

Case C-895/19**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:**

4 December 2019

Referring court:

Wojewódzki Sąd Administracyjny w Gliwicach (Poland)

Date of the decision to refer:

4 November 2019

Applicant:

A.

Defendant:

Dyrektor Krajowej Informacji Skarbowej

Subject matter of the case in the main proceedings

Establishment of the right to deduct input tax paid on the intra-Community acquisition of goods in the light of the amended provisions of the Law on VAT laying down a mandatory three-month limitation period for submitting a tax declaration.

Subject matter and legal basis of the request

Interpretation of EU law, Article 267 TFEU

Question referred

Is Article 167 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), in conjunction with Article 178 thereof, to be interpreted as precluding national legislation which makes the exercise of the right to deduct input tax in the same accounting period as that in which the tax due was payable on the transactions

constituting Community acquisitions of goods subject to entry of the tax due on those transactions in the appropriate tax declaration submitted within the mandatory period (in Poland, three months) following the end of the month in which the tax liability arose in relation to the goods and services acquired?

Provisions of EU law relied on

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, as amended by Directive 2010/45/EU of 13 July 2010 ('the VAT Directive'): Articles 1(2), 63, 167, 168, 178 to 182, and 273

Provisions of national law relied on

Ustawa z dnia 11 marca 2004 r. o podatku od towarów i usług (Law of 11 March 2004 on tax on goods and services) (*Dziennik Ustaw* 2018, item 2174, as amended; 'the Law on VAT')

Article 86(1), (10), (13) and (13a) in the version in force both before and after 1 January 2017:

1. In so far as goods and services are used to conduct taxed transactions, the taxable person ... shall have the right to deduct the amount of input tax from the amount of tax due

10. The right to deduct the amount of input tax from the amount of tax due shall arise when a return is drawn up for the period in which the tax liability arose in relation to the goods and services acquired or imported by the taxable person.

13. Where the taxable person has not deducted the amount of input tax from the amount of tax due within the periods referred to in paragraphs 10, 10d, 10e and 11, he may reduce the amount of the tax due by adjusting the tax declaration for the period in which the right to reduce the amount of tax due arose, but must do so within five years from the beginning of the year in which the right to reduce the amount of tax due arose, subject to paragraph 13a.

13a. Where the taxable person for the purposes of an intra-Community acquisition of goods or supply of goods or services, in respect of which, under Article 17, the taxable person is the purchaser of goods and services, has not deducted the amount of input tax from the amount of tax due within the periods referred to in paragraphs 10 and 11, he may reduce the amount of tax due by adjusting the tax declaration for the period in which the right to deduct the amount of tax due arose, but must do so within five years from the end of the year in which the right to reduce the amount of tax due arose.

Article 86(10b) in the version in force until 31 December 2016:

10b. The right to deduct the amount of input tax from the amount of tax due in the cases referred to in:

...

(2)(2)(4)(c) — shall arise pursuant to paragraph 10, provided that the taxable person:

...

(b) includes the amount of tax due on the intra-Community acquisition of goods in the tax declaration in which he is required to pay that tax;

(3)(2)(4)(a), (b) and (d) — shall arise pursuant to paragraph 10, provided that the taxable person includes the amount of tax due on those transactions in the tax declaration in which he is required to pay that tax.

As of 1 January 2017, Article 86(10b)(2)(b) and (3) was amended and paragraph 10i was added:

10b. The right to deduct the amount of input tax from the amount of tax due in the cases referred to in:

...

(2)(2)(4)(c) — shall arise pursuant to paragraph 10, provided that the taxable person:

...

(b) includes the amount of tax due on the intra-Community acquisition of goods in the tax declaration in which he is required to pay that tax, within three months following the month in which the tax liability arose in relation to the acquired goods;

(3)(2)(4)(a), (b) and (d) — shall arise pursuant to paragraph 10, provided that the taxable person includes the amount of tax due on those transactions in the tax declaration in which he is required to pay that tax, within three months following the month in which the tax liability arose in relation to the acquired goods or services.

10i. Where the taxable person includes the amount of tax due in the tax declaration in which he is required to pay that tax at a date subsequent to that laid down in paragraph (10b)(2)(b) and (3), the taxable person may increase the amount of input tax accordingly in the return for the accounting period in respect of which the period for submitting a tax declaration has not yet expired.

Succinct presentation of the facts and the main proceedings and the arguments of the parties

- 1 In the request for an individual interpretation of tax law, A. ('the company') stated that in the course of its economic activity it makes purchases, including intra-Community acquisitions of goods in the territory of Poland. The acquired goods are then used for transactions which are subject to tax on goods and services (VAT) in the territory of the country. In the course of that activity, cases have arisen, and may arise in future, where the tax due on the intra-Community acquisition of goods was not/will not be entered by the taxable person in the appropriate tax declaration (or tax adjustment) submitted within three months following the month in which the tax liability arose in relation to the acquired goods (it did or will do so after the expiry of that period by adjusting the tax declaration). In that regard, failure to state the tax due within the above period may arise from, inter alia, late receipt of an invoice, incorrect classification of the transaction by the company or a mistake by the person drawing up the records and VAT declarations. The company notes that it has a full right to deduct VAT and the entering of the amount of the tax due later (than three months) by adjusting the appropriate declaration is not connected with any abuse of rights or attempt to reduce tax.
- 2 In connection with the foregoing, the company asks whether, as the law stood as of 1 January 2017, in the situation set out in the request and in any future event, it can, or will be able to, as a result of an adjustment to a VAT declaration submitted for the period in which the tax liability arose, deduct input tax paid on the intra-Community acquisition of goods in the same accounting period in which the tax due was included, even if the adjustment was not, or will not be, made within three months following the month in which the tax liability arose in relation to the acquired goods.
- 3 In the view of the company, the answer to that question must be in the affirmative. It considers that the requirement arising from Article 86(10b)(2)(b) of the Law on VAT, in the version in force from 1 January 2017, is not a requirement under the VAT Directive and thus must not be applied and, furthermore, infringes the principle of tax neutrality and the principle of proportionality.
- 4 The Director of National Tax Information ('the tax authority') did not concur with the above position. In his view, the rules which have been introduced are not contrary to the VAT Directive, and in particular to the above provisions, since they do not restrict the right of the taxable person to reduce the tax due, which arises from that VAT arrangement. He also notes that under Article 178 of the VAT Directive the Member States may introduce certain formalities which impose conditions on the right to deduct VAT and considers that the three-month period laid down in Article 86(10b)(2)(b) of the Law on VAT constitutes such a formality.

- 5 The company brought before the Wojewódzki Sąd Administracyjny w Gliwicach (Regional Administrative Court in Gliwice) (the referring court) an action for annulment of the contested individual interpretation, claiming inter alia an infringement by Article 86 (10)(b)(2) of the Law on VAT on the grounds that it is contrary to Articles 167 and 178 of the VAT Directive, disregards the principle of tax neutrality expressed in Article 1(2) of that directive, and disregards the principle of proportionality resulting from Article 5(4) [TEU].
- 6 The tax authority has contended that the action should be dismissed and has maintained the position contained in the contested individual interpretation. The referring court has decided to stay the proceedings and to refer a question to the Court of Justice for a preliminary ruling.

Brief statement of the grounds for the request

- 7 In Poland, in accordance with the principle set out in Article 86(1) of the Law on VAT (which constitutes implementation of the principle of tax neutrality), in so far as the goods and services are used to conduct taxed transactions, a taxable person has the right to deduct the amount of input tax from the amount of tax due. The right in principle arises when the return is drawn up for the period in which the tax liability arose in relation to the goods and services acquired or imported by the taxable person (Article 86(10) of the Law on VAT). As the law stood until 31 December 2016, in the case of the intra-Community acquisition of goods that right arose under paragraph 10, provided, inter alia, that the taxable person includes the amount of tax due on the intra-Community acquisition of goods in the tax declaration in which he is required to pay that tax (Article 86(10)(2)(b) of the Law on VAT). However, the legislature introduced a new mandatory time limit which means that now enjoyment of those rules is contingent on submitting a declaration within a three-month period (Article 86(10b)(2)(b) of the Law on VAT, in the version in force from 1 January 2017). Where the period is exceeded, the taxable person must adjust the declaration submitted previously (Article 86(10g) of the Law on VAT) and at the same time may pay the tax due on the intra-Community acquisition of goods only on an ongoing basis (Article 86(10i) of the Law on VAT). It is clear from the explanatory memorandum relating to the amendment that it is justified by the occurrence of irregularities in declarations by some entities engaged in the intra-Community acquisition of goods and other transactions in which in principle the tax due is equal to the input tax.
- 8 However, in its judgment of 2 May 2019, *Grupa Lotos*, C-225/18, EU:C:2019:349, concerning a standstill clause, the Court of Justice found that the right of deduction provided for in Article 168(a) of the VAT Directive is an integral part of the VAT scheme and in principle may not be limited. The right to deduct must be exercised immediately in respect of all the VAT charged on transactions relating to inputs, and the deduction system is intended to relieve the trader entirely of the burden of the VAT payable or paid in the course of all his

economic activities. The common system of VAT consequently ensures neutrality of taxation of all economic activities, whatever their purpose or results, provided that they are themselves subject in principle to VAT. It follows from this that, in so far as the taxable person, acting as such at the time when he acquires goods or receives services, uses those goods or services for the purposes of his taxed transactions, he is entitled to deduct the VAT paid or payable in respect of those goods or services. The Court of Justice found that it is also apparent from the case-law that derogations from the right to deduct VAT are permitted only in the cases expressly provided for by the provisions of the directives governing that tax. Nonetheless, as the Court has held, account must be taken of the actual application of the national provisions on exclusions from the right to deduct VAT and the effects which follow for the taxable persons (paragraphs 25 to 28, and 37).

- 9 In the light of the above judgment, the referring court is uncertain whether it is possible to introduce rules, such as those in the present case, as a new measure which, in principle, was not previously provided for in national law. This is all the more relevant since, in introducing them, the Polish legislature expressed its view on the consistency of the proposed measures with EU law. However, it is clear from the explanatory memorandum relating to the amendment that no opinions were sought and no consultations were held or agreements reached with EU bodies and institutions.
- 10 On the other hand, the Court of Justice has repeatedly stated its view on the introduction of mandatory limitation periods by Member States as a formal requirement, including in the light of the principles of equivalence, effectiveness and proportionality. The referring court has cited the judgments of 28 July 2016, *Astone*, C-332/15, EU:C:2016:614 (paragraph 34; paragraph 1 of the operative part); of 8 May 2008, *Ecotrade SpA*, C-95/07 and C-96/07, EU:C:2008:267 (paragraph 1 of the operative part); of 12 January 2006, *A.S.G.*, C-504/04, EU:C:2006:30 (paragraph 35); of 18 March 1987, *Société pour l'exportation des sucres*, 56/86, EU:C:1987:146; of 30 June 1987, *Roquette Frères*, 47/86, EU:C:1987:316; of 26 June 1990, *Zardi*, C-8/89, EU:C:1990:260; of 9 July 2015, *Salomie and Oltean*, C-183/14, EU:C:2015:454; and of 15 September 2016, *Senatex*, C-518/14, EU:C:2016:691.
- 11 The referring court concludes from the above case-law that the provisions of the VAT Directive do not preclude the possibility of a Member State introducing mandatory limitation periods into national legal systems, but those limitation periods may not infringe the principle of tax neutrality and must be proportionate. That assessment is a matter for the national court, which should establish whether or not the provision introduces formalities which are disproportionate to the aims pursued, including whether or not the taxable person is economically burdened by them. In the present case, the role of the referring court is therefore to ascertain whether or not the mandatory limitation period introduced objectively satisfies the requirements arising from the principles of proportionality and tax neutrality. If it does not do so, the taxable person may rely on non-compliance and is consequently entitled to exercise the right to deduct retroactively.

- 12 In the present case, the company sets out two types of reason for non-compliance with the mandatory period: those independent of the taxable person and resulting from delay in receiving an invoice, and those dependent on the taxable person, that is to say, errors on his part.
- 13 In assessing the foregoing in the context of the principle of proportionality, it is first of all necessary to note the distinction drawn between the respective situations of the taxable person depending on whether tax due or input tax is involved. Article 86 of the Law on VAT contains a temporal restriction (mandatory time limit) in relation to the former only as regards a limitation of actions, that is to say a period of five years. Thus, adjustment of the tax due is possible up to the expiry of that period (Articles 13 and 13a of the Law on VAT). In relation to input tax, on the other hand, the legislature introduced two limitation periods. First, the three-month limitation period on offsetting it and thus retroactively or on an ongoing basis (Articles 86(10b)(2)(b) and 86(10i)), and, secondly, a five-year limitation period (Articles 86(13) and (13a)). It is the former which gives rise to uncertainty.
- 14 On the one hand, the referring court considers that the mandatory three-month limitation period laid down in Article 86(10b)(2)(b) of the Law on VAT appears to be sufficient for the taxable person to obtain an invoice. That period is certainly disciplinary in nature since it was introduced in order to make taxable persons more proactive in obtaining invoices recording intra-Community acquisitions of goods. Crucially, the aim of that provision is to avoid situations in which the input tax is equal to the tax due and that offsetting being used late on account of the later tax amendment resulting from the later inclusion of the invoice after the above time limit. This action served to 'optimise' tax and was used to abuse the right. In this regard, it is clear from the explanatory memorandum relating to the amendment that this time limit offers the tax authorities the possibility of greater control over VAT payments. The referring court points out that it is unaware of any statistics on what percentage of the cases involving exercise of the right to deduct retroactively within the five-year limitation period, rather than the three-year period, were used to evade tax or abuse the right. On the other hand, however, it should be noted that a taxable person sometimes has no control over compliance with the above time limit, as the company demonstrates in the present case. It can arise from a delay in a contractor issuing and sending an invoice or failures on the part of postal operators. In addition, the fact that a taxable person received an invoice within the time limit does not always mean that the requirements for the right of deduction are satisfied, for example in the case of errors in the drafting thereof. In the light of the VAT Directive, an invoice must satisfy both material and personal requirements. However, as the Court of Justice has noted, a delay in receiving an adjustment to an invoice in relation to formal requirements may not always result in the taxable person being deprived of the right of deduction. On the other hand, it is clear from the new provisions that, whatever the reason for the delay, on the expiry of the three-month limitation period a taxable person may offset the input tax only on an ongoing basis. There is a consequence to this situation in the form of the need to bear the economic

burden of the tax due, plus the payment of interest calculated from the first day after the date on which the tax became due up to the day on which it is actually paid or from the first day after the date on which the taxable person received repayment of an excess of input tax to the date of payment, or the need to adjust the amount to be transferred in respect of the period between the adjustment and the declaration for the current period.

- 15 In the view of the referring court, in assessing Articles 86(10b)(2)(b) and 86(11g) and (11i) of the Law on VAT, it is necessary, having regard to the case-law of the Court of Justice, to be guided by the principle of the ‘due diligence of the taxable person’. The imposition of a mandatory period for a non-diligent taxable person, and thus for someone who, as a result of his own negligence, causes the period for offsetting to be exceeded, for example by wrongly classifying the transaction, has been deemed by the Court of Justice to be consistent with the VAT Directive.
- 16 The referring court is inclined to the view that Article 167 of the VAT Directive, in conjunction with Article 178 thereof, is to be interpreted as precluding national legislation which makes the exercise of a taxable person’s right ‘in good faith’ to deduct input tax in the same accounting period as that in which the tax due was payable on the transactions constituting Community acquisition of goods subject to the tax due on those transactions being entered in the appropriate tax declaration submitted within the mandatory period (in Poland, three months) following the end of the month in which the tax liability arose in relation to the goods and services acquired, but otherwise does not preclude the introduction of such a limitation period.