Reports of Cases

JUDGMENT OF THE COURT (Tenth Chamber)

29 February 2024*

(Reference for a preliminary ruling – Common system of value added tax (VAT) – Directive 2006/112/EC – Article 138(1) – Exemption in respect of intra-Community supplies of goods – Refusal to grant the exemption – Evidence – Supplier of goods not proving delivery of the goods to the recipient indicated in the tax documents – Supplier presenting other information proving that the actual recipient has the status of taxable person)

In Case C-676/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the Nejvyšší správní soud (Supreme Administrative Court, Czech Republic), made by decision of 26 October 2022, received at the Court on 2 November 2022, in the proceedings

B2 Energy s.r.o.

v

Odvolací finanční ředitelství,

THE COURT (Tenth Chamber),

composed of Z. Csehi (Rapporteur), President of the Chamber, I. Jarukaitis and D. Gratsias,

Advocate General: P. Pikamäe,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 4 October 2023,

after considering the observations submitted on behalf of:

– l'Odvolací finanční ředitelství, by T. Měkýš and T. Rozehnal,

– the Czech Government, by, M. Smolek, L. Březinová, O. Serdula, and J. Vláčil, acting as Agents,

– the European Commission, by A. Armenia and M. Salyková, acting as Agents,

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

* Language of the case: Czech.

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 138(1) 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').

2 The request has been made in proceedings between B2 Energy s.r.o. and the Odvolací finanční ředitelství (Appellate Tax Directorate, Czech Republic) ('the tax directorate') concerning the refusal of the tax authorities to exempt from value added tax (VAT) a number of intra-Community supplies made by that company.

Legal context

European Union law

The VAT Directive

3 Article 131 of the VAT Directive provides as follows:

'The exemptions provided for in Chapters 2 to 9 shall apply without prejudice to other Community provisions and in accordance with conditions which the Member States shall lay down for the purposes of ensuring the correct and straightforward application of those exemptions and of preventing any possible evasion, avoidance or abuse.'

4 Under Article 138(1) of that directive:

'Member States shall exempt the supply of goods dispatched or transported to a destination outside their respective territory but within the Community, by or on behalf of the vendor or the person acquiring the goods, for another taxable person, or for a non-taxable legal person acting as such in a Member State other than that in which dispatch or transport of the goods began.'

5 Article 139(1) of that directive provides as follows:

'The exemption provided for in Article 138(1) shall not apply to the supply of goods carried out by taxable persons who are covered by the exemption for small enterprises provided for in Articles 282 to 292.

Nor shall that exemption apply to the supply of goods to taxable persons, or non-taxable legal persons, whose intra-Community acquisitions of goods are not subject to VAT pursuant to Article 3(1).'

Regulation (EU) No 904/2010

6 Recital 7 of Council Regulation (EU) No 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax (OJ 2010 L 268, p. 1) states:

'For the purposes of collecting the tax owed, Member States should cooperate to help ensure that VAT is correctly assessed. They must therefore not only monitor the correct application of tax owed in their own territory, but should also provide assistance to other Member States for ensuring the correct application of tax relating to activity carried out on their own territory but owed in another Member State.'

Czech law

7 Under Paragraph 92(3) of zákon č. 280/2009 Sb., daňový řád (Law No 280/2009, the Tax Code), in the version applicable in the main proceedings, the taxable person is to furnish proof of all the facts which he or she is obliged to provide in a standard tax return, a supplementary tax return or other documents.

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

8 The request for a preliminary ruling has been made in proceedings between B2 Energy, a Czech company, and the tax directorate, concerning the refusal of the tax authority to exempt B2 Energy from VAT in respect of several allegedly intra-Community supplies of goods to Poland, on the ground that B2 Energy had not shown that the conditions for entitlement to that exemption were satisfied.

9 In 2015, B2 Energy made deliveries of rapeseed oil to Poland. According to the referring court, those goods were not supplied to the recipients declared in the tax documents but to other recipients established in that Member State, some of whom confirmed receipt by stamping and signing international consignment notes.

10 After having carried out a tax inspection on 15 July 2015 for the months between February and May 2015, the tax authority concerned found that B2 Energy had not demonstrated, on the basis of the documents provided, that it satisfied the conditions for entitlement to the VAT exemption. Although it did not dispute that the goods concerned had actually been transported to another Member State, it took the view that B2 Energy had not shown that it had transferred the right to dispose of those goods as owner to the persons presented in the tax documents as being the recipients or even that those goods had been supplied to a person registered for tax purposes in another Member State. The tax authority therefore took the view that B2 Energy did not satisfy the conditions for entitlement to the exemption. Consequently, by tax notices of 6 October 2017, it found that the amount of VAT should be increased for the months between February and May 2015.

11 By a decision of 21 November 2019, the tax directorate rejected the complaints lodged by B2 Energy against those tax assessments. The action brought against that decision by B2 Energy was dismissed by the Městský soud v Praze (Prague City Court, Czech Republic) by judgment of 18 August 2021 stating, in essence, that B2 Energy had not even demonstrated that the goods concerned had been delivered, through the recipients declared on the tax documents, to the recipients it presented as being the final recipients. More specifically, the Městský soud v Praze

(Prague City Court) held that the documents submitted did not indicate either the person who assumed responsibility for the goods in the name of the recipient or the recipient to whom the goods had been delivered. As a result, it is not possible to identify the person entitled to exercise the right to dispose of those goods as owner.

12 B2 Energy brought an appeal against that judgment before the referring court, claiming, in essence, that it had provided evidence that the conditions for exercising the right to exemption from VAT for the supply of goods to another Member State were satisfied. The evidence provided, certifying the actual receipt of the goods concerned by companies other than the entities declared on the relevant tax documents, makes it possible to establish the identity of the recipients to whom the right to dispose of those goods has been transferred.

13 According to the referring court, the Court, in the judgment of 9 December 2021, *Kemwater ProChemie* (C-154/20, EU:C:2021:989), accepted that the conditions for eligibility for the right to deduct VAT are satisfied where the identity of the supplier is not established, if the tax authority has the information needed to verify that that supplier had the status of taxable person for the purposes of VAT. The referring court asks whether it is possible to apply the ruling in that judgment for the purposes of assessing the right to a VAT exemption upon supplies of goods to another Member State, where the facts show that those goods were accepted not by the recipient declared in the tax documents but by another recipient who had the status of taxable person.

14 In those circumstances, the Nejvyšší správní soud (Supreme Administrative Court, Czech Republic) decided to stay the proceedings and refer the following question to the Court of Justice for a preliminary ruling:

‘Must Article 138(1) of [the VAT Directive] be interpreted in accordance with the judgment [of 9 December 2021, *Kemwater ProChemie*, C-154/20, EU:C:2021:989], such that a claim for exemption from [VAT] upon the supply of goods to another EU Member State must be denied, without the tax authorities needing to prove that the supplier of the goods was involved in VAT fraud, if the supplier has failed to prove supply of goods to a specific recipient indicated in the tax documents and having the status of a taxable person in the other Member State, even though, with a view to the facts of the case and the information provided by the taxable person, there is data available to verify that the actual recipient in the other … Member State did indeed have that status?’

Consideration of the question referred

15 By its question, the referring court asks, in essence, whether Article 138(1) of the VAT Directive, relating to the exemption of intra-Community supplies, must be interpreted as meaning that the exemption from VAT of a supplier established in one Member State having supplied goods to another Member State, who has not proved that those goods were supplied to a recipient having the status of taxable person in that Member State, must be refused, even though, in view of the facts and information submitted by that supplier, the tax authorities of the Member State of departure have the information necessary to verify that the person to whom the goods were physically supplied had the status of a taxable person acting as such in the Member State of arrival.

16 It must be borne in mind at the outset that Article 138(1) of the VAT Directive requires Member States to exempt from VAT supplies of goods which satisfy the conditions listed in that article (judgment of 9 February 2017, *Euro Tyre*, C-21/16, EU:C:2017:106, paragraph 23 and the case-law cited).

17 As regards, first, the classification of a transaction as an intra-Community supply, it follows from Article 138(1) of the VAT Directive, in the version applicable to the facts in the main proceedings, read in conjunction with Article 131 of that directive, that the supply of goods dispatched or transported by or on behalf of the vendor or the purchaser, outside the territory of a Member State but within the EU, effected for another taxable person or a non-taxable legal person acting as such in a Member State other than that of the dispatch or transport of the goods, is covered by that concept and is exempt, under conditions which the Member States are to lay down for the purpose of ensuring the correct and straightforward application of the exemptions and of preventing any possible evasion, any avoidance or any abuse.

18 In that regard, it should be noted that, under Article 138(1) of the VAT Directive in the version applicable to the case in the main proceedings, the exemption of a transaction from VAT is subject to the condition that the right to dispose of goods as owner has been transferred to the purchaser, that the supplier establishes that those goods have been dispatched or transported to another Member State and that, as a result of that dispatch or that transport, they have physically left the territory of the Member State of the departure of the dispatch or transport (judgment of 9 February 2017, *Euro Tyre*, C-21/16, EU:C:2017:106, paragraph 25 and the case-law cited).

19 In addition, as is apparent from Article 139(1), second subparagraph, of the VAT Directive, exemption from that tax is subject to the condition that the supply cannot be made to a taxable person, or a non-taxable legal person, whose intra-Community acquisitions of goods are not subject to VAT pursuant to Article 3(1) of that directive (judgment of 9 October 2014, *Traum*, C-492/13, EU:C:2014:2267, paragraph 25).

20 Apart from those conditions, relating specifically to the capacity of the taxable person, to the transfer of the right to dispose of goods as owner and to the physical movement of the goods from one Member State to another, no other condition can be placed on the classification of a transaction as an intra-Community supply of goods, it being specified that the concept of intra-Community supply is objective in nature and applies without regard to the purpose or results of the transactions concerned (judgment of 27 September 2012, *VSTR*, C-587/10, EU:C:2012:592, paragraph 30).

21 Therefore, the principle of fiscal neutrality requires that an exemption from VAT be allowed if the substantive conditions are satisfied, even if the taxable person has failed to comply with some of the formal requirements (see, to that effect, judgment of 9 February 2017, *Euro Tyre*, C-21/16, EU:C:2017:106, paragraph 36).

22 In that context, the tax directorate's argument based on Article 138(1)(b) of the VAT Directive, as amended by Council Directive (EU) 2018/1910 of 4 December 2018 (OJ 2018 L 311, p. 3), which provides that Member States are to exempt the supply of goods dispatched or transported to a destination outside their respective territory but within the European Union, where the taxable person or non-taxable legal person for whom the supply is made is identified for VAT purposes in a Member State other than that in which dispatch or transport of the goods began and has communicated its VAT identification number to the supplier, is irrelevant in that context.

23 That provision, introduced by Directive 2018/1910, is not applicable *ratione temporis* to the facts of the case in the main proceedings.

24 Therefore, the conditions set out in Article 138(1) of the VAT Directive, in the version applicable to the facts in the main proceedings, concerning, first, the existence of a supply from one Member State to another and, second, the purchaser's status as a taxable person, according to which the purchaser must be a 'taxable person … acting as such in [another] Member State', do not, in themselves, imply that the physical supply of the goods concerned must be made to the recipient indicated on the tax documents.

25 In the present case, it is apparent from the order for reference that the tax authority refused B2 Energy the benefit of the VAT exemption on the ground that that company had not proved that the goods concerned had been supplied to the recipients declared in the tax documents or that those goods had been supplied to a person registered for VAT in another Member State.

26 In that regard, it should be recalled that, according to the Court's case-law, there are only two situations in which the failure to meet a formal requirement may result in the loss of entitlement to an exemption from VAT (judgment of 9 February 2017, *Euro Tyre*, C-21/16, EU:C:2017:106, paragraph 38 and the case-law cited).

27 In the first place, the principle of fiscal neutrality cannot be relied on for the purposes of an exemption from VAT by a taxable person who has intentionally participated in tax evasion which has jeopardised the operation of the common system of VAT. It is not contrary to EU law to require an operator to act in good faith and to take every step which could reasonably be asked of it to satisfy itself that the transaction which it is carrying out does not result in its participation in tax evasion. If the taxable person concerned knew or should have known that the transaction which it had carried out was part of a fraud committed by the purchaser and that the taxable person had not taken every step which could reasonably be required of it to prevent that fraud from being committed, that person would have to be refused a VAT exemption (see, to that effect, judgment of 8 November 2018, *Cartrans Spedition*, C-495/17, EU:C:2018:887, paragraph 41 and the case-law cited).

28 In the second place, non-compliance with a formal requirement may lead to the refusal of an exemption from VAT if that non-compliance would effectively prevent the production of conclusive evidence that the substantive requirements have been satisfied (judgment of 8 November 2018, *Cartrans Spedition*, C-495/17, EU:C:2018:887, paragraph 42 and the case-law cited). It follows, however, from the very condition to which that refusal to allow an exemption from VAT is subject that the authorities may not impose additional requirements which may have the effect of rendering the taxable person's right of exemption ineffective for practical purposes, where it has the information necessary to establish that the substantive requirements have been satisfied (judgment of 20 October 2016, *Plöckl*, C-24/15, EU:C:2016:791, paragraph 47), and in particular that the goods were supplied to a taxable person acting as such.

29 It should be noted, in that regard, that the referring court wishes to ask the Court about the need to establish the status of the person acquiring the goods as a taxable person without referring to possible fraud. In those circumstances, the question referred by the national court must be understood as referring to the types of evidence which may be required of the supplier in order to show that the conditions for exemption from VAT when a supply of goods to another Member State, and more particularly the condition relating to the status of the person acquiring the goods as a taxable person, are satisfied.

30 Therefore, it must be recalled that, in the absence of any provision in the VAT Directive as to the evidence that taxable persons are required to provide in order to be granted an exemption from VAT, it is for the Member States to lay down, in accordance with Article 131 of that directive, the conditions under which intra-Community transactions will be exempt, with a view to ensuring the correct and straightforward application of those exemptions and to preventing any possible evasion, any avoidance or any abuse. The Member States must, when they exercise their powers, observe the general principles of law which form part of the EU legal order, which include, in particular, the principles of legal certainty and proportionality (see, to that effect, judgment of 8 November 2018, *Cartrans Spedition*, C-495/17, EU:C:2018:887, paragraph 37 and the case-law cited).

31 It should be noted, in that regard, that it has been difficult since the abolition of border controls between Member States for the tax authorities to check whether or not the goods have physically left the territory of a Member State. As a result, it is principally on the basis of the evidence provided by taxable persons and their statements that the national tax authorities are to carry out the necessary checks (judgment of 6 September 2012, *Mecsek-Gabona*, C-273/11, EU:C:2012:547, paragraph 35 and the case-law cited).

32 More specifically, the Court has also stated that the obligations imposed on taxable persons with regard to evidence must be determined in the light of the conditions expressly laid down in that regard by national law and in accordance with the general practice established in respect of similar transactions (judgment of 8 November 2018, *Cartrans Spedition*, C-495/17, EU:C:2018:887, paragraph 57 and the case-law cited).

33 In that context, the referring court appears to indicate that B2 Energy submitted to the tax authorities, without demonstrating that it supplied the goods concerned to the declared recipients, the tax documents relating to the supplies made, including several attachments such as delivery notes, international consignment notes, weighbridge tickets or bank account statements, from which it is apparent that the goods were delivered to another Member State where their receipt was certified by entities other than those declared by B2 Energy or that it presented as the final recipients of those goods.

34 It is also apparent from the wording of the order for reference and from the wording of the question referred that that question is based on the premiss that the tax authorities had the information necessary to verify, in the light of the facts, that the actual recipients had the status of taxable persons. More specifically, the referring court points out that the transport of rapeseed oil from the Czech Republic to Poland and its unloading at premises of the recipients, who are not identified by the applicant in the main proceedings in its tax returns, were not disputed by the tax authorities. Moreover, the supply at issue in the main proceedings concerns goods which, by their nature, appear to be intended for use in the course of an economic activity.

35 That said, the fact that the goods were received by entities other than those mentioned in the tax documents could indicate that they were the subject of a commercial transaction, the time of which may be decisive for the application of the exemption. The classification of the supply as an intra-Community supply, made by the supplier applying the exemption and specified in the tax documents, depends on whether the transport can actually be ascribed to that supply (see, to that effect, judgment of 27 September 2012, *VSTR*, C-587/10, EU:C:2012:592, paragraph 31).

36 In that regard, it should be noted that, with a view to the exemption from VAT, the tax authorities must take proper account of all the information in their possession, such as the documents mentioned by the referring court, for the purposes of examining whether those documents may, where necessary, substantiate the likelihood of the actual supply of the goods transported to a Member State other than the Member State of departure of the transport or dispatch (see, by analogy, judgment of 8 November 2018, *Cartrans Spedition*, C-495/17, EU:C:2018:887, paragraphs 66 and 67).

37 Furthermore, in the light of the principle of fiscal neutrality, a taxable person cannot be required, in order to be able to exercise its right to exemption from VAT, to prove, in every case, where the recipient of the goods concerned has not been identified, that that recipient has the status of a taxable person in so far as it clearly follows from the factual circumstances that that recipient necessarily had that status (see, by analogy, judgment of 9 December 2021, *Kemwater ProChemie*, C-154/20, EU:C:2021:989, paragraph 40).

38 In those circumstances, it is for the tax authorities and the competent national courts to ascertain, on the basis of all the documents produced, including the documents in the supplier's possession, whether the substantive conditions for entitlement to the VAT exemption were met.

39 It is only where, having regard to the factual circumstances, and despite the evidence provided by the taxable person, the information necessary to verify that the conditions laid down in Article 138(1) of the VAT Directive are satisfied is lacking, that the taxable person must be refused the VAT exemption, without the tax authorities being required to prove that that taxable person was involved in VAT fraud.

40 In the light of all the foregoing considerations, the answer to the question referred is that Article 138(1) of the VAT Directive must be interpreted as meaning that the exemption from VAT of a supplier established in one Member State, having supplied goods to another Member State, must be refused where that supplier has not shown that the goods were supplied to a recipient having the status of a taxable person in that Member State and that, in the light of the factual circumstances and evidence provided by the supplier, the information necessary to verify that the recipient had that status is lacking.

Costs

41 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 (Tenth Chamber) hereby rules:

Article 138(1) 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 exemption from value added tax of a supplier established in one Member State, having supplied goods to another Member State, must be refused where that supplier has not shown that the goods were supplied to a recipient having the status of a taxable person in that Member State and that, in the light of the factual

circumstances and evidence provided by the supplier, the information necessary to verify that the recipient had that status is lacking.

[Signatures]