

Case C-335/19**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

24 April 2019

Referring court:

Naczelny Sąd Administracyjny (Poland)

Date of the decision to refer:

6 December 2018

Applicant:

E. Sp. z o.o. Sp. k., having its seat in S.

Defendant:

Minister Finansów

Subject matter of the case in the main proceedings

Refusal to allow adjustment of the VAT taxable amount in respect of supplies of services in the event of partial or total non-payment due to the specific tax status of the debtor and the creditor; ‘bad debt relief’

Subject matter and legal basis of the request

Interpretation of Article 90(2) of Directive 2006/112/EC, having regard to the principles of fiscal neutrality and proportionality; Article 267 TFEU

Questions referred

(1) Do the 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) — and in particular Article 90(2) thereof — having regard to the principles of fiscal neutrality and proportionality, permit the introduction into national law of a restriction on the ability to reduce the taxable amount in the event of partial or

total non-payment by reason of the specific tax status of the debtor and the creditor?

(2) In particular, does EU law not preclude the introduction of a rule in national legislation which provides for the option of taking advantage of ‘bad debt relief’ only on condition that on the date on which the service or goods are supplied and on the day preceding the date on which the tax return adjustment is filed in order to benefit from this relief:

- the debtor is not subject to insolvency or liquidation proceedings?
- the creditor and debtor are both registered as active VAT taxpayers?

Applicable provisions of EU law

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax: Articles 90 and 273.

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; ‘the Law on VAT’), *Journal of Laws* [Dz. U.] of 2011, No 177, item 1054, as amended:

Article 89a, in the wording applicable to the case under examination:

‘1. A taxable person may adjust the taxable amount and the amount of output tax arising from the supply of goods or services within the territory of Poland with respect to accounts receivable which are deemed probably unrecoverable. The adjustment shall also apply to the taxable amount and the amount of tax attributable to the part of the accounts receivable which are deemed probably unrecoverable.

1a. Accounts receivable shall be deemed probably unrecoverable where the accounts receivable have not been settled or disposed of in any manner within 150 days of the payment date stipulated in the agreement or invoice.

2. The provision of paragraph 1 shall apply where the following conditions are met:

(1) the supply of goods or services has been made for the benefit of a taxable person referred to in Article 15(1) who is registered as an active VAT taxpayer and is not subject to insolvency or liquidation proceedings;

[...]

(3) on the day preceding the date of filing the tax return in which the adjustment referred to in paragraph 1 is made:

(a) the creditor and debtor are both registered as active VAT taxpayers;

(b) the debtor is not subject to insolvency or liquidation proceedings;

[...]

(5) less than two years have elapsed since the end of the year in which the invoice documenting the accounts receivable was raised;

3. The adjustment referred to in paragraph 1 may be made in the settlement for the period in which the accounts receivable are deemed probably unrecoverable provided that the accounts receivable have not been settled or disposed of in any manner by the date on which the creditor files the tax return for that period.

4. Where, following the filing of the tax return in which the adjustment referred to in paragraph 1 is made, the amount due is settled or disposed of in any manner, the creditor shall increase the taxable amount and the amount of output tax in the settlement for the period in which the amount due is settled or disposed of. Where the amount due is settled in part, the taxable amount and the amount of output tax shall be increased in proportion to the amount settled.

5. When filing the tax return in which the adjustment referred to in paragraph 1 is made, the creditor shall notify its competent tax office of that adjustment, stating the amounts of the adjustment and the details of the debtor.

[...]

7. The provisions of paragraphs 1 to 5 shall not apply if the creditor and debtor are linked by a relationship of a kind referred to in Article 32(2) to (4).

8. The minister responsible for public finances shall determine, by way of a regulation, the template for the notification referred to in paragraph 5 [...]

Article 89b.

‘1. In the event of non-payment of the amount due arising from the invoice which documents the supply of goods or services in the territory of Poland within 150 days of the payment date stipulated in the agreement or invoice, the debtor shall adjust the deducted amount of tax resulting from that invoice in the settlement for the period in which 150 days elapsed from the payment date stipulated in the agreement or invoice.

1a. The provision of paragraph 1 shall not apply if the debtor has paid the amount due at the latest on the last day of the settlement period in which 150 days elapsed from the payment date of that amount due.

[...]

2. In the event of partial payment of the amount due within 150 days of the payment date stipulated in the agreement or invoice, the adjustment shall apply to the input tax attributable to the unpaid part of the amount due. Paragraph 1a shall apply *mutatis mutandis*.

[...]

4. Where the amount due is settled following the adjustment referred to in paragraph 1, the taxable person shall have the right to increase the amount of input tax in the return for the period in which the amount due is settled by the amount of tax referred to in paragraph 1. Where the amount due is settled in part, the input tax may be increased in proportion to the amount settled.

[...]

6. Where it is found that a taxable person has breached the obligation specified in paragraph 1, the head of the tax office or the fiscal control authority shall determine an additional tax liability of 30% of the amount of the tax arising from unpaid invoices which has not been adjusted in accordance with paragraph 1. No additional tax liability shall be determined in respect of natural persons who, in connection with the same act, are liable for a petty fiscal offence or for a fiscal offence’.

Ustawa z dnia 28 lutego 2003 r. — Prawo upadłościowe i naprawcze (Law of 28 February 2003 on Insolvency and Restructuring; ‘the Law on Insolvency and Bankruptcy’), consolidated text: *Journal of Laws* [Dz. U.] of 2015, item 233, as amended:

Article 342, in the wording applicable to the case under examination:

‘1. The amounts due that are to be satisfied from the insolvency estate shall fall into the following categories:

- (1) category one — the costs of the insolvency proceedings [...];
- (2) category two — claims arising from employment relationships arising prior to the declaration of insolvency [...];
- (3) category three — taxes and other public levies and other claims arising from social security contributions, including interest and the costs of enforcement;
- (4) category four — other receivables, if they are not satisfied under category five, together with interest for the last year before the date of insolvency, including contractual damages, the costs of court proceedings and the costs of enforcement;

(5) category five — interest which is not included in any of the above categories in the order in which claims on principal are satisfied as well as court and administrative penalties and claims arising from donations and legacies.

2. Claims acquired by way of assignment or endorsement after insolvency shall be satisfied within the framework of category three if they are not satisfied within the framework of category four. This shall not apply in regard to claims arising as a result of a receiver's or trustee's acts or the insolvent party's acts performed with the consent of the court supervisor.

3. [...].

Presentation of the facts and procedure and the main arguments of the parties

- 1 In its application for an individual tax ruling submitted to the Minister for Finances, E. sp. z o.o. ('the company') stated that, as a registered active VAT taxpayer, it engages in the supply of paid tax advice services including, inter alia, to entities registered as active VAT taxpayers. The recipients of those services are not linked to the company. The company recognises the remuneration for the services supplied as the taxable amount. For the purpose of taxing the services supplied in the territory of Poland, the company applies the basic rate of value added tax (VAT). In the cases stipulated in the Law on VAT, it also applies a reverse charge (Article 28b of the Law on VAT).
- 2 The company issued a VAT invoice to a counterparty for tax advice services supplied which were subject to taxation in the territory of Poland. Up until the date of submitting the application, the company had not received payment for the VAT invoice in question. More than two years had not elapsed from the date on which the invoice had been issued. The accounts receivable had not been settled or disposed of in any manner. In addition, the company indicated that, at the date on which the service had been supplied, the counterparty (debtor) was registered as an active VAT taxpayer, was not subject to insolvency proceedings and was not in liquidation. It is still registered as an active VAT taxpayer and is currently in liquidation.
- 3 The company accordingly asked the Minister for Finances whether the taxable amount and the output tax arising from the supply of services in the territory of Poland could be adjusted in the circumstances described where the liability has not been fully settled and the debtor is in liquidation in the settlement period in which 150 days have elapsed since the payment date.
- 4 In the individual tax ruling issued on 12 January 2015, the Minister for Finances held that the rule in Article 90 of Directive 2006/112/EC is optional for the Member States. The introduction in Article 89a of the Law on VAT of the creditor's right to adjust the taxable amount and the output tax arising from accounts receivable that are deemed probably unrecoverable does not infringe

Article 90 of Directive 2006/112. Therefore, where one of the basic conditions stipulated in the legal norm introduced into the Polish legal order, which allows the exercise of the right arising from Article 90 of that directive, has not been met, the taxable person has no grounds to derive his right to ‘bad debt relief’ directly from EU law.

- 5 The company challenged the individual tax ruling before the Wojewódzki Sąd Administracyjny w Szczecinie (Regional Administrative Court, Szczecin, Poland), which dismissed the action. In that court’s opinion, only the cumulative fulfilment of all the conditions stipulated in Article 89a(2) of the Law on VAT confers the right to adjust output VAT, which was not the position in the case under consideration.
- 6 The company brought an appeal in cassation against that judgment. The Naczelny Sąd Administracyjny (Supreme Administrative Court) joined the case with three others for the purpose of a joint ruling. In all these cases, the company applied for an individual tax ruling and the essence of the problem relates to the compatibility with EU law of the conditions for the application of bad debt relief in the possible circumstances to which Article 89a of the Law on VAT applies.

Brief statement of and reasons for the reference

- 7 The referring court has doubts concerning the extent to which the Member States are free to determine the conditions for the application of the rule laid down in Article 90 of Directive 2006/112 in their national legislation. In particular, the court is uncertain whether the conditions laid down in Article 89 of the Law on VAT should not be limited solely to those which make it possible to establish that the accounts receivable stated in the VAT return as taxable turnover and output tax have not been settled, with the exception of those conditions which concern the tax status of the creditor and debtor. In Article 89a of the Law on VAT, in addition to determining which accounts receivable are deemed not settled, the conditions set forth in paragraph 2 are introduced.
- 8 Article 90 of Directive 2006/112 does not specify either the conditions or the obligations which the Member States may impose, and in the case-law of the Naczelny Sąd Administracyjny (Supreme Administrative Court) to date this has been interpreted as meaning that those provisions give the Member States a margin of discretion, inter alia, as to the formalities to be complied with by taxable persons vis-à-vis the tax authorities in order for the taxable amount to be reduced. Therefore, it has been accepted in the national case-law that bad debt relief falls within the Member States’ margin of discretion.
- 9 The referring court considers that the case-law of the Court of Justice to date does not provide an unambiguous answer as to the permissibility of introducing such restrictions in national law.

- 10 The case-law of the Court of Justice to date appears to indicate that it is in favour of a restrictive interpretation of the restrictions on the application of ‘bad debt relief’ that Member States may introduce in their national legislation.
- 11 In particular, in its judgment of 15 May 2014, *Almos Agrárkülkereskedelmi Kft*, C-337/13, EU:C:2014:328, in paragraph 39, the Court held that ‘the formalities to be complied with by taxable persons to exercise, vis-à-vis the tax authorities, the right to reduce the taxable amount for VAT must be limited to those which make it possible to provide proof that, after the transaction has been concluded, part or all of the consideration will definitely not be received’.
- 12 However, in paragraph 36 of that judgment, the Court pointed out that ‘as regards the question of the formalities to which the exercise of that right to a reduction of the taxable amount may be subject, it must be noted that, under Article 273 of the VAT Directive, Member States may impose the obligations which they deem necessary to ensure the correct collection of VAT and to prevent evasion, provided, inter alia, that that option is not relied upon in order to impose additional invoicing obligations over and above those laid down in Chapter 3 of that directive’.
- 13 Nor are the present court’s doubts resolved by the judgment of the Court of Justice of 23 November 2017, *Enzo Di Maura*, C-246/16, EU:C:2017:887, operative part, in which the Court held that Article 11.C(1), second subparagraph, of the Sixth Council Directive must be interpreted as meaning that a Member State may not make the reduction of the VAT taxable amount subject to the condition that insolvency proceedings have been unsuccessful when such proceedings may last longer than ten years.
- 14 The foregoing may suggest that the length of insolvency proceedings was crucial for assessing the compatibility of national legislation with EU law. However, in the grounds of its judgment [in Case C-246/16, *Enzo Di Maura*], the Court stated that, ‘although it is relevant that the Member States may counteract the inherent uncertainty of the definitive non-payment of an invoice, recalled in paragraph 16 of the present judgment, such a power of derogation cannot extend beyond that uncertainty, and in particular cannot extend to whether a reduction of the taxable amount may not be carried out in situations of non-payment’ (paragraph 22). As the Court further observed, ‘to accept that it is possible for Member States to exclude any reduction of the VAT taxable amount would run counter to the principle of the neutrality of VAT, which means, inter alia, that the trader, as tax collector on behalf of the State, is entirely to be relieved of the burden of tax due or paid in the course of his economic activities, themselves subject to VAT’ (paragraph 23).
- 15 Invoking the principle of proportionality, the Court stated that ‘that uncertainty is plainly taken into account by depriving the taxable person of his right to reduce the taxable amount for as long as the debt is not definitely unrecoverable, as provided for, in essence, by the national legislation at issue in the main

proceedings. However [...] the same objective could also be pursued by granting the reduction when the taxable person demonstrates a reasonable probability that the debt will not be honoured, even if the taxable base is re-evaluated upwards in the event that payment nonetheless occurs' (paragraph 27).

- 16 At the same time, the Court found that 'it would thus be for the national authorities to determine, with due regard to the principle of proportionality and subject to review by the courts, the evidence for a probable extended period of non-payment to be provided by the taxable person, according to the specific features of the applicable national law' (paragraph 27).
- 17 The case-law of the Court of Justice to date appears to indicate that the conditions for using the bad debt relief provided for in national legislation may address only the issue of counteracting the uncertainty of the definitive non-payment of an invoice.
- 18 In view of the foregoing, the referring court has doubts as to whether such additional conditions as provided for in Article 89a(2) of the Law on VAT are permissible, or whether a sufficient condition for making the adjustment is the probable unrecoverability of the accounts receivable which the taxable person may demonstrate by showing that the accounts receivable have not been settled or disposed of in any manner within 150 days of the payment date stipulated in the agreement or invoice.
- 19 In particular, the referring court expects the Court of Justice to indicate whether the conditions laid down in Article 89a(2) of the Law on VAT remain outside the margin of discretion granted to the Member States or whether, having regard to the principle of proportionality, the national court should assess those conditions on a case-by-case basis, which would mean, in particular, that account should be taken of the length of the insolvency or liquidation proceedings.
- 20 To consider that EU law precludes the application by a Member State of the condition laid down in Article 89a(2) of the Law on VAT would expressly undermine the coherence of the Polish legal system, since in Article 89b of the Law on VAT the Polish legislature decided to exercise the power provided for in Article 185(2) of Directive 2006/112.
- 21 In order to respect the principles of neutrality and proportionality, the use of 'bad debt relief' by the taxable person/creditor and the adjustment of output tax entails an obligation imposed on the taxable person/debtor to adjust the input tax. In this manner, VAT neutrality, which is a structural feature of this tax, is ensured. Where the creditor takes advantage of 'bad debt relief', the tax which is subject to adjustment ceases to exist. Thus, in fact, the input tax which could be deducted ceases to exist as well. Therefore, the consequence of the creditor's right to adjust output VAT where the accounts receivable are unrecoverable is the obligation, arising from Article 89b(1) of the Law on VAT, for the taxable person/debtor to decrease the amount of input tax deductible or, where no such amount is present,

to increase the amount of output tax by the amount of tax arising from unpaid invoices by filing an adjusted tax return for the period in which the tax was deducted. Since the provisions of Article 89a of the Law on VAT concern the taxable person's/creditor's right and lay down the conditions for the exercise of this right, while Article 89b(1) of that law concerns the simultaneous obligation on the part of a taxable person/debtor who has not paid, when requested to do so by the creditor, the accounts receivable meeting the requirements of Article 89a(1) and (1a) of the Law on VAT, to make an appropriate adjustment to the input tax deductible or to increase commensurately the amount of output tax for the period in which the taxable person deducted the input tax, those two rules must be fully correlated and concern the same legal situation, as the assessment as to whether the creditor has correctly exercised his right to adjust output tax dictates the assessment of the debtor's situation given the direct relationship between the rights of one taxable person and the obligations of the other taxable person.

- 22 In the view of the referring court, an adjustment made by a creditor vis-à-vis an insolvent debtor interferes in an unacceptable manner with insolvency proceedings by changing the order in which creditors' claims are satisfied as laid down in Article 342 of the Law on Insolvency and Bankruptcy, since such an adjustment satisfies — at the Treasury's expense — one of the debtor's creditors in whose place another creditor of the insolvent party's estate appears, namely the Treasury. This results in the shifting of the VAT liability from category four (the gross value of the creditor's invoice arising from business, and, in general, civil-law relationships) to category three (taxes). In national case-law it is recognised that the provisions of the Law on Insolvency and Bankruptcy, including, in particular, Article 342, constitute a *lex specialis* in relation to fiscal laws and preclude the claims of individual creditors from being satisfied other than in the order established by that provision.
- 23 The restrictions introduced in national law in Article 89a(2)(1) and, respectively, in Article 89b(1b) of the Law on VAT reflect this principle and breach thereof would undermine the coherence of the present system of national law as expressed in Article 342 of the Law on Insolvency and Bankruptcy.
- 24 In this context, however, the dilemma arises as to whether these restrictions are in conflict with Article 90(2) of Directive 2006/112, having regard to the principles of fiscal neutrality and proportionality, and if, in the Court's view, they do infringe those norms, whether the national court should rule in a manner contrary to the norm laid down in Article 342 of the Law on Insolvency and Bankruptcy.
- 25 The foregoing doubts also arise in relation to the other conditions for the application of bad debt relief which are laid down in Article 89a of the Law on VAT. These conditions also ensure the symmetry of the tax arrangements adopted. In particular, the condition that the supply is to be made to an active VAT taxpayer ensures a symmetrical reduction in input tax by the purchaser of the goods supplied. If no such restriction were present, this would mean that final consumption was not taxed and that proper tax collection would not be ensured.

- 26 In the view of the referring court, the foregoing arguments militate in favour of the need to ensure that the conditions stipulated in Article 89a and Article 89b of the Law on VAT are cumulatively fulfilled.

WORKING DOCUMENT