Case C-621/19

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:

20 August 2019

Referring court:

Najvyšší súd Slovenskej republiky (Slovak Republic)

Date of the decision to refer:

16 April 2019

Appellant:

Weindel Logistik Service SR spol. s r.o.

Respondent:

Finančné riaditeľstvo Slovenskej republiky

Subject of the main proceedings

Common system of value added tax — Interpretation of Directive 2006/112/EC — Article 167 and Article 168(e) — Right to deduct value added tax — Refusal — Condition of a right of ownership in respect of the imported goods or of the right to dispose of the goods as owner — Condition that the imported goods be used for the purposes of the taxable person's taxable transactions in the form of the sale of the goods in the national territory or the supply of the goods to another Member State or the export of the goods to a third country — Requirement for fulfilment of the condition that there be a direct and immediate link between the goods purchased and the output transactions

Subject matter and legal basis of the request for a preliminary ruling

Interpretation of EU law. Article 267 TFEU.

Questions referred

1. Must Article 167 and Article 168(e) of Council Directive 2006/112/EC [of 28 November 2006] on the common system of value added tax be interpreted as meaning that the right to deduct the value added tax which a taxable person is required to pay on imported goods is conditional on a right of ownership in respect of the imported goods or on the right to dispose of the imported goods as owner?

2. Must Article 168(e) of Directive 2006/112/CE … be interpreted as meaning that the right to deduct the value added tax which a taxable person is required to pay on imported goods arises only if the imported goods are used for the purposes of the taxable person's taxable transactions in the form of the sale of the goods in the national territory or the supply of the goods to another Member State or the export of the goods to a third country?

3. In such circumstances, is the condition that there be a direct and immediate link between the goods purchased and the output transaction satisfied and, more specifically, is it permissible to apply, in the present case, the traditional interpretation of the right of deduction based on a direct and immediate link between the goods purchased and the output transactions with regard to cost components that have not arisen in relation to the goods and that cannot therefore be reflected in the price of the output supply?

Provisions of EU law cited

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax: Article 167 and Article 168(e)

Provisions of national law cited

Law No 222/2004 on value added tax, as amended (zákon č. 222/2004 Z.z. o dani z pridanej hodnoty v znení neskorších predpisov)

Paragraph 2(1)(d)

'The tax shall be chargeable on:

(a) the supply of goods for consideration,

(b) the supply of services ('the supply of services') for consideration within the national territory by a taxable person,

(c) the purchase within the national territory of goods for consideration from another Member State of the European Communities ('Member State'),

(d) the importation of goods into the national territory.'

Paragraph 3(1)

‘“Taxable person” shall mean any person who carries out an independent economic activity as referred to in subparagraph 2, whatever the purpose or results of that activity.’

Paragraph 3(2)

‘“Economic activity” (“economic activity”) shall mean any income-generating activity, including the activities of producers, traders and suppliers of services, including mining, construction and agricultural activities, activities pursued as a liberal profession under specific regulations, intellectual creative activities and sporting activities. The use of tangible and intangible assets for the purpose of generating income from such assets shall also be considered an economic activity; where asserts are jointly owned by spouses, their use for the purpose of generating income shall be considered to be an economic activity in equal shares for each spouse, unless the spouses agree otherwise.’

Paragraph 21(1)

Where goods are imported, the tax shall become chargeable:

(a) upon the goods becoming subject to the customs arrangements for free circulation,

(b) upon the goods becoming subject to the inward processing relief customs arrangements under the drawback system,

(c) upon the termination of the customs arrangements for temporary admission,

(d) where goods are re-imported and become subject to the customs arrangements for free circulation having been subject to the customs arrangements for outward processing relief;

(e) upon the unlawful importation of goods;

(f) upon the removal of the goods from customs supervision;

(g) in any other situation where a customs debt arises upon the importation of goods.’

Paragraph 49(2)(d)

‘The taxable person may deduct, from the tax he is liable to pay, the tax paid on goods and services which he uses for the supply of goods and services as a taxable person, subject to the exceptions laid down in subparagraphs 3 and 7. The taxable person may deduct the tax if the tax has been paid to the tax authorities upon importation of the goods into the national territory.’

Paragraph 51(1)(d)

‘The taxpayer may exercise his right to deduct tax in accordance with Paragraph 49 if, in respect of deductions under Paragraph 49(2)(d), he holds an import document confirmed by the customs authority in which he is identified as either consignee or importer.’

Paragraph 69(8)

‘The tax payable on the importation of goods shall be paid by a person who is a debtor under the customs regulations, or by the consignee of the goods, if at the time of importation the debtor pursuant to the customs regulations is a foreign person that holds a single authorisation pursuant to special provisions issued by the customs authority of another Member State, provided that the debtor will not use the imported goods for the purposes of his own economic activities.’

Law No 511/1992 on the administration of taxes and other charges and modifying the organisation of regional tax authorities, as amended (zákon č. 511/1992 Zb. o správe daní a poplatkov a o zmenách v sústave územných finančných orgánov v znení neskorších predpisov)

Paragraph 44(6)(b)(1)

‘Where a taxable person is made the subject of a tax audit or repeated tax audit, the tax authorities shall, within 15 days of the completion thereof (Paragraph 15(13), issue an additional tax assessment if the tax assessed after the tax audit differs from the tax declared in the tax return or additional tax return or declaration or additional declaration, or if the tax assessed after a repeated tax audit differs from the tax levied by the tax authorities after a tax audit, or if it differs from the difference in tax in the additional tax assessment.’

Case-law of the Court of Justice cited by the referring court

C-98/98, *Midland Bank*

C-408/98, *Abbey National*

C-465/03, *Kretztechnik*

Outline of the facts and the main proceedings

1 This request for a preliminary ruling was made in proceedings between the company Weindel Logistik Service SR, spol. s.r.o. and Finančné riaditeľstvo Slovenskej republiky (Finance Directorate of the Slovak Republic) concerning the refusal of the appellant’s right to deduct value added tax (‘VAT’) pursuant to Paragraph 51(1)(d) of Law No 222/2004.

2 By decisions of 18 July 2011, the Daňový úrad Bratislava (Tax Office, Bratislava, ‘the Tax Office’) refused the appellant the right to deduct VAT for the tax period

February to December 2008. The tax difference for that tax period amounts to EUR 198 322.25.

3 The appellant, as consignee and declarant, imported into the Slovak Republic goods from Switzerland, Hong Kong and China for the purpose of repackaging them. When the goods were released for free circulation, the appellant became liable to pay the tax in accordance with Article 21(1)(a) of Law No 222/2004. Once the goods had been repackaged, they were exported or supplied from the territory of the Slovak Republic to a third country and the repackaging services were invoiced to the customer. Ownership of the goods remained with the foreign customer the entire time.

4 The appellant paid the tax and claimed a right of deduction pursuant to Paragraph 51(1)(d) of Law No 222/2004. The Tax Office refused to allow the appellant to deduct the tax it had paid, on the ground of non-compliance with Paragraph 49(2) and Paragraph 51(1)(d) of Law No 222/2004. First of all, neither was the appellant the owner of the imported goods, nor did it have the right to dispose of the goods as owner. Next, the cost of the goods was not directly and immediately linked with the appellant's economic activity and the appellant had not incurred costs in the purchase of goods that would then be included in the price of downstream transactions subject to tax. Lastly, the appellant had not used the imported goods in order to supply goods or services: it had not sold the goods in the national territory, or supplied them to another Member State of the European Union, or exported them to a third country, and so it had not used the goods for the purposes of its own economic activity as a taxable person.

5 The Tax Office's decisions were confirmed by the respondent by decisions of 13 October 2011.

6 The appellant brought an action which was dismissed by judgment of the Krajský súd v Bratislave (Regional Court, Bratislava, Slovak Republic, 'the Regional Court') of 20 June 2012.

7 Subsequently, the judgment of the Regional Court was set aside by judgment of the Najvyšší súd Slovenskej republiky (Supreme Court of the Slovak Republic, 'the Supreme Court') No 3Sžf/78-88/2012 of 15 January 2013, the effect of which was that the decisions of the respondent and of the Tax Office were annulled and the case was referred back. In its judgment, the Supreme Court stated that the appellant had acted correctly in exercising its right to deduct the tax which it had been obliged to pay on the imported goods. The economic link lay in the fact that, had it not actually imported the goods, the appellant would not have been able to carry out the services relating to such goods. The Tax Office and the respondent had acted contrary to the law in imposing on the appellant, without any legal reason, an impossible condition. The appellant was entitled to provide repackaging services even without any right of ownership over the goods, since no provision of law prohibited that. If it were otherwise, there would be a breach of the principle of neutrality.

8 Without there being any change in the facts stated, by new decisions of 16 January 2014, the Tax Office again refused to recognise the appellant's right to deduct the tax for the period from February to December 2008 amounting to EUR 198 322.25, doing so for the same reasons as before. The Tax Office reiterated its previous reasoning and also relied on the conclusions of the 94th meeting of the 'VAT Committee' of 19 October 2011, according to which the person that is liable to pay the tax on importing goods does not have a right to deduct the tax paid if he has not acquired the right to dispose of the goods as owner or if the cost of the goods is not directly and immediately linked to its economic activity. The Tax Office also referred to the judgments of the Court of Justice in Cases C-98/98, *Midland Bank*, C-408/98, *Abbey National*, and C-465/03, *Kretztechnik*.

9 The appellant appealed against the Tax Office's decisions of 16 January 2014, arguing that the right of ownership, and more specifically the transfer of the right to dispose of the goods as the owner, inasmuch as it was a requirement resulting from the meeting of the 'VAT Committee', related exclusively to the supply of goods to a purchaser. The appellant also argued that the words 'uses for the supply of goods and services', appearing in Paragraph 49(2) of Law No 222/2004, must be interpreted in the light of Paragraph 3(3) of that law, with the result that the deduction of tax is dependent upon the scope of the use that is made of the goods in the taxable person's economic activity. The appellant had, for the purposes of its economic activity, imported goods which it had not in fact subsequently sold, but had instead used solely in the pursuit of its principal economic activity, that is to say, repackaging services.

10 By new decisions of 7 April 2014, the respondent confirmed the Tax Office's decisions of 16 January 2013. In particular, it endorsed the Tax Office's reasoning, referring to the conclusions of the meeting of the 'VAT Committee'.

11 The dispute was then brought before the Regional Court, which annulled the respondent's decisions of 7 April 2014. An appeal against that judgment was brought before the Supreme Court, which ultimately dismissed the application for review of the legality of the respondent's decisions and endorsed the legal arguments put forward by the Tax Office and the respondent. The Supreme Court rejected the appellant's request for the case to be referred to the Court of Justice and the case was then brought before the Ústavný súd Slovenskej republiky (Constitutional Court of the Slovak Republic), which found that there had been an infringement of the appellant's fundamental right to effective and impartial judicial protection.

Main arguments of the parties

12 The appellant asserts that it is entitled to deduct the VAT, since the right of ownership, and more specifically the transfer of the right to dispose of the goods as owner, relates exclusively to the supply of goods to a purchaser. The appellant was not a purchaser and so that condition cannot apply in its case. When goods are

imported, the liability to pay the tax and the right of deduction are not conditional on there being a right of ownership or a right to dispose of the goods as owner. The goods were imported for the purposes of its principal economic activity.

13 The respondent asserts that, when goods are imported, one of the pre-conditions for exercising the right to deduct VAT is the acquisition of a right of ownership or of the right to dispose of the goods as owner, along with the requirement that there be a direct and immediate link with the economic activity, the incurring of costs in the purchase of the goods and their use for the supply of goods or services in the context of the pursuit of an economic activity.

Summary of the reasons for the reference

14 The fundamental question in this case is whether, in a situation in which the appellant received imported goods in the territory of the Slovak Republic for the purposes of storing and repackaging them, and, on their release for free circulation, became liable to tax under Law No 222/2004, and, after storing and repackaging the goods, which were subsequently delivered to a third country or to other Member States, the appellant was then entitled, on the basis of the invoice issued, to deduct the VAT pursuant to Law No 222/2004.

15 In judgment No 3Sžf/78-88/2012, the Supreme Court found that the appellant had become liable to pay the tax on the basis of its having imported goods, not on the basis of the supply of goods or services, and that it had therefore acted correctly when, against the amount of VAT that it had been required to pay as a taxable person on importing the goods into the national territory, it had exercised its right to deduct the tax on the supply of goods and services. There was also an economic link, in that, had it not imported the goods to its place of business, the appellant would not have been able to pursue its economic activity, namely the repackaging of goods.

16 However, it in subsequent judgment in the case, No6Sžf/23/2016, the Supreme Court, while acknowledging the conclusions stated in the initial judgment, to the effect that the appellant had become liable to pay the tax on the date of acceptance of the customs declaration relating to the release of the goods for free circulation, arrived at a different conclusion regarding the fulfilment of the conditions for deducting the VAT. The Supreme Court emphasised in its judgment that the pre-condition for the full deduction of VAT is that the goods or services are used for the purposes of the taxable person’s economic activity. At the same time, it pointed out that, when the right to deduct the tax is exercised, there must, in principle, be a direct link between the individual input taxable transaction (goods purchased or services received) and the goods or services supplied, [that is to say, the costs of the inward transaction must be directly incorporated in the subsequent taxable supply]. Consequently, the cost components must, as a general rule, arise before the taxable person carries out the taxable transaction to which they relate. When the taxable person exercises the right to deduct the tax in full, it must be

able to demonstrate a direct and immediate link with the taxable supply with reference to which the law permits it to deduct the tax.

17 In the light of the above, the Supreme Court concluded that the condition that the goods or services should be used for the purposes of the taxable person's economic activity was not fulfilled. Nor was there a direct and immediate link between the input transaction and the output transaction, since the appellant had not subsequently resold the goods, of which it was not the owner: it had not been in a position to perform a taxable transaction; it had merely been able to repackage the goods and arrange for their export to the third countries designated by the Swiss company that owned the goods. If the appellant were reimbursed the tax that it had paid, then there would be no payment of the tax on the national territory, since the foreign company was not registered as a taxable person in the national territory. The tax that the appellant sought to deduct related to the goods and was not part of the repackaging service. The appellant had invoiced the foreign company for the repackaging service only and had not included the cost of purchasing the goods.

18 *Sic stantibus rebus*, having regard to the conclusions drawn by the Constitutional Court of the Slovak Republic in its decision No II. ÚS-381/2018-49 of 11 October 2018, which included the finding that the appellant's fundamental rights had been breached as a result of the fact that the case was not referred to the Court of Justice, the Supreme Court finds that, before the case in the main proceedings can proceed, it is necessary to refer the questions of interpretation of EU law set out above to the Court of Justice for a preliminary ruling.