



## Reports of Cases

**Case C-335/19**

**E. Sp. z o.o. Sp. k.**

**v**

**Minister Finansów**

(Request for a preliminary ruling from the Naczelny Sąd Administracyjny)

**Judgment of the Court (First Chamber), 15 October 2020**

(Reference for a preliminary ruling – Common system of value added tax (VAT) – Directive 2006/112/EC – Article 90 – Reduction of the VAT taxable amount – Total or partial non-payment of the price – Conditions imposed by national legislation for the exercise of the right to reduction – Condition that the debtor must not be the subject of insolvency or winding-up proceedings – Condition that the creditor and the debtor must be subject to VAT)

*Harmonisation of fiscal legislation – Common system of value added tax – Taxable amount – Reduction in the case of total or partial non-payment – National measures derogating therefrom – Adjustment of the taxable amount and of the VAT chargeable – National legislation making the reduction of the taxable amount subject to the creditor's and debtor's liability for VAT, the debtor not being subject to insolvency proceedings – Not permissible*

*(Council Directive 2006/112, Art. 90(1) and Art. 273)*

(see paragraphs 21-23, 33-35, 46, 48, 50, 53, operative part)

### **Résumé**

E., a company established in Poland and which is registered for value added tax (VAT), provides tax advice and charges VAT at the standard rate on the services provided. E. sent one of its customers, registered as a taxable person for VAT purposes, a VAT invoice in respect of services taxable in Polish territory. That customer was wound up after the expiry of the payment deadline, while remaining registered as a taxable person for VAT purposes. As the invoice was not settled, E. submitted to the Minister for Finance a request for a tax ruling in order to ascertain whether, despite the fact that its customer had been wound up after the supply of the services concerned had been carried out, it was entitled, on the ground that the other conditions laid down by the national VAT legislation were satisfied, to a reduction in the VAT taxable amount on account of non-payment of the debt arising from the invoice.

By a tax ruling, the Minister for Finance replied to that request in the negative. The minister stated that Article 90 of Directive 2006/112<sup>1</sup> confers on taxable persons the right to reduce the VAT taxable amount only under conditions determined by each Member State. Those conditions are laid down by the national VAT legislation. According to the Minister for Finance, if one of those conditions, such as the requirement that the debtor must not be the subject of winding up proceedings, is not satisfied, the taxable person is not entitled to rely on the right to a reduction by deriving it directly from EU law.

After unsuccessfully challenging the tax ruling before the Polish court with jurisdiction at first instance, E. appealed on a point of law to the Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland), on the ground that the court of first instance had wrongly held that the disputed provisions of the national VAT legislation did not infringe the requirements resulting from EU law.

The relevant provisions of national legislation make the right of the taxable person to reduce the VAT taxable amount in the case of a debt which is likely to be irrecoverable subject to the condition that, on the day of delivery of the goods or provision of the services and on the day preceding that on which the adjusted tax return seeking that reduction is filed, the debtor is registered as a taxable person for VAT purposes and is not subject to insolvency or winding up proceedings and that, on the day preceding that on which the adjusted tax return is filed, the creditor is itself still registered as a taxable person for VAT purposes. Article 90(1) of Directive 2006/112, which refers *inter alia* to cases of total or partial non-payment of the price after the supply which gave rise to the payment of VAT takes place, requires the Member States to reduce, in accordance with the conditions which they lay down, the taxable amount and, consequently, the amount of VAT payable by the taxable person whenever, after a transaction has been concluded, part or all of the consideration has not been received by the taxable person. Article 90(2) of Directive 2006/112 allows Member States to derogate from the rule referred to in Article 90(1) of that directive in situations of total or partial non-payment of the transaction price.

As it had doubts as to the discretion granted to the Member States to determine, in their national law, the conditions for the application of the provisions of Article 90 of Directive 2006/112, the national court referred questions to the Court of Justice for a preliminary ruling on the interpretation of that provision.

In its judgment of 15 October 2020, the Court held that Article 90 of Directive 2006/112 precludes national legislation which makes the reduction of the VAT taxable amount subject to the condition that, on the day of delivery of the goods or provision of the services and on the day preceding that on which the adjusted tax return seeking that reduction is filed, the debtor is registered as a taxable person for the purposes of VAT and is not the subject of insolvency or winding-up proceedings, and that, on the day preceding the date of filing of the adjusted tax return, the creditor is itself still registered as a taxable person for the purposes of VAT.

In that regard, the Court considered whether the restriction that the conditions laid down by the national legislation entail for taxable persons such as E. is justified by the need to take account of the uncertainty as to whether the non-payment is definitive.

<sup>1</sup> Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1).

The Court thus ruled that conditions which make the reduction of the VAT taxable amount conditional on the registration of the debtor as a taxable person for VAT purposes on the day of delivery of the goods or provision of the services and on the creditor and the debtor retaining their status as taxable persons on the day preceding that on which the adjusted tax return is filed cannot be justified by that need. It further specified that, while it is true that the right of a taxable person to reduce the taxable amount after the conclusion of a transaction implies the obligation for the other party to that transaction, for its part, to adjust the amount of VAT deductible, the guarantee of a symmetrical reduction in the VAT taxable amount payable and in the amount of VAT deductible does not depend on whether the two parties are liable to VAT. Furthermore, the Court held that the requirement that the creditor and debtor are subject to VAT cannot be justified either by the prevention of irregularities or abuses or in the light of the provisions of Article 273 of Directive 2006/112.

As regards the condition making the reduction of the tax base subject to the debtor not being the subject of insolvency or winding up proceedings on the day of delivery of the goods or provision of the services and on the day preceding that on which the adjusted tax return is filed, the Court held that, by depriving the creditor of its right to a reduction on the ground that it cannot be established that the debt was definitely irrecoverable before the end of the insolvency or winding up proceedings, that condition takes account of the inherent uncertainty as to whether the non-payment is definitive. However, such uncertainty could also be taken into account by granting the reduction of the VAT taxable amount when the creditor demonstrates, before the end of the insolvency or winding-up proceedings, a reasonable probability that the debt will not be honoured, even if that taxable base is re-evaluated upwards in the event that payment nonetheless occurs. Such a rule would be an equally effective means of attaining the objective pursued, while being less onerous for the creditor.

Finally, the Court noted that, since Article 90(1) of Directive 2006/112 has direct effect, a taxable person such as E., who does not satisfy the national conditions which do not comply with that provision, may rely on that provision before the national courts against the State in order to obtain a reduction in the taxable amount, it being for the national court before which proceedings have been brought to set aside those conditions which do not comply, in accordance with the principle of the primacy of EU law.