Reports of Cases

JUDGMENT OF THE COURT (Ninth Chamber)

15 April 2021 *

(Reference for a preliminary ruling – Common system of value added tax (VAT) – Directive 2006/112/EC – Article 273 – Overstatement in the tax return of the amount of the refund of VAT – Error of assessment by the taxable person concerning the taxable nature of a transaction – Correction of the tax return following an audit – Penalty of an amount equal to 20% of the overstated VAT reimbursement – Principle of proportionality)

In Case C-935/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Wojewódzki Sąd Administracyjny we Wrocławiu (Regional Administrative Court, Wrocław, Poland), made by decision of 3 October 2019, received at the Court on 23 December 2019, in the proceedings

Grupa Warzywna sp. z o.o.

v

Dyrektor Izby Administracji Skarbowej we Wrocławiu,

THE COURT (Ninth Chamber),

composed of N. Piçarra, President of the Chamber, S. Rodin and K. Jürimäe (Rapporteur), Judges,

Advocate General: G. Pitruzzella,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Grupa Warzywna sp. z o.o., by M. Pacyna, and K. Kocowski, adwokaci, and by S. Ząbczyk, doradca podatkowy,

– the Polish Government, by B. Majczyna, acting as Agent,

– the European Commission, by J. Jokubauskaitė and M. Siekierzyńska, acting as Agents,

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

* Language of the case: Polish.

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 4(3) TEU, Article 325 TFEU and Articles 2, 250 and 273 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1, 'the VAT Directive') and of the principle of proportionality.

2 The request has been made in the context of proceedings between Grupa Warzywna sp. z o.o. and Dyrektor Izby Administracji Skarbowej we Wrocławiu (Director of the Tax Administration Chamber in Wrocław, Poland) concerning the imposition of an administrative penalty on that company following a tax audit.

Legal context

European Union law

3 Article 2(1)(a) of the VAT Directive provides:

'The following transactions shall be subject to [value added tax (VAT)]:

(a) the supply of goods for consideration within the territory of a Member State by a taxable person acting as such;'

4 Article 12(1) and (2) of that directive states:

'(1) Member States may regard as a taxable person anyone who carries out, on an occasional basis, a transaction relating to the activities referred to in the second subparagraph of Article 9(1) and in particular one of the following transactions:

(a) the supply, before first occupation, of a building or parts of a building and of the land on which the building stands;

…

(2) For the purposes of paragraph 1(a), "building" shall mean any structure fixed to or in the ground.

…

Member States may apply criteria other than that of first occupation, such as the period elapsing between the date of completion of the building and the date of first supply, or the period elapsing between the date of first occupation and the date of subsequent supply, provided that those periods do not exceed five years and two years respectively.'

5 Article 135(1) of that directive provides:

‘Member States shall exempt the following transactions:

…

(j) the supply of a building or parts thereof, and of the land on which it stands, other than the supply referred to in point (a) of Article 12(1);

…’

6 Under Article 137 of that directive:

‘(1) Member States may allow taxable persons a right of option for taxation in respect of the following transactions:

…

(b) the supply of a building or of parts thereof, and of the land on which the building stands, other than the supply referred to in point (a) of Article 12(1);

…

(2) Member States shall lay down the detailed rules governing exercise of the option under paragraph 1.

…’

7 Article 250 of the VAT Directive provides:

‘(1) Every taxable person shall submit a VAT return setting out all the information needed to calculate the tax that has become chargeable and the deductions to be made including, in so far as is necessary for the establishment of the basis of assessment, the total value of the transactions relating to such tax and deductions and the value of any exempt transactions.

(2) Member States shall allow, and may require, the VAT return referred to in paragraph 1 to be submitted by electronic means, in accordance with conditions which they lay down.’

8 According to Article 273 of that directive:

‘Member States may impose other obligations which they deem necessary to ensure the correct collection of VAT and to prevent evasion, subject to the requirement of equal treatment as between domestic transactions and transactions carried out between Member States by taxable persons and provided that such obligations do not, in trade between Member States, give rise to formalities connected with the crossing of frontiers.

The option under the first paragraph may not be relied upon in order to impose additional invoicing obligations over and above those laid down in Chapter 3.’

Polish law

9 Article 43(1), point (10) of the ustawa o podatku od towarów i usług (Law on the tax on goods and services), of 11 March 2004 (Dz. U. of 2017, item 1221), in the version applicable to the main proceedings (the 'Law on VAT'), provides:

'The following are exempt from tax: … the supply of buildings, civil engineering works or parts thereof, except where:

(a) the supply is made within the framework of the first occupation or prior to the first occupation;

(b) the period between the first occupation and the supply of the building, civil engineering works or parts thereof was less than two years …'

10 Article 43(10) of the Law on VAT prescribes:

'A taxable person may waive the exemption referred to in paragraph 1, point (10), and opt for taxation of the supply of buildings, civil engineering works or parts thereof on condition that both the supplier and the purchaser of the building, civil engineering work or part thereof:

(1) are registered as active VAT taxable persons;

(2) submit, before the date of supply of these facilities, to the relevant head of the tax office for the purchaser a joint declaration that they opt for the taxation of the supply of the building, civil engineering work or part thereof.'

11 Under Article 112b(1) and (2) of that law:

'1. Where it is found that the taxable person:

(1) indicated in the submitted tax return:
   (a) an amount of tax liability lower than the amount due;
   (b) an amount of tax difference to be refunded or an amount of input tax to be refunded greater than the amount due;
   (c) an amount of tax credit to be deducted from the amount of tax due for subsequent tax periods greater than the amount due;
   (d) an amount of tax credit to be refunded, an amount of input tax to be refunded or an amount of tax credit to be deducted from the amount of tax due for subsequent accounting periods instead of showing the amount of tax liability to be paid to the tax office;

(2) failed to submit a tax return and failed to pay the amount of tax due:

– the head of the tax office or the head of the customs and tax office shall determine the corresponding correct amounts and shall impose an additional tax liability corresponding to 30% of the understated tax liability or 30% of the overstated tax credit to be refunded, the amount of the input tax to be refunded or the amount of the tax credit to be deducted from the amount of tax due for subsequent tax periods.

2. If, following the completion of a tax audit or customs and fiscal audit or during the customs and fiscal audit, in the cases referred to in:

(1) paragraph 1, point (1), the taxable person submitted a corrected tax return taking into account the irregularities found and paid the amount of the tax liability or returned the amount of the undue refund;

(2) paragraph 1, point (2), the taxable person submitted a tax return and paid the amount of the tax liability

– the amount of the additional tax liability shall be 20% of the understated tax liability or 20% of the overstated tax credit to be refunded, the amount of the input tax to be refunded or the amount of the tax credit to be deducted from the amount of tax due for subsequent tax periods.'

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

12 Grupa Warzywna acquired an immovable property, which had been occupied for more than two years. On the declaration in the notarial act concerning the acquisition of that property, its price was stated as a gross amount, thus including VAT. The seller of that property, furthermore, issued a bill which mentioned the amount of VAT relating to the transaction concerned. Grupa Warzywna paid that amount and considered that it constituted an amount of input VAT which was, therefore, deductible. Grupa Warzywna subsequently submitted to the Naczelnik Urzędu Skarbowego w Trzebnicy (Director of the Tax Administration Chamber in Trzebnica, Poland) a VAT return in which it mentioned an excess of VAT, for which it requested a refund.

13 Following an audit, the Tax Administration Chamber in Trzebnica held that, under Article 43(10) of the Law on VAT, the supply of the immovable property at issue was, in principle, wholly exempt from VAT and that the parties to the transaction had not submitted any declaration that they had opted to waive that exemption. Consequently, Grupa Warzywna was not entitled to deduct the input VAT resulting from the supply of that property.

14 Subsequently, Grupa Warzywna submitted a correction to its tax return, taking into account the irregularities found by the tax office. Accordingly, that company mentioned in that tax return a significantly lower excess of VAT than it had initially declared.

15 Despite that correction, the Director of the Tax Administration Chamber in Trzebnica issued a decision which assessed the amount of excess VAT corresponding to the amount stated in the corrected tax return, and imposed an additional tax penalty on Grupa Warzywna equivalent to 20% of the amount of the overstated VAT reimbursement that was wrongly claimed. That decision was confirmed, as regards the penalty, by the second instance tax authority before which Grupa Warzywna brought an appeal.

16 Grupa Warzywna brought an action before the referring court against the decision of the second instance tax authority. That court considers it necessary to determine whether the imposition of such a penalty, in a situation where the error made by that company did not involve any loss of tax revenues, is consistent with the principles of proportionality and VAT neutrality and is warranted with regard to the objectives of ensuring the correct collection of tax and of preventing tax evasion.

17 The referring court considers that the establishment of an administrative penalty was meant to act as an incentive for taxable persons to complete their tax returns in an accurate and diligent manner. However, the penalty at issue in the main proceedings is oppressive rather than preventive. Article 112b(2) of the Law on VAT does not allow account to be taken of the fact that the erroneous payment of VAT is the result of an error in assessment made by both parties to the transaction regarding the taxable nature of the supply. According to that court, that penalty is inappropriate for attaining the objective of combating tax offences and, in any event, goes beyond the scope of that objective, since it is not able to fulfil the necessary function of prevention with regard to potential fraudsters and does not take account of the nature and the degree of seriousness of the infringement, nor of the fact that the State Treasury suffered no loss of tax revenues and that there is no evidence of tax evasion.

18 In those circumstances, the Wojewódzki Sąd Administracyjny we Wrocławiu (Regional Administrative Court, Wrocław, Poland) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Is an additional tax liability such as that provided for in Article 112b(2) of the Law on VAT compatible with the provisions of the [VAT Directive] (in particular Articles 2, 250 and 273 thereof), Article 4(3) [TEU], Article 325 TFEU and the principle of proportionality?'

Consideration of the question referred

19 As a preliminary point, it should be noted that the referring court is asking the Court to rule on the compatibility of the national provisions at issue in the main proceedings with Article 4(3) TEU, Article 325 TFEU and Articles 2, 250 and 273 of the VAT Directive and with the principles of proportionality and of VAT neutrality.

20 It must be recalled in this respect that, although it is not the task of the Court, in preliminary ruling proceedings, to rule upon the compatibility of provisions of national law with the legal rules of the European Union, it has jurisdiction to give the national court full guidance on the interpretation of EU law in order to enable it to determine the issue of compatibility for the purposes of the case before it (see, to that effect, judgment of 15 July 2010, *Pannon Gép Centrum*, C-368/09, EU:C:2010:441, paragraph 28 and the case-law cited).

21 It is therefore appropriate for the Court, in the present case, to restrict its analysis to the provisions of EU law by providing an interpretation of them which will be of use to the national court, which has the task of determining the compatibility of the provisions of national law with EU law, for the purposes of deciding the dispute before it (see, to that effect, judgment of 15 July 2010, *Pannon Gép Centrum*, C-368/09, EU:C:2010:441, paragraph 29 and the case-law cited).

22 It follows from the order for reference that the referring court's questions do not specifically concern the principle of sincere cooperation, enshrined in Article 4(3) TEU, nor combating fraud in order to protect the financial interests of the European Union, which is covered by Article 325 TFEU. Likewise, the interpretation of Articles 2 and 250 of the VAT Directive does not appear, having regard to the details appearing in the order for reference, necessary in order to provide a useful answer to the question referred, given that those articles concern, respectively, transactions subject to VAT and VAT returns.

23 By contrast, as regards Article 273 of the VAT Directive, the referring court indicates that the automatic application, required by national law, of the administrative penalty at issue in every instance of understatement of VAT or of the overstatement of the VAT reimbursement, is inappropriate for attaining the objective of combating tax offences referred to in that article and goes beyond what is necessary for that objective. In those circumstances, it must be concluded that the question concerns the interpretation of Article 273 of the VAT Directive and the principles of proportionality and of VAT neutrality.

24 Thus, by its question, the referring court asks, in essence, whether Article 273 of the VAT Directive and the principles of proportionality and of VAT neutrality must be interpreted as meaning that they preclude a national law which imposes on a taxable person who wrongly classified a transaction that is exempt from VAT as a transaction that is subject to that tax a penalty equal to 20% of the amount of the overstated VAT reimbursement that was wrongly claimed, without taking account of the nature or the degree of seriousness of the irregularity vitiating the tax return, of the lack of evidence that that error constituted evasion and of the fact that the State Treasury suffered no loss of revenue.

25 Under Article 273 of the VAT Directive, the Member States may adopt measures to ensure the correct collection of VAT and to prevent evasion. In particular, in the absence of provisions of EU law on that matter, the Member States have the power to choose the sanctions which seem to them to be appropriate in the event that conditions laid down by EU legislation for the exercise of the right to deduct VAT are not observed (judgment of 8 May 2019, *EN.SA.*, C-712/17, EU:C:2019:374, paragraph 38 and the case-law cited).

26 Nevertheless, the Member States must exercise that power in accordance with EU law and its general principles and, consequently, in accordance with the principle of proportionality (judgment of 26 April 2017, *Farkas*, C-564/15, EU:C:2017:302, paragraph 59 and the case-law cited).

27 Thus, such penalties must not go beyond what is necessary to attain the objectives of ensuring the correct collection of the tax and preventing evasion. In order to assess whether a penalty is consistent with the principle of proportionality, account must be taken of, inter alia, the nature and the degree of seriousness of the infringement which that penalty seeks to sanction, and of the means of establishing the amount of that penalty (judgment of 26 April 2017, *Farkas*, C-564/15, EU:C:2017:302, paragraph 60).

28 Although it falls to the referring court to assess whether the amount of the penalty does not go beyond what is necessary to attain the objectives mentioned in the previous paragraph of the present judgment, it is appropriate to inform that court of certain aspects of the main proceedings which would enable it to determine whether the penalty imposed is compatible with the principle of proportionality (see, to that effect, judgment of 26 April 2017, *Farkas*, C-564/15, EU:C:2017:302, paragraph 61).

29 In that regard, it should be noted that Article 112b(2) of the Law on VAT imposes an administrative penalty corresponding to 30% of the amount of the overstated VAT reimbursement, which is reduced to 20% of the first of those amounts where, following a tax audit, the taxable person made a correction to their tax return, taking account of the irregularities established by that audit, and has paid the amount of tax liability or has returned the wrongly refunded amount.

30 It is apparent from the order for reference that that penalty is intended to improve the collection of VAT by penalising errors made in the payment of that tax, involving understating the amount of chargeable tax or overstating the amount of excess VAT to be refunded or to be carried over to the following period. It is also intended to act as an incentive for taxable persons to complete their tax returns in an accurate and diligent manner and, in the event of an irregularity, to rectify them, so as to attain the objective, pursuant to Article 273 of the VAT Directive, of ensuring the correct collection of VAT.

31 In that regard, it is apparent from the Court's case-law that an administrative penalty intended to act as an incentive for taxable persons to rectify as quickly as possible instances of insufficient payment of tax and, therefore, to attain the objective of the correct collection of that tax, the amount of which is set, by default, at 50% of the amount of the VAT which the taxable person is required to pay to the tax authority, but which may be reduced on the basis of the circumstances of the case in question, in principle, makes it possible to ensure that such a penalty does not go beyond what is necessary to attain the objective of ensuring, pursuant to Article 273 of the VAT Directive, the correct collection of tax (see, to that effect, judgment of 26 April 2017, *Farkas*, C-564/15, EU:C:2017:302, paragraphs 62 to 64).

32 Nonetheless, as regards the methods of calculating the amount of the penalty at issue in the main proceedings, it is important to note that, where that amount is set at 20% of the amount of the overstated excess VAT, the amount may not be reduced on the basis of the specific circumstances of the case at issue, unless the irregularity arises from minor errors.

33 In that regard it is apparent from the explanations provided to the Court by the referring court that the irregularities at issue in the main proceedings are the result of an error of assessment made by the parties to the transaction regarding the taxable nature of that transaction, those parties having considered that the supply of the building concerned was subject to VAT, when they had not submitted a corresponding declaration, required by national law, by which they opted for the taxation of that supply. Further, it follows from the referring court's findings that the penalties laid down apply without distinction both to a case such as that at issue in the main proceedings, where the overstated amount of the excess VAT is made due to an error of assessment made by the parties to the transaction regarding the taxable nature of that transaction, which is characterised by a lack of evidence of evasion and which, furthermore, according to that court, did not give rise to any loss of tax revenue, or to a situation where such specific circumstances, which, according to that court, merit being taken into account, are lacking.

34 Thus, those methods of calculation did not allow the tax authorities to adapt the amount of the penalty to the specific circumstances of this particular case.

35 It follows that the methods of calculation of that penalty, applied automatically, do not allow the tax authorities to adjust the penalty imposed to the individual circumstances, so as to ensure that that penalty does not go beyond what is necessary to attain the objectives of ensuring the correct collection of tax and preventing evasion.

36 In those circumstances, it is not necessary to examine the legislation at issue in the main proceedings with regard to the principle of VAT neutrality.

37 Having regard to all the forgoing considerations, the answer to the question referred is that Article 273 of the VAT Directive and the principle of proportionality must be interpreted as meaning that they preclude a national law which imposes on a taxable person, who wrongly

classified a transaction that is exempt from VAT as a transaction that is subject to that tax, a penalty equal to 20% of the amount of the overstated VAT reimbursement that was wrongly claimed, where that penalty applies without distinction both to a situation where the irregularity is the result of an error of assessment made by the parties to the transaction regarding the taxable nature of that transaction, which is characterised by the lack of evidence of evasion and of loss of revenues for the State Treasury, and to a situation where such specific circumstances do not exist.

Costs

38 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 (Ninth Chamber) hereby rules:

Article 273 of the Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax and the principle of proportionality must be interpreted as meaning that they preclude a national law which imposes on a taxable person, who wrongly classified a transaction that is exempt from value added tax (VAT) as a transaction that is subject to that tax, a penalty equal to 20% of the amount of the overstated VAT reimbursement that was wrongly claimed, where that penalty applies without distinction both to a situation where the irregularity is the result of an error of assessment made by the parties to the transaction regarding the taxable nature of that transaction, which is characterised by the lack of evidence of evasion and of loss of revenues for the State Treasury, and to a situation where such specific circumstances do not exist.

[Signatures]