Case C-935/19

Summary of a request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

23 December 2019

Referring court:

Wojewódzki Sąd Administracyjny we Wrocławiu (Regional Administrative Court in Wrocław, Poland)

Date of issue of the decision to refer:

3 October 2019

Applicant:

Grupa Warzywna Sp. z o.o. [Grupa Warzywna limited liability company]

Defendant:

Dyrektor Izby Administracji Skarbowej we Wrocławiu (Director of the Tax Administration Chamber in Wrocław)

Subject matter of the case in the main proceedings

Appeal contesting the decision to impose an additional VAT liability pursuant to Article 112b(2) of the Ustawa o VAT (Law on VAT).

Subject matter and legal basis of the reference

Request for a preliminary ruling submitted under Article 267 TFEU concerning the compatibility with European Union law of the imposition of an additional VAT liability under Article 112b(2) of the Law on VAT.

Question referred

Is an additional tax liability such as that provided for in Article 112b(2) of the Law on VAT compatible with the provisions of Council Directive 2006/112/EC of

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28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1, as amended; 'Directive 2006/112') (in particular Articles 2, 250 and 273 thereof), Article 4(3) of the Treaty on European Union, Article 325 TFEU and the principle of proportionality?

Applicable provisions of EU law

Article 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), as amended

Article 4(3) TEU

Article 325 TFEU

Applicable provisions of national law

Ustawa z dnia 11 marca 2004 r. o podatku od towarów i usług (Law of 11 March 2004 on the tax on goods and services) (Codified version, Dz. U. of 2017, item 1221;'the Law on VAT'):

Article 43(1)(10): '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 2 years;'

Article 43(10): '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 head of the tax office competent for the purchaser a joint declaration that they opt for the taxation of the supply of the building, civil engineering work or part thereof'.

Article 112b(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;

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(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 difference which reduces the amount of output tax for subsequent tax periods greater than the amount due;

(d) the amount of tax difference to be refunded, the amount of input tax to be refunded or the amount of tax difference which reduces the amount of output tax for subsequent tax 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 liability

- the head of the tax office or the head of the customs and tax office shall determine the respective correct amounts and shall impose an additional tax liability corresponding to 30% of the understated tax liability or the overstated tax difference to be refunded, input tax to be refunded or tax difference which reduces the amount of output tax for subsequent tax periods'.

Article 112b(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 return taking into account the irregularities found and paid the amount of tax liability or returned the undue refund amount;

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

- the amount of additional tax liability shall be 20% of the understated tax liability or of the overstated tax difference to be refunded, input tax to be refunded or tax difference which reduces the amount of output tax for subsequent tax periods'.

Ustawa z dnia 29 sierpnia 1997 r. — Ordynacja podatkowa (Law of 29 August 1997 — Tax Code) (Dz. U. of 2019, item 900, as amended)

Article 81(1): 'Unless separate regulations provide otherwise, taxable persons, tax payers and tax collectors may correct a tax return submitted previously'.

Article 81b(1): 'The right to correct a tax return:

1) shall be suspended for the duration of tax proceedings or a tax audit within the scope covered by such proceedings or audit;

2) shall continue to apply after the completion of:

(a) the tax audit;

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(b) the tax proceedings — within the scope not covered by the decision determining the amount of tax liability'.

Succinct presentation of the facts and procedure

1 In the contested decision, the Dyrektor Izby Administracji Skarbowej we Wrocławiu (Director of the Tax Administration Chamber in Wrocław) ('the tax authority of second instance') upheld the decision of the Naczelnik Urzędu Skarbowego w Trzebnicy (Head of the Tax Office in Trzebnica) ('the tax authority of first instance') in the part imposing an additional VAT liability of PLN 520 316 for December 2017 on Grupa Warzywna Sp. z o.o. ('the Applicant' or 'the Taxable Person'). In the part determining the amount of excess of input tax over output tax, the tax authority of second instance annulled the decision of the tax authority of first instance and discontinued the proceedings.

2 The tax authorities established that the Taxable Person purchased, by means of notarial deed dated 29 December 2017, a developed property which had been occupied for more than two years. The notarial deed included a declaration that the price of the buildings stated was the gross amount (including VAT). The purchase was additionally documented by an invoice issued by the seller, which showed, inter alia, a sale subject to tax of PLN 14 209 003.60 net and output tax of PLN 3 268 070.83.

3 The Taxable Person included this amount as deductible input tax in the submitted return. As a result, an excess of input tax over output tax to be refunded to the Taxable Person's bank account was shown.

4 Due to the initiation of a tax audit, no VAT refund was made.

5 In the audit report, the tax authority of first instance found that the transaction concerning the supply of the property should have been entirely exempt from tax, citing Article 43(1)(10) of the Law on VAT. At the same time, the authority held that the parties to the transaction had failed to submit a declaration that they had opted to waive the exemption, which was required under Article 43(10) of the Law on VAT. Consequently, the authority established that the Taxable Person was not entitled to deduct the input tax resulting from the tax-exempt supply of property.

6 Exercising its right under Article 81 of the Tax Code, the Taxable Person submitted a correction to its tax return which took into account all the audit findings and thus showed a significantly lower excess of input tax over output tax.

7 Despite the submission of the correction, the tax authority of first instance issued a decision which assessed the amount of the excess of input tax over output tax in the amount stated in the corrected return and imposed an additional tax liability on the Taxable Person.

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8 As a result of the appeal lodged, the tax authority of second instance annulled the decision of the tax authority of first instance in the part determining the amount of excess of input tax over output tax. The authority held that the submitted correction was effective in this regard and that there were no grounds for issuing a tax decision. On the other hand, it upheld the decision in the part imposing the additional tax liability, citing Article 112b(2) of the Law on VAT.

9 In its appeal to the Wojewódzki Sąd Administracyjny we Wrocławiu (Regional Administrative Court in Wrocław, Poland), the applicant sought the annulment of the contested decision, alleging, inter alia, an infringement of the principle of proportionality and neutrality of VAT and pointing out that in the case at issue no financial loss was suffered by the Treasury as the tax refund indicated in the return was not made.

10 In its response to the appeal, the tax authority of second instance claimed that the appeal should be dismissed and maintained the position it had adopted in the contested decision.

11 The court of first instance decided to refer the questions indicated in the operative part for a preliminary ruling to the Court of Justice of the European Union and stayed the proceedings in the case.

Brief statement of and reasons for the reference

12 In order to resolve the dispute in the present case, an assessment is required as to whether the application of penalties in the form of an additional tax liability where no tax revenue was lost, as a result of an erroneous understanding of applicable laws, is compatible with the principle of proportionality and whether the imposition of such additional liabilities actually serves to prevent tax fraud or is merely an additional fiscal measure.

13 In the view of the referring court, it follows from the case-law of the Court of Justice concerning the interpretation of the principle of proportionality that the imposition of additional liabilities is only justified in order to prevent actual tax fraud.

14 The referring court cites the judgment of 2[6] April 2017, *Farkas*, C-564/15, EU:C:2017:302, according to which, in the absence of harmonisation of EU legislation in the field of sanctions applicable where conditions laid down by arrangements under that legislation are not complied with, Member States remain empowered to choose the sanctions which seem to them to be appropriate. The Member States must nevertheless exercise that power in accordance with EU law and its general principles, and consequently in accordance with the principle of proportionality. Thus, such penalties must not go beyond what is necessary to attain the objectives of ensuring the correct levying and collection of the tax and preventing fraud. In order to assess whether a penalty is consistent with the principle of proportionality, account must be taken inter alia of the nature and the

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degree of seriousness of the infringement which the penalty seeks to sanction, and of the means of establishing the amount of the penalty. 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 set out …, it is appropriate to inform that court of certain aspects of the main proceedings which would enable it to determine whether the penalty … is compatible with the principle of proportionality. In that regard, such a penalty appears to create an incentive for taxable persons to rectify as quickly as possible instances of insufficient payment of the tax and therefore to achieve the objective of ensuring the correct collection of that tax.

15 As a general rule, Member States may impose penalties for breaches of the principle of the common VAT system. National measures implementing the objectives laid down in Article 273 of Directive 2006/112 must comply with the principle of proportionality. The application of penalties must be assessed not only in terms of whether they can serve their intended purpose but also whether they do not go beyond what is necessary to achieve this purpose (compare the judgment of the Court of 19 October 2017, *SC Paper Consult SRL*, C-101/16, EU:C:2017:775, paragraphs 49 and 50).

16 The provision enabling the imposition of an additional tax liability was introduced into the Law on VAT with effect as of 1 January 2017 by the Ustawa z dnia 1 grudnia 2016 r. o zmianie ustawy of VAT (Law of 1 December 2016 amending the Law on VAT) (Dz. U. of 2016, item 2024).

17 Previously, similar penalties were provided for in the Law on VAT until 30 November 2008 and also earlier, in the Ustawa z dnia 8 stycznia 1993 r. o podatku od towarów i usług oraz o podatku akcyzowym (Law of 8 January 1993 on Tax on Goods and Services and Excise Duty). In its judgment of 29 April 1998, the Trybunał Konstytucyjny (Constitutional Court, Poland) ruled that such a penalty was compatible with the Konstytucja Rzeczypospolitej Polskiej (Constitution of the Republic of Poland). In its judgment of 15 January 2009, *K-1*, C-502/07, EU:C:2009:11, the Court of Justice ruled that the penalty provided for in the provisions of the Polish Law on VAT was not incompatible with the provisions of the VAT Directive.

18 In the explanatory memorandum to the amendment introduced as of 1 January 2017, the legislature indicated that in view of the scale of VAT fraud, it was appropriate to reintroduce that mechanism to improve VAT collection. As a result, tax penalties were reintroduced for inaccurate tax settlements resulting in the understatement of tax liabilities, the overstatement of the excess of input tax over output tax to be refunded or settled in subsequent tax periods, or the overstatement of tax refunds. The legislature stated that the penalties in question were primarily preventive in nature, as their aim was to convince taxable persons that it is in their interest to complete their tax returns in an accurate and diligent manner, since where an error is found in a settlement, the result is an obligation to pay a fixed additional tax liability.

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19 This preventive function of the penalties introduced is indicated by the provisions specifying the cases in which these penalties are not imposed. This is the case where the taxable person corrects the error him or herself and pays the difference which compensates for the understatement of tax or overstatement of refund at any time prior to the date on which a tax or fiscal audit is initiated.

20 The referring court understands the legitimacy of the objective of convincing taxable persons that it is in their interest to complete tax returns in an accurate and diligent manner, but points out that in VAT cases, the complicated legal environment and the increased probability of mistakes should be taken into account. A clear example here is the provision of Article 43(1)(10) of the Law on VAT, which was also the subject of the Court's judgment of 16 November 2017, *Kozuba Premium Selection*, C-308/16, EU:C:2017:869 and of extensive case-law from national administrative courts. Article 112b(2) of the Law on VAT in no way accounts for cases — such as that in the main proceedings — where an incorrect settlement results from the erroneous assessment by both parties to the transaction as to whether the supply in question is subject to VAT. In this case, no tax revenue is in fact lost, since the tax (although undue) is paid by the seller, whereas if both parties had initially recognised the transaction as exempt, no tax would have been paid.

21 As a side note, it should be pointed out that in cases such as that in the main proceedings, national courts have taken into account the fact that legal provisions are unclear (Article 43(10) of the Law on VAT), finding that transactions similar to the one carried out by the Taxable Person are subject to tax and the purchaser is entitled to deduct input tax. In the present case, however, the Taxable Person accepted the findings of the audit and decided not to deduct input tax, considering the transaction to be exempt from VAT. However, since the Taxable Person paid to the seller the full amount of the invoice, he in fact bore the full economic burden of this tax, which is also contrary to the principle of neutrality (if we accept the view expressed in the case-law that the transaction is subject to tax). As a result, the principle of VAT neutrality has been infringed.

22 As the Court of Justice pointed out, 'the principle of the neutrality of VAT, as given specific definition by the case-law relating to Article 203 of Directive 2006/112, must be interpreted as precluding a tax authority from refusing, on the basis of a provision of national law intended to transpose that article, the supplier of an exempt supply the refund of VAT invoiced in error to a customer, on the ground that the supplier had not corrected the erroneous invoice, in circumstances where that authority had definitively refused the customer the right to deduct that VAT and such definitive refusal results in the system for correction provided for under national law no longer being applicable' (judgment of the Court of 11 April 2013, *Rusedespred OOD*, C-138/12, EU:C:2013:[233], paragraph 35).

23 In such cases, the effects of the introduced regulation are contrary to the aforementioned objective, since the imposition of an additional tax liability essentially discourages the taxable person from accepting the findings of an audit

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and from paying the tax together with interest on a voluntary basis. Moreover, this is incompatible with the taxable person's right to submit a correction under Article 81b of the Tax Code and is in essence a trap for the taxable person, since he has a certain right but an additional penalty will be imposed on him for exercising that right. At the same time, this penalty actually affects the taxable person who received the incorrect invoice rather than the one who issued it incorrectly.

24 In the form in which it has been introduced, the provision does not account in any way for the taxable person's intention, namely, whether the understatement of the tax was due to fraud or error. It should be emphasised that the unclear provisions of the Law on VAT and their frequent amendment means that the tax authorities themselves often misinterpret these provisions. In many cases, it is only the case-law of the courts and, in extreme cases, a Court of Justice judgment that establishes the correct interpretation of the rules. However, the provision in question also provides for penalties to be imposed on taxable persons where, for instance, they incorrectly follow a common practice. Thus, the penalty in question is apparently oppressive rather than preventive in nature.

25 In the Court's judgment of 26 February 2013, *Hans Åkerberg Fransson*, C-617/10, EU:C:2013:105, it is stated that it follows from Articles 2, 250(1) and 273 of Directive 2006/112, which reproduce inter alia the provisions of Article 2 of the Sixth Directive and of Article 22(4) and (8) of that directive in the version resulting from Article 28h thereof, and second, from Article 4(3) TEU, that every Member State is under an obligation to take all legislative and administrative measures appropriate for ensuring collection of all the VAT due on its territory and for preventing evasion. Furthermore, Article 325 TFEU obliges the Member States to counter illegal activities affecting the financial interests of the European Union through effective deterrent measures and, in particular, obliges them to take the same measures to counter fraud affecting the financial interests of the European Union as they take to counter fraud affecting their own financial interests. Given that the European Union's own resources include, as provided in Article 2(1) of Council Decision 2007/436/EC, Euratom of 7 June 2007 on the system of the European Communities' own resources, revenue from application of a uniform rate to the harmonised VAT assessment bases determined according to European Union rules, there is thus a direct link between the collection of VAT revenue in compliance with the European Union law applicable and the availability to the European Union budget of the corresponding VAT resources, since any lacuna in the collection of the first potentially causes a reduction in the second. It follows that tax penalties and criminal proceedings for tax evasion, such as those to which the defendant in the main proceedings has been or is subject because the information concerning VAT that was provided was false, constitute implementation of Articles 2, 250(1) and 273 of Directive 2006/112 (previously Articles 2 and 22 of the Sixth Directive) and of Article 325 TFEU and, therefore, of European Union law, for the purposes of Article 51(1) of the Charter of Fundamental Rights.

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26 In its judgment of 17 January 2019, *Dzivev*, C-310/16, EU:C:2019:30, paragraph 30, the Court pointed out that 'even though the penalties and administrative and/or criminal procedures relating to those penalties established by Member States in order to counter infringements of harmonised VAT rules fall within their procedural and institutional autonomy, that autonomy is nevertheless limited by the principle of effectiveness, which requires that such penalties be effective and dissuasive, in addition to the principle of proportionality and the principle of equivalence, the application of which is not in point in the present case'.

27 Life experience indicates that an actual fraudster would have no interest in revealing his activities by submitting corrections to his tax returns. Therefore, a penalty such as that provided for in Article 112b(2) of the Law on VAT does not adequately fulfil the preventive function against potential fraudsters.

28 Thus, the automatic imposition by operation of law of an additional tax liability in all cases where the tax liability has been understated or the refund has been overstated, even where the tax in question has in fact been paid by another entity or where excess tax has not been refunded is, in the view of the court, an inappropriate measure for the purposes of attaining the objective of combating tax evasion as provided for in Article 273 of Directive 2006/112, and goes beyond what is necessary to attain the objectives of ensuring the correct collection of the tax and preventing tax fraud, since it does not take into account the nature and seriousness of the infringement. It likewise does not take account of the fact that the authority suffered no loss of tax revenue and there is no evidence of tax evasion (Court judgment of 2[6] April 2017, *Farkas*, C-564/15, EU:C:2017:302).

29 In the light of the foregoing, recognising that a preliminary ruling is essential in order to resolve the case pending before it, the Wojewódzki Sąd Administracyjny we Wrocławiu (Regional Administrative Court in Wrocław) has decided to refer a question to the Court of Justice of the European Union for a preliminary ruling pursuant to Article 267 TFEU.

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