

Case C-48/20

Summary of a request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

28 January 2020

Referring court:

Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland)

Date of the decision to refer:

15 November 2019

Applicant:

UAB 'P'

Defendant:

Dyrektor Izby Skarbowej w Białymstoku

Subject matter of the case in the main proceedings

The obligation to pay VAT unduly indicated on invoices issued by a taxable person acting in good faith.

Subject matter and legal basis of the reference

Interpretation of the VAT Directive and Article 267 TFEU.

Question referred

Must Article 203 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) and the principle of proportionality be interpreted as precluding the application, in a situation such as that in the main proceedings, of a national provision such as Article 108(1) of the Ustawa z dnia 11 marca 2004 r. o podatku od towarów i usług (Law of 11 March 2004 on tax on goods and services) (*Journal of Laws [Dz. U.]* of 2011, No 177, item 1054, as amended) to invoices with VAT incorrectly indicated that were issued by a taxable person acting in good faith, if:

- the taxable person's actions did not involve tax fraud, but resulted from an erroneous interpretation of the law by the parties to the transaction, based on an interpretation given by the tax authorities and a common practice in that respect at the time of the transaction, which incorrectly assumed that the issuer of the invoice was supplying goods when in fact it was providing a VAT-exempt financial intermediation service; and

- the recipient of the invoice with the VAT incorrectly indicated would have been entitled to claim a VAT refund if the transaction had been correctly invoiced by a taxable person who was actually supplying the recipient with goods?

Provisions of EU law cited

Article 203 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax ('the VAT Directive') provides that VAT is payable by any person who enters the VAT on an invoice.

Provisions of national law cited

Article 108(1) 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 Law on VAT') provides that if a legal person, an unincorporated organisational unit or a natural person issues an invoice in which the amount of tax is indicated, that person or entity is to be obliged to pay that tax.

Brief outline of the facts and the main proceedings

- 1 In his decision of 27 June 2014, the naczelnik urzędu skarbowego (Head of the Tax Office) determined the following with respect to the applicant company, UAB P. with its seat in Lithuania ('the company'): VAT liabilities for the periods from March to December 2011, overpayment for the periods from March to June 2011,

and tax payable pursuant to Article 108(1) of the Law on VAT. The tax authority challenged the company's right to deduct input tax resulting from the invoices issued to it for fuel purchases by petrol stations. In addition, it found that the company had issued and introduced into circulation invoices for fictitious fuel sales to Lithuanian companies. According to the authority, the company was neither a fuel buyer nor a fuel supplier, and its actual activity involved financing the purchase by Lithuanian companies of diesel at petrol stations using fuel cards (that is, granting credit to those companies). Under the Law on VAT, such activities constitute tax-exempt financial services.

- 2 In his decision of 2 October 2014, the dyrektor izby skarbowej (Director of the Tax Chamber) annulled the decision of the authority of first instance in its entirety due to the erroneous determination by that authority of the place of taxation of the activities performed by the company and ruled on the merits on the case, determining the following with respect to the company: VAT liabilities for the periods from March to December 2011, overpayment for the periods from March to June 2011, and tax payable pursuant to Article 108(1) of the Law on VAT. In the opinion of the appeal authority, the company did not acquire or supply fuel in the territory of Poland. The fuel was transferred directly between the petrol station and Lithuanian companies which refuelled their vehicles at Polish petrol stations using fuel cards rather than cash. The company did not have the right to dispose of the fuel as the owner, and its actual activity consisted in financing the purchase by contracting parties of diesel at petrol stations using fuel cards. The refuelling of vehicles took place in two ways: either directly through the company under agreements concluded with petrol stations or through an agent under an agency agreement on the sale of processing services. The company's role was to look for customers (fuel card buyers), place orders for fuel cards with the agent or with a petrol station, and secure means of payment for refuelling by its customers. In return, the company received remuneration in the form of a commission or discount from fuel sellers or from the agent. The appeal authority found that the sales invoices issued by the company gave rise to an obligation to pay the tax indicated thereon pursuant to Article 108(1) of the Law on VAT.
- 3 The company appealed against the decision of the appeal authority. In its judgment of 7 April 2015, the Wojewódzki Sąd Administracyjny (Regional Administrative Court) annulled the decision of the Director of the Tax Chamber.
- 4 As a result of the appeal on a point of law brought by the Director of the Tax Chamber, in its judgment of 17 February 2017 the Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland) set aside the judgment of the court of first instance of 7 April 2015 and referred the case back to the Regional Administrative Court, which, in turn, in its judgment of 19 July 2017, dismissed the company's appeal.
- 5 The Regional Administrative Court reiterated the position of the appeal authority that although the sales invoices issued by the company did not reflect the actual course of economic events and, as a result, were not subject to settlement in the

VAT-7 return, they still gave rise to an obligation to pay the tax indicated thereon pursuant to Article 108(1) of the Law on VAT. By issuing the contested VAT invoices — which were not reflected in actual economic transactions — to Lithuanian entities, the company created a situation in which the recipients of those invoices could treat the tax indicated thereon as deductible input tax or claim a refund of the tax. The invoices issued by the company documented fictitious sales of fuel to Lithuanian companies, and therefore it had to be assumed that there was a risk of a loss of tax revenue. There can therefore be no question of a breach of the principle of VAT neutrality or the principle of proportionality enshrined in the *Konstytucja Rzeczypospolitej Polskiej* (Constitution of the Republic of Poland).

- 6 The company appealed against that judgment to the Supreme Administrative Court, which decided to stay the proceedings and to refer a question to the Court of Justice for a preliminary ruling.

Grounds for the order for reference

- 7 It is clear from the case file that the company was incorrectly convinced that it participated in chain transactions which concerned the supply of fuel to Lithuanian carriers, whereas, in fact, it provided financial services to Lithuanian entities which were tax-exempt in Poland.
- 8 That position is confirmed by the judgment of the Court of 15 May 2019, *Vega International* (C-235/18, EU:C:2019:412), in which the Court held that Article 135(1)(b) of the VAT Directive must be interpreted as meaning that the provision of fuel cards by a parent company to its subsidiaries, enabling those subsidiaries to refuel the vehicles they transport, may be classified as a service granting credit which is exempt from VAT as referred to in that provision. The Court previously took a similar view in its judgment of 6 February 2003, *Auto Lease Holland* (C- 185/01, EU:C:2003:73).
- 9 There is no evidence of fraud or abuse in the case. The classification of the disputed transactions as chain supplies was a result of the prevailing national practice relating to the application of the provisions of the Law on VAT, which was different from that presented in the aforementioned Court judgments, and under which those transactions were treated as a supply of goods rather than as the provision of services.
- 10 The practice was based on the assumption that each of the entities in the fuel supply chain supplied goods for consideration, even though only one physical delivery of goods actually took place. It was also believed that it was the intermediary (the provider of the card) who supplied the goods to the final recipient (and thus conducted a transaction subject to VAT). This practice was reflected in the invoicing of supplies in the case at issue, which was carried out as follows:

- petrol stations invoiced the company (which provided the fuel cards) for the fuel issued to fuel card holders (Lithuanian transport companies);
 - the company considered itself to be a participant in a chain transaction (the purchase of fuel and its resale to Lithuanian transport companies);
 - Lithuanian transport companies received from the company invoices for fuel with VAT indicated on them and could apply for a refund of the VAT in Poland.
- 11 This taxation scheme was accepted in tax rulings issued by tax authorities to taxable persons.
 - 12 The dispute in the case at issue concerns settlements for several months in 2011 when the tax authorities uniformly approved the above settlement method. The company was therefore fully entitled to be confident in the interpretation of the relevant regulations presented by the tax authorities.
 - 13 In Polish practice, a different scheme for the settlement of such transactions emerged only in 2012, when the Supreme Administrative Court, in its judgment of 14 August 2012, relied on the Court's judgment of 6 February 2003, *Auto Lease Holland* (C-185/01, EU:C:2003:73), and held that transactions using fuel cards do not give rise to the right to deduct VAT. That judgment resulted in divergent practices by tax authorities.
 - 14 However, there can be no doubt that in 2011, the company, acting in good faith, issued incorrect invoices with VAT indicated thereon to its Lithuanian clients. Thus, the conditions for the application of Article 108(1) of the Law on VAT — which implements Article 203 of the VAT Directive — were formally fulfilled.
 - 15 The referring court refers to the judgment of the Court of 11 April 2013, *Rusedespred OOD* (C-138/12, EU:C:2013:233, paragraphs 24 to 29), concluding that, in order to ensure the neutrality of VAT, it is for the Member States to provide, in their domestic legal systems, for the possibility of adjusting any tax improperly invoiced where the person who issued the invoice shows that he acted in good faith. However, Polish law does not provide for such an adjustment by a taxable person after a tax inspection or tax proceedings have been initiated as regards that person. Pursuant to Article 81b(1) of the Ustawa z dnia 29 sierpnia 1997 r. — Ordynacja podatkowa (Law of 29 August 1997 — Tax Code) (*Journal of Laws* [Dz. U.] of 2019, item 900, as amended), the right to amend a return is suspended for the duration of tax proceedings or tax inspection within the scope of such proceedings or inspection.
 - 16 Therefore, in the case at issue, the company did not have the opportunity to adjust the tax incorrectly indicated on the invoices issued to transport companies in Lithuania, as confirmed by the tax decision issued in the present case.
 - 17 Furthermore, the tax authority stresses that the issuer of the invoice failed to eliminate the risk of loss of tax revenue in good time, since the incorrect invoices

were not corrected, and thus Lithuanian entities could apply for tax refunds (under the rules set out in Article 89 of the Law on VAT, which implement Council Directive 2008/9/EC of 12 February 2008 laying down detailed rules for the refund of value added tax, provided for in Directive 2006/112/EC, to taxable persons not established in the Member State of refund but established in another Member State). However, the company rightly claims that if the transactions in question between petrol stations, the company and Lithuanian companies had been settled correctly, with the company acting as a provider of financial services, instead of the invoices issued by the company for fuel supplies with the VAT unduly indicated, the Lithuanian companies would have received invoices issued by petrol stations for the fuel supplies made to these Lithuanian companies. In essence, those invoices would have been similar in amount to the company's contested invoices, with respect to which the obligation to pay tax has been determined under Article 108(1) of the Law on VAT (Article 203 of the VAT Directive); the difference would have been limited to the margin applied by the company in the disputed transactions. Those invoices (issued by petrol stations) would also have entitled Lithuanian companies to claim refund of the tax indicated in them.

- 18 This indicates that, despite the company's undue invoicing of fuel supplies to Lithuanian companies, the correct settlement of these supplies by petrol stations would also have entitled Lithuanian fuel buyers to claim a tax refund. On the other hand, the application of Article 108 of the Law on VAT to the company's contested invoices while at the same time taxing the fuel supplies made by petrol stations to Lithuanian companies results in VAT being charged twice on a single transaction (once at the stage of the transaction between petrol stations and Lithuanian companies, and subsequently, pursuant to Article 108(1) of the Law on VAT, to the company).
- 19 Therefore, there is reasonable doubt as to whether in a situation such as the one in the case at issue the tax authorities are entitled — taking into account the principles of neutrality and proportionality — to apply a rule such as Article 108(1) of the Law on VAT (Article 203 of the VAT Directive), which prevents the company from correcting incorrectly issued invoices.
- 20 In its judgment of 11 April 2013, *Rusedespred OOD* (C-138/12, EU:C:2013:233), the Court held that the principle of the neutrality of VAT, as given specific definition by the case-law relating to Article 203 of the VAT Directive, may be relied on by a taxable person in order to contest a provision of national law that makes the refund of VAT invoiced in error conditional on the correction of the incorrect invoice, in circumstances where the right to deduct that VAT has definitively been refused and such definitive refusal results in the system for correction provided for under national law no longer being applicable.
- 21 In its judgment of 8 May 2019, *EN.SA* (C-712/17, EU:C:2019:374), the Court stated that the VAT Directive, read in the light of the principles of neutrality and proportionality, must be interpreted as not precluding national legislation which

excludes the right to deduct VAT relating to fictitious transactions while requiring the persons who enter VAT on an invoice to pay that tax, including for a fictitious transaction, provided that national law allows the tax liability arising from that obligation to be adjusted when the issuer of that invoice shows that he acted in good faith or where he has, in sufficient time, wholly eliminated the risk of any loss of tax revenue, this being a matter for the referring court to ascertain.

- 22 In the case at issue, no findings have been made as to whether Lithuanian companies attempted to recover the tax from those invoices and, if so, what the effect of those attempts was. However, as has already been mentioned, preventing the company from correcting the disputed invoices, while Lithuanian companies are entitled to claim tax refunds on the fuel purchased in Poland regardless of whether the transactions are invoiced incorrectly or correctly, raises justified doubts as to the legitimacy of applying a rule such as Article 108(1) of the Law on VAT to the VAT incorrectly indicated on the company's invoices.

WORKING DOCUMENT