Case C-696/20

Request for a preliminary ruling

Date lodged:

21 December 2020

Referring court:

Naczelny Sąd Administracyjny (Poland)

Date of the decision to refer:

30 June 2020

Appellant on a point of law:

B.

Respondent in the appeal on a point of law:

Dyrektor Izby Skarbowej w.

DECISION

30 June 2020,

the Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland) […]

[…]

having examined on **30 June 2020**

at a hearing before the **Izba Finansowa (Finance Chamber)**

the appeal on a point of law brought by **B., established in H.,**

against the judgment of the **Wojewódzki Sąd Administracyjny w Warszawie (Regional Administrative Court in Warsaw, Poland)**

of **16 May 2017** […]

in the action brought by **B., established in H.,**

against the decision of the **Dyrektor Izby Skarbowej (Director of the Tax Chamber) in W.**

of **11 September 2015**, No […]

concerning **the determination of the VAT difference to be refunded for April 2012,**

decides:

(1) pursuant to Article 267 of the Treaty on the Functioning of the European Union […], **to refer the following question to the Court of Justice of the European Union for a preliminary ruling:**

Do Article 41 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax […] **and the principles of proportionality and neutrality preclude the application, in a situation such as that at issue in the main proceedings, of a national provision such as Article 25(2) of the ustawa z dnia 11 marca 2004 r. o** [Or. 2] **podatku od towarów i usług (Law of 11 March 2004 on Value Added Tax)** […] **to an intra-Community acquisition of goods by a taxable person**

- if that acquisition has already been taxed in the territory of the Member State in which dispatch ends, by the persons acquiring the goods from that taxable person

- where it has been established that the taxable person's actions did not involve any tax fraud, but that they were the result of an incorrect designation of supplies in chain transactions and that that taxable person's Polish VAT identification number was provided for the purposes of a domestic rather than an intra-Community supply?

(2) […] to stay the proceedings until such time as the above question referred for a preliminary ruling has been answered. [Or. 3]

GROUNDS

I. Legal framework

EU law

1. Provisions of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax […]:

Article 40

The place of an intra-Community acquisition of goods shall be deemed to be the place where dispatch or transport of the goods to the person acquiring them ends.

Article 41

Without prejudice to Article 40, the place of an intra-Community acquisition of goods as referred to in Article 2(1)(b)(i) shall be deemed to be within the territory of the Member State which issued the VAT identification number under which the person acquiring the goods made the acquisition, unless the person acquiring the goods establishes that VAT has been applied to that acquisition in accordance with Article 40.

If VAT is applied to the acquisition in accordance with the first paragraph and subsequently applied, pursuant to Article 40, to the acquisition in the Member State in which dispatch or transport of the goods ends, the taxable amount shall be reduced accordingly in the Member State which issued the VAT identification number under which the person acquiring the goods made the acquisition.

National law

1. Provisions of the Law of 11 March 2004 on Value Added Tax ([…], 'the Law on VAT'):

Article 25

1. An intra-Community acquisition of goods shall be deemed to have been made in the territory of the Member State in which the goods are located at the time when their dispatch or transport ends.

[Or. 4]

2. Notwithstanding paragraph 1, where the person acquiring the goods referred to in Article 9(2), in making an intra-Community acquisition of goods, has provided the number assigned to him by the Member State concerned for the purposes of intra-Community transactions other than the Member State in which the goods are located at the time when their dispatch or transport ends, the intra-Community acquisition of goods shall also be deemed to have been made in the territory of that Member State, unless the person acquiring the goods demonstrates that the intra-Community acquisition of goods:

(1) has been taxed in the territory of the Member State in which the goods are located at the time when their dispatch or transport ends; or

(2) is deemed to have been taxed in the territory of the Member State in which the goods are located at the time when their dispatch or transport ends due to the application of the simplified intra-Community triangular transaction procedure referred to in Chapter XII.

II. Facts of the case

Proceedings before the tax authorities

1 By decision of 11 June 2015, the Dyrektor Urzędu Kontroli Skarbowej (Director of the Tax Audit Office) in R. determined the VAT difference to be refunded for April 2012 with respect to the appellant company B., established in R. ('the Company'). The authority established that the Company, as a VAT-taxable person registered in Poland, participated in chain transactions concerning the same goods, which were concluded by at least three operators. Those transactions resulted in the direct transfer (transport) of goods from the first operator to the last operator in the supply chain. The Company acted as an intermediary between the supplier and the recipient. In Poland, the Company purchased goods exclusively from B., established in P. ('BOP'). The transactions in which the Company participated followed one of two schemes:

- Scheme I: BOP with a Polish VAT number –> the Company with a Polish VAT number –> an EU operator with an EU VAT number

- Scheme II: BOP with a Polish VAT number –>the Company with a Polish VAT number –> the first EU operator/customer with an EU VAT number –> the second EU operator/recipient with an EU VAT number

The Company recognised supplies from BOP as domestic supplies which were subject to 23% VAT. On the other hand, the Company classified its supplies to the EU recipients as intra-Community supplies of goods with a 0% VAT rate, which resulted in it receiving tax refunds. After analysing the terms and nature [**Or. 5**] of the supplies and the organisation of transport, the authority found that the Company had incorrectly recognised the supply involving transport in the supply chain. As a result, the authority redefined the above supply chain by establishing that the 'supply involving transport' was the first one – between BOP and the Company – which it interpreted as an intra-Community supply of goods on the part of BOP and as an intra-Community acquisition of goods on the part of the Company.

Thus, the authority considered the actions of the Company which treated supplies to its counterparties from Member States as intra-Community supplies of goods subject to 0% VAT to be incorrect. The authority found that those transactions should be taxed in the territory of the Member States of destination of the goods (outside Poland). The authority pointed out that, to that end, the Company should have registered in the territory of the Member States of destination of the goods and settled the relevant intra-Community acquisitions there. Subsequent sales of goods within that chain to counterparties from those Member States should, on the other hand, have been taxed as supplies within the Member States of destination of the goods, in accordance with the rules applicable there. The authority stated that, as a result of the incorrect recognition of the supply involving transport and at the same time the incorrect recognition of the intra-Community supply of goods, the value of intra-Community supplies in the register maintained by the Company had been overstated.

Moreover, the authority pointed out that, as a result of the supplies effected by BOP (the first operator in the supply chain) to the Company being interpreted as supplies involving transport, the Company would not only be obliged to settle those supplies in the Member State of destination of the goods, but additionally Article 25(2)(1) of the Law on VAT would be applicable; since in connection with the intra-Community acquisition of goods the Company had provided the Polish EU VAT number, which was a number issued by a Member State other than the Member State in which transport of the goods ended, it was obliged to settle VAT in Poland pursuant to Article 25(2)(1) of the Law on VAT.

2 By its decision of 11 September 2015, the Director of the Tax Chamber in W. annulled the decision of the authority of first instance in its entirety and determined a slightly higher amount of the VAT difference to be refunded for April 2012. This change in the outcome was irrelevant to the question referred, since in principle the authority of second instance confirmed all the factual and legal findings of the authority of first instance.

Importantly, it should be noted that none of the authorities found that the transactions in which the Company had participated involved tax fraud. The transactions within **[Or. 6]** the supply chain were subject to VAT, and tax was paid at each stage. In essence, the authorities' position is that the Company taxed them incorrectly, however, by failing properly to recognise the nature of individual transactions.

3 The authority of second instance confirmed as correct the position that the Company was subject to the provision of Article 25(2)(1) of the Law on VAT, since, in connection with the acquisition of goods from BOP, it had provided a Polish VAT number, which was a number issued by a Member State other than the Member State in which transport of the goods ended. The authority considered that such an action created an obligation on the part of the Company to settle the tax in Poland, since it had failed to demonstrate that it had taxed the acquisition of goods in the territory of the Member State in which dispatch or transport ended.

Judgment at first instance

4 The Company appealed against the decision of the authority of second instance before the Wojewódzki Sąd Administracyjny w Warszawie (Regional Administrative Court in Warsaw, Poland), which, in its judgment of 16 May 2017, […] dismissed the action, declaring its claims to be unfounded.

The Regional Administrative Court shared the position of the authorities that the Company had incorrectly identified the transactions in the supply chain, including the transaction which should have been considered to involve transport. The court thus accepted the finding that the transaction between BOP and the Company (the first transaction in the supply chain) was an intra-Community supply of goods (rather than a domestic purchase subject to 23% VAT as recognised by the Company), and transactions between the Company and the recipients were

transactions made outside the territory of Poland (the Company treated them as intra-Community supplies of goods subject to 0% VAT), which the Company was obliged to recognise as intra-Community acquisitions of goods. At the same time, the court accepted the unchallenged finding that the persons which had acquired goods from the Company had recognised the intra-Community acquisitions of goods in the Member State in which dispatch ended and that there was no loss of VAT income.

The court confirmed that Article 25(2)(2) of the Law on VAT applied to the Company. It stated that, as a result of the authorities verifying the nature of the relevant supplies, the Company, as a taxable person performing the intra-Community acquisition of goods which provided an identification number different from the number issued by the Member State in which transport of the goods ended, should be deemed to have caused goods to be acquired in two places – in the Member State in which transport ended and in the Member State of its registration. Since the Company had failed to demonstrate that it had itself taxed the acquisition of goods in the Member State in which transport ended **[Or. 7]** (it was taxed by the recipients), the intra-Community acquisition of goods was deemed to have been carried out in Poland pursuant to Article 25(2) of the Law on VAT.

5 As regards the background of the case, it should also be noted that the tax charged to the Company in connection with the intra-Community acquisition of goods in Poland was not the only disputed issue. As a result of the authorities verifying the transactions in the supply chain, the Company's right to deduct input VAT paid on the invoices for its acquisition of goods from BOP, which transaction was treated by both operators as a domestic supply, was also challenged. When reclassifying those transactions as intra-Community supplies of goods, the authorities decided that the Company had no right to deduct the VAT incorrectly shown on the relevant invoices. At the same time, however, they took the position that the issuer of those invoices was obliged to charge 23% VAT, as the Company had used the Polish VAT number for those transactions. The above problem is not covered by the question referred, but it should be mentioned that the interpretation adopted and the application of the law in the case at issue resulted in the Company being charged 46% VAT in total.

Proceedings before the Supreme Administrative Court

6 The Company appealed against the above judgment in its entirety, claiming that the court of first instance had infringed, inter alia, the following laws:

- Article 25(2)(1), read in conjunction with Article 25(1), of the Law on VAT, by their incorrect application consisting in the assumption that the condition for the application of Article 25(2) of the Law on VAT was met in a domestic situation (that is to say, where transport starts in the Member State which issued the VAT number shown on the invoices), whereas this is a provision which can be applied only to intra-Community transactions;

- Article 25(2) of the Law on VAT and Article 41 of Directive 2006/112, read in conjunction with Article 16 of Council Implementing Regulation (EU) No 282/2011, by incorrectly finding that Article 25(2) of the Law on VAT may be applied to situations in which a transaction has already been taxed as a supply of goods in the territory of Poland;

- Article 25(2)(1) of the Law on VAT, by its incorrect interpretation consisting in the erroneous view that this provision may be applied where supplies have been taxed in the Member State in which transport of the goods ended (including by a person other than the customer referred to in Article 25(2)(1) of the Law on VAT).

[Or. 8]

III. Grounds for the request for a preliminary ruling by the national court (Supreme Administrative Court)

7 In order for the Supreme Administrative Court to decide on some of the claims put forward by the Company in its appeal on a point of law, input is required from the Court of Justice of the European Union on the interpretation and application of Article 41 of Directive 2006/112/EC in the context of the principles of proportionality and neutrality. […] [Reference to Article 267 TFEU]

III. The question referred for a preliminary ruling

8 The analysis of the evidence gathered in the course of the tax proceedings in the case indicates that the finding of the authorities and of the court of first instance that the Company incorrectly recognised the nature of the supplies in which it participated should be accepted as correct; the supply involving transport was in fact the one performed between BOP and the Company, and thus it constituted an intra-Community supply of goods. The Company itself did not challenge this finding in the proceedings, but it rejected the conclusions as to the manner of taxation of the transactions reclassified in this manner.

9 The consequence of accepting the above findings is that VAT is charged to the Company on the basis of Article 25(1) and Article 25(2)(1) of the Law on VAT, which implement Article 41 of Directive 2006/112 in national legislation. Article 41 refers to the ‘VAT identification number under which the person acquiring the goods made the [intra-Community] acquisition’; the corresponding Polish rule refers to a situation in which the person acquiring the goods has indicated on the invoice a VAT number other than that of the Member State in which dispatch or transport ends ‘in connection with the intra-Community acquisition of goods’. The problem in this case lies in the fact that the Company, by providing a Polish VAT number on the invoice, did not do so for the purposes of an intra-Community acquisition transaction, but for the purposes of a domestic transaction, since it treated the acquisition of goods from BOP as such. Even if it is considered that this subjective element of the Company’s motivation does not affect the application of the aforementioned provisions, the consequences of this

error must be assessed. In the case, it has not been established that the actions of the Company or its counterparties amounted to fraud or abuse. According to their original classification, the transactions were correctly taxed **[Or. 9]**.

10 There is no doubt that the purpose of introducing provisions such as Article 41 of Directive 2006/112 (formerly Article 28(b)(A) of the Sixth Directive) was to prevent tax fraud. The intention was to eliminate tax evasion in a situation where, at the time of purchase, the person acquiring the goods is not certain in which Member State dispatch or transport will end. This rule also makes it possible to eliminate cases of non-taxation where the person acquiring the goods has no VAT identification number in the country in which dispatch or transport ends but has one in another Member State. As a result, the common VAT system is made complete without the risk that the transaction will not be taxable at a certain stage.

11 At the same time, the obligation to tax an intra-Community acquisition of goods in the Member State in which the VAT identification number provided by the person acquiring the goods was issued, while maintaining the principle of taxation in the Member State in which transport of the goods ends, means that the same transaction, namely the intra-Community acquisition of goods, may be taxed in two different Member States. This is prevented by the ability of the person acquiring the goods to demonstrate that the transaction has been taxed in accordance with Article 40, that is to say, in the Member State in which transport ends.

12 In the case at issue, it remains undisputed that the analysed transactions were taxed in the Member State in which transport ended, yet this was not done by the Company, which did not treat them as intra-Community acquisitions of goods, but rather by the recipients. The fact that the authorities which conducted the proceedings in this case had no competence to verify the entire supply chain in order to ensure correct taxation and confined themselves to examining only part of it results in the infringement of not just the VAT-neutrality principle but also of the proportionality principle. The Company's inability to account in its settlement of intra-Community acquisitions for the tax paid by its counterparties in the Member State in which transport ended (taking into account that the tax obligation concerns the year 2012) will result in a disproportionate tax burden.

13 These doubts, which are related to the interpretation of Article 41 of 2006/112/EC in conjunction with the principles of neutrality and proportionality, justify a request to the Court of Justice of the European Union for a preliminary ruling **[Or. 10]**

14 In connection with the question referred for a preliminary ruling, the Supreme Administrative Court has stayed the proceedings in the appeal on a point of law pursuant to Article 124(1)(5) of the Prawo o postępowaniu przed sądami administracyjnymi (Law on Proceedings before the Administrative Courts).