Case C-855/19

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:

22 November 2019

Referring court:

Naczelny Sąd Administracyjny (Poland)

Date of the decision to refer:

17 October 2019

Applicant:

G. Sp. z o.o.

Defendant:

Dyrektor Izby Administracji Skarbowej w Bydgoszczy

Subject matter of the case in the main proceedings

Obligation and terms of VAT payment on the intra-Community acquisition of diesel fuel

Subject matter and legal basis of the request

Interpretation of EU law; Article 267 TFEU

Questions referred

I. Do Article 110 of the Treaty on the Functioning of the European Union (consolidated version 2012) (OJ 2012 C 326, p. 1 et seq.) and 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; 'Directive 2006/112/EC') not preclude a provision such as Article 103(5a) of the 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) (*Journal of Laws* [Dz. U.] of 2016, item 710, as amended; 'the VAT

Law', which stipulates that, in the case of an intra-Community acquisition of motor fuels, the taxable person is obliged, without being called upon to do so by the head of the customs office, to calculate and pay the amounts of tax to the account of the customs office competent for dealing with the payment of excise duty:

(1) within 5 days of the date on which the goods in question enter the place of receipt of excise goods specified in the relevant permit — if the goods are the subject of intra-Community acquisition within the meaning of the Ustawa z dnia 6 grudnia 2008 r. o podatku akcyzowym (Law of 6 December 2008 on excise duty) by a registered consignee under the excise duty suspension procedure pursuant to the provisions on excise duty;

(2) within 5 days of the date on which such goods enter a tax warehouse from the territory of a Member State other than Poland;

(3) upon the movement of these goods within the territory of Poland — if the goods are moved outside of the excise duty suspension procedure pursuant to the provisions on excise duty?

II. Does Article 69 of Directive 2006/112/EC preclude a provision such as Article 103(5a) of the VAT Law, which stipulates that, in the case of the intra-Community acquisition of motor fuels, the taxable person is obliged, without being called upon to do so by the head of a customs office, to calculate and pay the amounts of tax to the account of the customs office competent for dealing with the payment of excise duty:

(1) within 5 days of the date on which the goods in question enter the place of receipt of excise goods specified in the relevant permit — if the goods are the subject of intra-Community acquisition within the meaning of the Law of 6 December 2008 on excise duty by a registered consignee under the excise duty suspension procedure pursuant to the provisions on excise duty;

(2) within 5 days of the date on which such goods enter a tax warehouse from the territory of a Member State other than Poland;

(3) upon the movement of these goods within the territory of Poland — if the goods are moved outside of the excise duty suspension procedure pursuant to the provisions on excise duty:

– where the above amounts are interpreted as not constituting interim VAT payments within the meaning of Article 206 of Directive 2006/112/EC?

III. Does an interim VAT payment within the meaning of Article 206 of Directive 2006/112/EC which is not paid on time lose its legal status at the end of the tax period for which it is to be paid?

Applicable provisions of EU law

Treaty on the Functioning of the European Union: Article 110

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax ('the VAT Directive'): Articles 69, 206, 250, 258, 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) (*Dziennik Ustaw (Journal of Laws)* [Dz. U.] of 2016, item 710, as amended, 'the VAT Law'):

Article 103(5a) (in the wording in force from 1 August 2016 to 1 March 2017):

In the case of the intra-Community acquisition of the motor fuels listed in Annex 2 to the Law of 6 December 2008 on excise duty, the production or marketing of which requires a licence pursuant to the provisions of the Ustawa z dnia 10 kwietnia 1997 r. — Prawo energetyczne (Energy Law of 10 April 1997), the taxable person shall be obliged, without being called upon to do so by the head of a customs office, to calculate and pay the amounts of tax to the account of the customs chamber competent for excise duty:

(1) within 5 days of the date on which the goods in question enter the place of receipt of excise goods specified in the relevant permit — if the goods are the subject of intra-Community acquisition within the meaning of the Law of 6 December 2008 on excise duty by a registered consignee under the excise duty suspension procedure pursuant to the provisions on excise duty;

(2) within 5 days of the date on which such goods enter a tax warehouse from the territory of a Member State other than Poland;

(3) upon the movement of these goods within the territory of Poland — if the goods are moved outside of the excise duty suspension procedure pursuant to the provisions on excise duty.

Article 20(5):

In the case of the intra-Community acquisition of goods, the chargeable event shall occur on issue of the invoice by the VAT-taxable person, but no later than on the 15th day of the month following the month in which the supply of goods that are the subject of intra-Community acquisition occurs, subject to paragraphs 8 and 9 and to Article 20b. The provision of paragraph 1a shall apply *mutatis mutandis*.

Brief summary of the facts and the procedure in the main proceedings

The tax authorities established that, in December 2016, the applicant (G. Sp. z o.o., having its seat in B.) made an intra-Community acquisition of 3 190.874 m^3 of diesel fuel with CN code 2710 19 43 and, as a consequence, was liable to pay tax on goods and services (VAT) pursuant to Article 103(5a) of the VAT Law within five days of each date of those goods entering the territory of Poland, on 20 transactions in total, amounting to PLN 1 530 766, which the applicant failed to do.

Moreover, although pursuant to Article 99(11a) of the VAT Law, in the case of the intra-Community acquisition of goods referred to in Article 103(5a), the taxable person is obliged to submit returns to the head of the customs office competent for excise duty indicating the amounts of tax due for monthly periods by the 5th day of the month following the month in which the obligation to pay the tax arose, the applicant failed to submit the VAT-14 return for the period covered by the main proceedings.

Consequently, it was held that the applicant had VAT arrears amounting to PLN 1 530 766 for December 2016, which, together with the interest for late payment due, should be paid promptly to the bank account of the tax office.

The company appealed against the decision of the Dyrektor Izby Administracji Skarbowej w Bydgoszczy (Director of the Tax Administration Chamber in Bydgoszcz) of 6 April 2018 concerning VAT for December 2016 to the Wojewódzki Sąd Administracyjny w Bydgoszczy (Regional Administrative Court in Bydgoszcz), which dismissed the appeal in its judgment of 10 July 2018.

The court of first instance agreed with the review body that the applicant should have accounted for the tax pursuant to Article 103(5a) of the VAT Law. According to that court, it was irrelevant whether the applicant did in fact hold a licence or that the purchased oil was neither offered for sale nor used to power internal combustion engines (it was intended to be used for the manufacture of products other than motor fuels).

That court also held that the amounts payable under Article 103(5a) of the VAT Law were not interim VAT payments, but rather tax amounts owed (‘a separate tax arrangement’). It also found no incompatibility between Article 103(5a) of the VAT Law, on the one hand, and Article 206 of the VAT Directive and Article 110 TFEU, on the other.

The company brought an appeal on a point of law against that judgment before the Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland), which has stayed the proceedings and referred questions to the Court of Justice for a preliminary ruling.

Grounds for the order for reference

The first question

1 On 1 August 2016, the Ustawa z dnia 7 lipca 2016 r. o zmianie ustawy o podatku od towarów i usług oraz niektórych innych ustaw (Law of 7 July 2016 amending the VAT Law and certain other laws) (*Journal of Laws* [Dz. U.] of 2016, item 1052, as amended) entered into force. This introduced the 'fuel package', that is, a set of amendments intended to make the collection of VAT on intra-Community acquisitions of motor fuels more effective and thus prevent VAT fraud related to cross-border trade in such fuels.

2 The new provisions added in Article 103(5a)-(5d) of the VAT Law introduced an important change since, under the provisions in force until 31 July 2016, intra-Community acquisition of motor fuels did not require VAT to be paid at the time of acquisition (within a set period from the fuel entering the territory of Poland) because, as a rule, an active VAT taxable person accounted for the acquisition — with regard to input and output VAT — in a VAT-7 return submitted by the 25th day of the month following each subsequent tax period (month or quarter). The VAT-7 return included the output VAT related to the intra-Community acquisition of fuels as well as input VAT in the same amount as the output VAT (provided that the acquisition involved a taxable sale).

3 In its appeal on a point of law, the applicant has claimed that the new provision of Article 103(5a) of the VAT Law is incompatible with Article 110 TFEU in that it establishes a tax that discriminates against goods from other EU Member States.

4 Under Article 110 TFEU, no Member State may impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products. Furthermore, no Member State may impose on the products of other Member States any internal taxation of such a nature as to afford indirect protection to other products.

5 In its appeal on a point of law, the applicant has pointed out that the Court of Justice, in its case-law, has interpreted that provision at least twice in the context of establishing earlier payment dates for taxes on goods imported from other Member States of the European Union. Firstly, in its judgment of 27 February 1980, *Commission* v *Ireland*, 55/79, EU:C:1980:56, the Court held that, where domestic traders who trade in particular types of goods enjoy longer VAT payment terms than traders who purchase similar goods originating in other Member States, this amounts to discriminatory treatment of those goods.

6 Secondly, in its judgment of 17 June 1998, *Grundig Italiana*, C-68/96, EU:C:1998:299, the Court held that Article 95 of the Treaty (now Article 110 TFEU) must be considered to have been infringed where, for imported goods, the obligation to pay the charge arises at the time of importation through customs, whereas, for domestic goods, it arises only when the domestic producer lodges the

return with the tax authorities during the month following the quarter in which the goods have been placed on the market, the event giving rise to the charge occurring when the product intended for consumption is placed on the domestic market (paragraph 25). As a consequence, the Court found that Article 95 of the Treaty is to be interpreted as precluding a Member State from introducing and levying a consumption tax in so far as the taxable amount and the procedure for collecting the tax are different for domestic products and for products imported from other Member States.

7 Thus, in those judgments, the Court held that Article 95 of the Treaty (now Article 110 TFEU) must be interpreted as precluding national legislation which provides for a payment period with respect to tax on goods from other Member States which is shorter than that on similar domestic goods, which should be binding on national courts.

8 The Court held that an accelerated payment period for goods from other Member States discriminates against those goods, which is logical, since deferred tax payment confers an economic advantage on the trader and, if the payment period for goods from other Member States is accelerated, this amounts to a financial disadvantage for the trader.

9 The applicant has claimed that this is the case with Article 103(5a) of the VAT Law, since that provision lays down accelerated terms for the payment of VAT on motor fuels from other Member States. It should be noted that the right to deduct tax in this regard arises pursuant to Article 86(2)(4)(c), in conjunction with Article 86(10) and Article 86(10b)(2); of the VAT Law — for the period in which the chargeable event arose in relation to the goods and services purchased by the taxable person (Article 20(5) of the VAT Law), provided that the taxable person:

(a) receives an invoice documenting the supply of goods, which is an intra-Community acquisition of goods for the taxable person in question, within three months of the end of the month in which the chargeable event arose in relation to the goods acquired;

(b) includes the amount of output tax on the intra-Community acquisition of goods in the tax return in which the taxable person is required to account for that tax, not later than three months from the end of the month in which the chargeable event arose in relation to the goods acquired.

10 The discrepancy between tax payment periods under Article 103(5a) of the VAT Law and the point at which the taxable person becomes entitled to deduct the tax on intra-Community acquisition of fuels results clearly in the need for the buyer to engage more of its own funds to perform the accelerated VAT settlement. By contrast, traders who trade in similar domestic goods pay tax by the 25th day of the month following the month in which the supply takes place.

11 Under Article 273 of the VAT Directive, Member States may impose other obligations which they deem necessary to ensure the correct collection of VAT

and to prevent evasion, subject to the requirement of equal treatment as between domestic transactions and transactions carried out between Member States by taxable persons and provided that such obligations do not, in trade between Member States, give rise to formalities connected with the crossing of frontiers.

12 Although Article 258 of the VAT Directive provides that Member States are to lay down detailed rules for the submission of VAT returns in respect of intra-Community acquisitions of new means of transport, as referred to in Article 2(1)(b)(ii), and intra-Community acquisitions of products subject to excise duty, as referred to in Article 2(1)(b)(iii), firstly, this concerns intra-Community acquisitions of excise goods by traders who are not required to account for VAT on other intra-Community acquisitions and, secondly, this provision refers to the submission of returns rather than the rules for collecting VAT, which are the subject of the dispute in the present case.

13 On the other hand, the freedom of Member States to set VAT payment terms, including in the case of the title at issue, is limited by the requirements arising in this respect from Article 273 of the VAT Directive, namely:

- the obligations must be necessary to ensure the correct collection of VAT and to prevent evasion;

- they must ensure the equal treatment of domestic transactions and intra-Community transactions;

- they must not give rise to formalities connected with the crossing of frontiers.

14 In the case of the disputed Article 103(5a) of the VAT Law, there are doubts as to whether that provision meets the latter two criteria.

The second question

15 If the Court of Justice should find that the rule governing accelerated VAT payments under Article 103(5a) of the VAT Law is not incompatible with Article 110 TFEU and Article 273 of the VAT Directive, the second contentious issue in the present case in relation to the provisions of the VAT Directive is the nature of those payments in the context of the point in time at which the chargeable event occurs, that is to say, whether the tax payments provided for in Article 103(5a) of the VAT Law are a separate arrangement for the accelerated collection of VAT or whether they constitute interim payments within the meaning of Article 206 of the VAT Directive.

16 First of all, under Article 69 of the VAT Directive (since 1 January 2013), in the case of the intra-Community acquisition of goods, VAT is to become chargeable on issue of the invoice, or on the passing of the time limit referred to in the first paragraph of Article 222 if no invoice has been issued by that time.

17 In the light of that provision, the chargeable event occurs on issue of the invoice, and, if no invoice has been issued before the date of the intra-Community acquisition, the chargeable event occurs on the 15th day of the month following the month in which the chargeable event occurred.

18 This is a special regulation and therefore there are no exceptions to it. What this means is that VAT on intra-Community acquisitions of goods becomes payable by the taxable person only on the occurrence of the above circumstances.

19 Article 69 of the VAT Directive was implemented by Article 20(5) of the VAT Law, which provides that in the case of the intra-Community supply of goods, the chargeable event occurs on issue of the invoice by the taxable person, but no later than on the 15th day of the month following the month in which the supply of goods occurs.

20 Against the background of these rules, the question arises as to whether VAT on intra-Community acquisitions of motor fuels can be collected, as provided for in Article 103(5a) of the VAT Law, even before the chargeable event provided for in Article 69 of the VAT Directive (Article 20(5) of the VAT Law) occurs.

21 If it is assumed that the tax payments referred to in Article 103(5a) of the VAT Law are a separate arrangement for the accelerated collection of VAT, then the obligation to make those payments before the date on which the chargeable event occurs under Article 69 of the VAT Directive (Article 20(5) of the VAT Law) should be regarded as incompatible with the provisions in question, since there are no grounds to require the taxable person to pay VAT before the chargeable event.

22 It therefore appears that it is only if those payments are to be regarded as interim payments under Article 206 of the VAT Directive that it would be possible to establish that they are compatible with the above provisions.

23 Pursuant to Article 206 of the VAT Directive, any taxable person liable for payment of VAT must pay the net amount of the VAT when submitting the VAT return provided for in Article 250 of that directive. Member States may, however, set a different date for payment of that amount or may require interim payments to be made.

24 The first sentence of that provision provides for the obligation to pay the net amount of the VAT when submitting the VAT return provided for in Article 250. However, the payment provided for in Article 103(5a) of the VAT Law, which is calculated by multiplying the price of motor fuels acquired by way of an intra-Community acquisition by the applicable tax rate, without deducting input tax, is a gross payment.

25 That payment is due within 5 days of the entry of the motor fuel into the territory of Poland, that is, before the obligation to submit a VAT-14 return specific to these transactions, in which all intra-Community acquisitions of motor fuels during the previous month must be reported and the tax on them indicated (which

must be paid earlier, by the dates set forth in Article 103(5a) of the VAT Law). The return must be submitted to the competent authority by the 5th day of the month following the month in which the obligation to pay tax under Article 103(5a) of the VAT Law arose, with the indicated amount of tax for a given month being the sum of partial amounts in regard to individual transactions during that period, which should be paid in accordance with Article 103(5a) and (5b) of the Law.

26 It should be pointed out that the net amount of the VAT, pursuant to the first sentence of Article 206 of the VAT Directive, is only indicated by the taxable person in the VAT-7 return (submitted after the end of the tax period) in which the taxable person includes the output VAT paid under Article 103(5a) of the VAT Law in the given tax period in connection with intra-Community acquisitions of fuel as well as the amount of output VAT on intra-Community acquisitions of other goods, deducting the relevant input tax for that tax period from those amounts.

27 As the Court pointed out in its judgment of 26 March 2015, *Macikowski*, C-499/13, EU:C:2015:201, it follows from Articles 206 and 250 of the VAT Directive that the amount of VAT paid to the public exchequer must be a net amount, that is to say, an amount which takes account of the deductions to be made, and that all the deductions must be made in relation to the tax period during which they arose.

28 Thus, if the second sentence of Article 206 of the VAT Directive provides for the possibility to 'set a different date for payment of that amount', the amount in question is the amount referred to in the first sentence, namely, the net amount of the VAT rather than the gross amount. Thus, where a Member State imposes an obligation to pay the gross amount on a given intra-Community acquisition of goods, such as that provided for in Article 103(5a) of the VAT Law, it appears that the amount in question cannot be VAT with a different payment period set but rather the interim payment referred to at the end of the second sentence of Article 206 of the Directive.

29 In the aforementioned *Macikowski* judgment, the Court of Justice (albeit in respect of the paying agent) held that, if the paying agent pays the VAT owed on the transaction indicated in the return by the taxable person, such a situation may be justified under the second sentence of Article 206 of the VAT Directive, which permits Member States to require interim payments to be made.

30 In those circumstances, it appears that, in order for the payments to be made by the taxable person under Article 103(5a) of the VAT Law to be considered compatible with Articles 69 and 206 of the VAT Directive, they must be regarded as interim payments within the meaning of Article 206 of the VAT Directive.

The third question

31 If it is assumed that the taxable person's payments referred to in Article 103(5a) of the VAT Law are interim tax payments, a further question arises as to whether an interim VAT payment within the meaning of Article 206 of the VAT Directive which is not paid on time loses its legal status at the end of the tax period for which it is to be paid; the answer to this question is essential in order to determine whether interim payments can be assessed after the end of the tax period and also to determine the point in time up to which interest on interim payments not paid on time should be calculated.

32 Under the interim payment system, payments are made during the entire tax period towards a liability that will be determined only in the future (after the end of the tax period). Only then does the taxable person make a final settlement with the public exchequer through an additional payment or refund of the amounts overpaid in interim payments, accounting for — in the case of VAT — input tax, which results in the determination of the net amount of tax to be paid (or the amount of VAT refund). Therefore, after the end of the tax period, it appears that gross interim tax payments should not be assessed and tax arrears should not be determined in this connection, as at this point the actual tax liability has already been determined as the net tax liability for the entire period towards which the interim payments were to be collected.

33 The separate nature of the tax liability on account of gross interim payments, and thus their legal independence, does not mean that these are unrelated to the net tax liability for a given tax period for which gross interim payments are due.

34 The tax liability on account of interim payments is one form of tax liability, but its essence is that after the end of the tax period, the liability on account of interim payments ceases to exist as the actual amount of tax for that period is determined. This follows from the temporary nature of interim payments, as a result of which the right to assess such payments should cease at the end of the tax period.

35 This would mean that an interim payment not made on time becomes a tax liability, but only until it expires as a legal entity, that is, until the end of the tax period for which it is due.

36 It would therefore be pointless for the tax authority to determine the gross amount of interim tax payments due where they have not been correctly made, but this should not release the taxable person from the obligation to pay interest on interim payments not made in time where these exceed the amount of output tax for the tax period in question.