the issuer of the invoice, of invoiced VAT, one factor to be taken into account by the national court when assessing whether a taxable transaction conferring the right of deduction on the recipient of an invoice in a specific case exists.

38 In the light of the foregoing, the answer to the first question is that Article 203 of Directive 2006/112 must be interpreted as meaning that:

— the VAT entered by a person on an invoice is payable by him regardless of whether a taxable transaction actually exists;

— it cannot be inferred from the mere fact that the tax authorities did not correct, in a tax adjustment notice addressed to the issuer of that invoice, the VAT declared by the latter that those authorities have acknowledged that the invoice corresponded to an actual taxable transaction.

Question 2

39 By the second question, the referring court asks, in essence, whether the principles of fiscal neutrality, proportionality and the protection of legitimate expectations must be interpreted as precluding the recipient of an invoice from being refused the right to deduct input VAT even though, in the tax adjustment notice addressed to the issuer of that invoice, the VAT declared by the latter was not adjusted.

40 This raises the question whether European Union law requires the issue as to whether a supply of goods or services actually exists to be determined identically in respect of the issuer of the invoice and its recipient.

41 So far as concerns the treatment of VAT that has been improperly invoiced in the absence of a taxable transaction, it follows from Directive 2006/112 that the two traders involved are not necessarily treated identically in so far as the issuer of the invoice has not corrected it, as is apparent from paragraphs 29 to 33 above.

42 On the one hand, the issuer of an invoice is liable to pay the VAT entered on that invoice even if there is no taxable transaction, in accordance with Article 203 of Directive 2006/112. On the other hand, exercise of the right of deduction by the recipient of an invoice is limited solely to tax corresponding to a transaction subject to VAT, in accordance with Articles 63 and 167 of that directive.

43 In such a situation, compliance with the principle of fiscal neutrality is ensured by the possibility, to be provided for by the Member States and noted in paragraph 33 above, of correcting any tax improperly invoiced where the issuer of the invoice shows that he acted in good faith or where he has, in sufficient time, wholly eliminated the risk of any loss of tax revenue.

44 It follows that the principle of fiscal neutrality does not preclude the recipient of an invoice from being refused deduction of input VAT because there is no taxable transaction, even though, in the tax adjustment notice addressed to the issuer of the invoice, the VAT declared by the latter was not adjusted.

45 As is apparent from the order for reference, in the main proceedings the tax authorities inferred that there was no taxable supply from, in particular, the fact that the supplier, or the latter's suppliers, did not submit all the documents required during a tax audit. Since that conclusion is contested by the claimant, it is for the national court to verify it, by carrying out, in accordance with the rules of evidence of national law, an overall assessment of all the facts and circumstances of the case (see, by analogy, Case C-273/11 *Mecsek-Gabona* [2012] ECR, paragraph 53, and Case C-285/11 *Bonik* [2012] ECR, paragraph 32).

46 In this connection, it is true that preventing possible tax evasion, avoidance and abuse is an objective recognised and encouraged by Directive 2006/112 and European Union law cannot be relied on for fraudulent or abusive ends (see, inter alia, Case C-255/02 *Halifax and Others* [2006] ECR I-1609, paragraphs 68 and 71; Joined Cases C-80/11 and C-142/11 *Mahagében and Dávid* [2012] ECR, paragraph 41; and *Bonik*, paragraphs 35 and 36).

47 It is therefore incumbent upon the national authorities and courts to refuse the right of deduction where it is established, on the basis of objective evidence, that that right is being relied on for fraudulent or abusive ends (see, to that effect, Joined Cases C-439/04 and C-440/04 *Kittel and Recolta Recycling* [2006] ECR I-6161, paragraph 55; *Mahagében and Dávid*, paragraph 42; and *Bonik*, paragraph 37).

48 Nevertheless, according to case-law that is also well-established, it is incompatible with the rules governing the right of deduction under Directive 2006/112 to impose a penalty, in the form of refusal of that right, on a taxable person who did not know, and could not have known, that the transaction concerned was connected with fraud committed by the supplier, or that another transaction forming part of the chain of supply prior or subsequent to the transaction carried out by the taxable person was vitiated by VAT fraud (see, inter alia, Joined Cases C-354/03, C-355/03 and C-484/03 *Optigen and Others* [2006] ECR I-483, paragraphs 52 and 55; *Kittel and Recolta Recycling*, paragraphs 45, 46 and 60; *Mahagében and Dávid*, paragraph 47; and *Bonik*, paragraph 41).

49 Furthermore, the Court held in *Mahagében and Dávid*, paragraphs 61 to 65, that the tax authorities cannot, as a general rule, require the taxable person wishing to exercise the right to deduct VAT, first, to ensure that the issuer of the invoice relating to the goods and services in respect of which the exercise of that right is sought has the capacity of a taxable person, that he was in possession of the goods at issue and was in a position to supply them and that he has satisfied his obligations as regards declaration and payment of VAT, in order to be satisfied that there are no irregularities or fraud at the level of the traders upstream, or, second, to be in possession of documents in that regard.

50 It follows that a national court which is called upon to decide whether, in a particular case, there was no taxable transaction, and before which the tax authorities have relied in particular on irregularities committed by the issuer of the invoice or one of the issuer's suppliers, such as omissions in the accounts, must ensure that the assessment of the evidence does not result in the case-law recalled in paragraph 48 above being rendered meaningless and in the recipient of the invoice being indirectly obliged to carry out checks of the other party to the contract which, in principle, are not a matter for him.

51 Where, in a situation such as that at issue in the main proceedings, refusal of the right of deduction results from an application of Directive 2006/112 that takes account of the requirements flowing from paragraphs 47 to 50 above, there is no basis for presuming that the principles of proportionality and the protection of legitimate expectations preclude such a refusal.

52 In the light of the foregoing, the answer to the second question is that the principles of fiscal neutrality, proportionality and the protection of legitimate expectations must be interpreted as not precluding the recipient of an invoice from being refused the right to deduct input VAT because there is no actual taxable transaction even though, in the tax adjustment notice addressed to the issuer of that invoice, the VAT declared by the latter was not adjusted. However, if, in the light of fraud or irregularities, committed by the issuer of the invoice or upstream of the transaction relied upon as the basis for the right of deduction, that transaction is considered not to have been actually carried out, it must be established, on the basis of objective factors and without requiring of the recipient of the invoice checks which are not his responsibility, that he knew or should have known that that transaction was connected with VAT fraud, a matter which it is for the referring court to determine.

Costs

53 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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 (Third Chamber) hereby rules:

1. **Article 203 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning that:**

   — **the value added tax entered by a person on an invoice is payable by him regardless of whether a taxable transaction actually exists;**

   — **it cannot be inferred from the mere fact that the tax authorities did not correct, in a tax adjustment notice addressed to the issuer of that invoice, the value added tax declared by the latter that those authorities have acknowledged that the invoice corresponded to an actual taxable transaction.**

2. **The principles of fiscal neutrality, proportionality and the protection of legitimate expectations must be interpreted as not precluding the recipient of an invoice from being refused the right to deduct input value added tax because there is no actual taxable transaction even though, in the tax adjustment notice addressed to the issuer of that invoice, the value added tax declared by the latter was not adjusted. However, if, in the light of fraud or irregularities, committed by the issuer of the invoice or upstream of the transaction relied upon as the basis for the right of deduction, that transaction is considered not to have been actually carried out, it must be established, on the basis of objective factors and without requiring of the recipient of the invoice checks which are not his responsibility, that he knew or should have known that that transaction was connected with value added tax fraud, a matter which it is for the referring court to determine.**

[Signatures]