

Case C-241/23

Request for a preliminary ruling

Date lodged:

18 April 2023

Referring court:

Naczelny Sąd Administracyjny (Poland)

Date of the decision to refer:

24 February 2023

Applicant:

P. sp. z o.o.

Defendant:

Dyrektor Izby Administracji Skarbowej w Warszawie

ORDER

24 February 2023

The Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland) ...

... [composition of the court]

following consideration on **24 February 2023**

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

of the appeal on a point of law brought by **P. sp. z o.o., W.**,

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

of **29 May 2018** ...

in the action brought by **P. sp. z o.o., W.**,

against the decision of the **Dyrektor Izby Administracji Skarbowej w Warszawie** (Director of the Tax Administration Chamber in Warsaw)

of **30 June 2017 ...**

concerning **value added tax for the fourth quarter of 2014 and the first quarter of 2015**

makes the following order:

1. the following question is referred to the Court of Justice of the European Union for a preliminary ruling, pursuant to Article 267 ... [TFEU]: ‘Is consideration obtained or to be obtained by the supplier in return for a supply of goods, as referred to in Article 73 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), to be understood as meaning the nominal value of the shares acquired or the issue value, if the parties have stipulated that the consideration is to be the issue value of the shares?’

... [stay of proceedings]

GROUND(S)

I. Legal framework

Provisions of European Union law

Provisions 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; ‘Directive 2006/112’):

Article 73

In respect of the supply of goods or services, other than as referred to in Articles 74 to 77, the taxable amount shall include everything which constitutes consideration obtained or to be obtained by the supplier, in return for the supply, from the customer or a third party, including subsidies directly linked to the price of the supply.

Provisions of national law

Ustawa z dnia 11 marca 2004 r. o podatku od towarów i usług ... (Law of 11 March 2004 on tax on goods and services) (Dz. U. of 2011, No 177, item 1054, as amended; ‘the Law on VAT’):

Article 29a

1. Subject to paragraphs 2, 3, 4 and 5, Article 30a to 30c, Article 32, Article 119 and Article 120(4) and (5), the taxable amount shall be everything that constitutes consideration which the supplier of goods or services has received or is to receive on account of a sale from the purchaser, customer or a third party, including subsidies, subventions and other similar amounts received which have a direct effect on the price of the goods or services supplied by the taxable person.

Article 88(3a)(4)(b)

Invoices and customs documents cannot serve as the basis for the right to deduct tax payable and for a refund of the tax difference or for a refund of input tax where the invoices, corrective invoices or customs documents issued state amounts which do not correspond to the true state of affairs, in respect of those items for which amounts not corresponding to the true state of affairs have been stated.

II. Facts

1. P. [...] ('the company' or 'the applicant') included in its return for the fourth quarter of 2014 and the first quarter of 2015 amounts of tax on goods and services and net amounts shown in invoices issued to it by: W. [...] (W. [...]) No [...] of 6 October 2014, No [...] of 28 November 2014 and No [...] of 31 December 2014 and B. [...], subsequently converted into B. [...] (B.) No [...] of 7 October 2014 and No [...] of 28 November 2014, documenting the payment of non-cash contributions to the applicant in return for shares issued in connection with the increase in the share capital of the latter. In the agreements on the transfer of immovable property as a non-cash contribution ('agreements on an in-kind contribution'), the parties had stipulated that the consideration would be the issue price of the shares. As a result, the company adopted the issue value of the shares (that is to say, the value of the non-cash contributions) as the amount of consideration, and not the nominal value thereof (which was many times less).

2. By decision of 28 March 2017, the Head of the First Tax Office of W. [...] (the body deciding at first instance) fixed the amount of the VAT liability of the party concerned for the fourth quarter of 2014 at PLN 54 291 674, and the amount of the excess of the input tax over that due, to be carried over to the following accounting period, at PLN 0.00, and fixed the amount of the VAT liability for the first quarter of 2015 at PLN 34 352 011. In the view of that body, the taxable amount had to be the nominal value of the shares in the case of the transactions described, and not the issue value, which was many times greater.

3. After considering the appeal, the Director of the Tax Administration Chamber in W. (the appeal body), upheld, by decision of 30 June 2017, the decision of the body deciding at first instance.

3.1. The appeal body established that, pursuant to Resolution No 1/2014 of 3 October 2014, P. [...] (subsequently converted into the applicant) had increased

the share capital by issuing new shares to be subscribed in return for non-cash contributions and additional cash contributions.

To document the above supply of goods detailed in the agreement of 3 October 2014, W. [...] issued to P. [...] invoice No [...] on 6 October 2014. The appeal body assumed that the consideration actually received by W. [...] for the supply of the goods detailed in the agreement of 3 October 2014 was 4 767 series 'E' shares issued by P. [...] with a nominal value of PLN 50.00 each. The value of that consideration, quantified in money at the time of the acquisition of the shares by W. [...], was PLN 238 350 (4 767 x 50.00). The above amount is the gross amount, which means that the taxable amount of the taxable transaction documented by invoice No [...] was PLN 201 664, and the amount of tax PLN 36 686.

In the view of the appeal body, the amounts detailed in invoice No [...] constituting the issue values of the shares did not at all correspond to the true state of affairs and could not form the basis for the party concerned exercising the right to deduct under Article 86(1) of the Law on VAT.

In addition, as a result of the agreement concluded on 3 October 2014 with the applicant, B. subscribed 2 100 shares, with a nominal value of PLN 50.00 each, for an issue price of PLN 35 287.19 per share. To document the supply of the goods detailed in that agreement of 3 October 2014, B. issued to P. [...] invoice No [...] of 7 October 2014. The [appeal] body assumed that the consideration actually received by B. for the supply of the goods detailed in the agreement of 3 October 2014 was 2 100 series 'E' shares issued by P. with a nominal value of PLN 50.00 each. The value of that consideration, valued in money at the time of the acquisition of the shares by B., was PLN 105 000 (2 100 x 50.00). The amount in question (namely PLN 105 000) was the gross amount, which means that the taxable amount of the taxable transaction detailed in invoice No [...] was PLN 90 804.32, and the amount of tax was PLN 14 195.68.

In the view of the appeal body, the amounts detailed in invoice No [...] constituting the issue values of the shares could not, as they did not at all correspond to the true state of affairs, form the basis for the party concerned exercising the right to deduct under Article 86(1) of the Law on VAT.

3.2. In addition, the appeal body also established that the applicant had, by Resolution No 1/2014 of 28 November 2014, increased the share capital by issuing new shares, which were subscribed in return for non-cash contributions (in-kind contributions). In that case too, as with Resolution No 1/2014 of 3 October 2014, the shares were subscribed by W. [...] and B. in return for non-cash contributions (and additional cash contributions).

W. [...] subscribed 1 164 shares, with a nominal value of PLN 50.00 each, for an issue price of PLN 35 287.19 per share. B. [...] subscribed 133 shares, with a nominal value of PLN 50.00 each, for an issue price of PLN 35 287.19 per share.

To document the supply of the goods detailed in the agreement of 28 November 2014. W. [...] issued to P. [...] invoice No [...] of 28 November 2014. The appeal body proceeded on the basis of the assumption that the consideration actually received by W. [...] for the supply of the goods detailed in the agreement of 28 November 2014 and in invoice No [...] was 1 164 series 'F' shares issued by P. [...] with a nominal value of PLN 50.00 each. The value of that consideration, quantified in money at the time of the acquisition of the shares by W. [...], was PLN 58 200 (1 164 x 50.00). The amount in question (namely PLN 58 200) is the gross amount, which means that the taxable amount of the taxable transaction detailed in invoice No [...] was PLN 28 250.57, and the amount of tax was PLN 6 497.63.

The appeal body found that, as they did not at all correspond to the true state of affairs, the amounts detailed in invoice No [...] could not form the basis for the party concerned exercising the right to deduct under Article 86(1) of the Law on VAT.

To document the supply of the goods detailed in the agreement of 28 November 2014. B. issued to P. [...] invoice No [...] of 28 November 2014. The appeal body assumed that the consideration actually received by B. for the supply of the goods detailed in the agreement of 28 November 2014 and invoice No [...] was 133 series 'F' shares issued by P. [...] with a nominal value of PLN 50.00 each. The value of that consideration, quantified in money at the time of acquisition of the shares by B., was PLN 6 650 (133 x 50.00). The amount in question (namely PLN 6 650) is the gross amount, which means that the taxable amount for the taxable transaction detailed in invoice No [...] was PLN 5 411.34, and the amount of tax was PLN 1 238.66.

The appeal body found that, as they did not at all correspond to the true state of affairs, the amounts detailed in invoice No [...] could not form the basis for the party concerned exercising the right to deduct under Article 86(1) of the Law on VAT.

3.3. Pursuant to Resolution No 1/2014 of 29 December 2014, P. [...] increased the share capital by issuing new shares which were to be subscribed in return for non-cash contributions (in-kind contributions).

To document the supply of the goods detailed in the agreement of 29 December 2014. W. [...] issued to P. [...] invoice No [...] of 31 December 2014. The appeal body assumed that the consideration actually received by W. [...] for the supply of the goods detailed in the agreement of 29 December 2014 and invoice No [...] was 7 745 series 'G' shares issued by P. [...] with a nominal value of PLN 50.00 each. The value of that consideration, valued in money at the time of acquisition of the shares by W. [...], was PLN 387 250 (7 745 x 50.00). The amount in question (namely PLN 387 250) is the gross amount, which means that the taxable amount for the taxable transactions detailed in invoice No [...] was PLN 320 362.48, and the amount of tax was PLN 66 887.52.

In the view of the Director of the Tax Administration Chamber, the amounts detailed in invoice No [...], as they did not at all correspond to the true state of affairs, could not form the basis for the party concerned exercising the right to deduct under Article 86(1) of the Law on VAT.

3.4. In the view of the appeal body, the items covered by the agreements concluded between W. [...] and B. and the company met the statutory definition of goods and the supply thereof by the above entities constituted a supply of goods for consideration within the meaning of the Law on VAT. The consideration received by W. [...] and B. (in return for a supply in the form of a non-cash contribution and additional cash contributions) were shares issued by P. [...]. The remuneration received by W. [...] and B. in return for the supply in the form of an in-kind contribution to P. [...] had a specific value which could be expressed in a form equivalent to monetary units. In the view of the appeal body, the consideration received by W. [...] and B. in return for the supply in the form of an in-kind contribution was equivalent to the (gross) nominal value of the shares.

4. After the applicant had brought an action before the court of first instance, that court dismissed the action. The court of first instance, referring in particular to Article 29a(1) and Article 88(3a)(4)(b) of the Law on VAT, held that the consideration due to an entity making an in-kind contribution to a company in a form other than an undertaking or part of an undertaking is the nominal value of the shares received in return from the company accepting the in-kind contribution.

5. That position of the court was not shared by the applicant, which lodged an appeal on a point of law, alleging, inter alia, infringement of the following:

- Article 29a of the Law on VAT by the incorrect interpretation thereof, holding that the taxable amount of the transaction relating to the in-kind contribution documented by invoices should be determined on the basis of the nominal value of the shares, whereas, on a proper interpretation of that provision, the taxable amount of the in-kind contribution should be determined on the basis of the issue price of the shares, less the value of the cash contribution made to the company by B. and W;

- Article 88(3a)(4)(b) of the Law on VAT, by the incorrect interpretation thereof, holding that the amount of input tax detailed in the invoices documenting the in-kind contribution constitutes in part an amount which does not correspond to the true state of affairs, whereas, on a correct interpretation of that provision, the amount detailed in that invoice was an amount corresponding fully to the true state of affairs, and thus there were no grounds for holding that the company did not have a right to reduce output tax by the input tax shown on the invoices in an amount exceeding PLN 125 505.

III. Grounds for the request for a preliminary ruling

1. In essence, the dispute in this case concerns whether, in the established circumstances, the taxable amount is the nominal value of the shares subscribed in return for the in-kind contribution from the company or the issue value of those shares.

In the view of the bodies concerned and the court of first instance, the taxable amount of the transaction relating to the in-kind contribution should be established on the basis of the nominal value of the shares. In the view of the applicant, by contrast, the taxable amount of the transaction relating to in-kind contribution should be established on the basis of the issue value of the shares, less the value of the cash contribution made to the company.

2. According to the first of the views put forward, the taxable amount for the non-cash contribution (in-kind contribution) to the company will be the sum of the nominal value of the stakes which constitute the amount due (decision of the Naczelny Sąd Administracyjny (Supreme Administrative Court) of 31 March 2014 in Case I FPS 6/13).

The second position is based on the belief that, in the case of an in-kind contribution in return for shares in a company, the consideration will be the shares in that company. The number of shares, and thus their value, will depend on the intention of the parties in that regard. The number of shares – which may be not only at their nominal value but also the issue price – may depend on an agreement of the parties in that respect. It may therefore be the nominal or issue value of the shares (judgment of the Naczelny Sąd Administracyjny of 22 March 2017 in Case No 1322/15).

Therefore, there is no doubt that in the case of a non-cash contribution to a company in the form of an in-kind contribution, the taxable amount within the meaning of Article 29a(1) of the Law on VAT is ‘everything which constitutes consideration’, but it will not be the market value of the in-kind contribution, rather all the rights and obligations received in return for the contribution, corresponding to the value of that contribution. This is because there is no reference to the market value of goods and services in the provisions of EU and national law (judgment of the Naczelny Sąd Administracyjny of 27 August 2017 in Case I FSK 2326/15 and judgment of the Naczelny Sąd Administracyjny of 3 July 2014 in Case I FSK 225/13).

The nominal value of the shares determines the scope of the property and non-property rights and obligations of the partners (shareholders) of the company. This is because, in return for contributions made to the company, partners receive shares (stakes) in the share capital. In the strict sense, share capital is a denoted number recorded on the liability side of the company’s balance sheet, that is to say, it constitutes the formal value, which is the sum of the company’s shares.

The issue value of the shares is the value that is assumed when the shares are issued and that value may be equal to the nominal value, but may exceed it. The nominal value of a share may differ from the market value and the balance-sheet value. This is because the market value denotes the value that can be achieved on the market when the shares are sold. This is determined by the company's assets, but also by other elements, such as the company's clientele, location, goodwill, and thus factual circumstances.

To sum up, the following conclusions may be drawn. First, in the case of an in-kind contribution, the taxable amount cannot be the market value of the object of the in-kind contribution. Second, in the case of an in-kind contribution in return for shares, the consideration will be the shares in that company. However, there is some doubt as to whether the value of those shares and, at the same time, the taxable amount should be determined on the basis of the nominal value of the shares or the issue value of the shares, if the parties to the agreement have determined the amount of the consideration in that way.

3. The question at issue has not been explicitly addressed by the Court of Justice of the European Union (Court of Justice). The referring court is not aware of any rulings which address the issue of whether, in the case of an in-kind contribution to a company, the taxable amount is the nominal value or the issue value of the shares subscribed in return for the in-kind contribution, if the parties to the agreement on an in-kind contribution determined the amount of the consideration in that manner. In its case-law, the Court of Justice has taken the view that the taxable amount cannot be the market value of the goods or services concerned (judgment of the Court of Justice of 19 December 2012, *Orfey Bulgaria*, C-549/11, EU:C:2012:832).

4. If those considerations are applied to the present case, it should be noted that, although the contested decision and the grounds for the judgment of the court of first instance describe at length the links between the companies making the in-kind contribution and the applicant, neither the bodies concerned nor the court of first instance questioned the nominal and issue value, stated by the applicant, of the shares transferred as an in-kind contribution.

Having regard to the remarks made, the referring court states that the case-law of the Court of Justice does not answer the question whether, in the case of the subscription of shares in a company for an in-kind contribution made to that company, the taxable amount for that transaction should be determined on the basis of the nominal value of the shares or the issue value thereof, if the parties to the agreement have determined the amount of the consideration in that manner. It follows unequivocally from the cited judgment of the Court of Justice that the market value of the object of the in-kind contribution cannot constitute the taxable amount, which, however, does not directly relate to the matter at issue in this case.

It should also be noted that the referring court's doubts as to the manner in which the taxable amount was formed arise from the fact that the nominal value of the

shares adopted by the bodies adjudicating in this case as the taxable amount upon the acquisition of the in-kind contribution by the company is grossly inequivalent to the value of the object of the in-kind contribution (immovable property). Identifying that imbalance, the parties stipulated in the agreement on an in-kind contribution that the consideration for the in-kind contribution would be the company's shares at their issue value, thus rendering that transaction equivalent.

IV. Legal basis of the request for a preliminary ruling

In view of the doubts which, on the basis of the provisions of Directive 2006/112 cited above, arise with regard to the determination of the taxable amount when shares in a company are subscribed in return for an in-kind contribution, in circumstances such as those of the dispute in the main proceedings, the Naczelny Sąd Administracyjny has concluded that it is obliged to refer a question to the Court of Justice for a preliminary ruling pursuant to the third paragraph of Article [267] of the Treaty on the Functioning of the European Union.

V. Stay of proceedings

...

[signatures]

WORKING DOCUMENT