Case C-398/20

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 2020

Referring court:

Krajský soud v Brně (Česká republika) (Regional Court in Brno (Czech Republic))

Date of the decision to refer:

29 July 2020

Applicant:

ELVOSPOL, s.r.o.

Defendant:

Odvolací finanční ředitelství (Appellate Tax Directorate)

Background to the main proceedings

The background to the main proceedings is an application lodged by ELVOSPOL, s.r.o. against a decision of the Odvolací finanční ředitelství (Appellate Tax Directorate) under which the company was not allowed to reduce its output value added tax to take account of an unpaid claim against an insolvent debtor on the grounds that the claim arose less than six months before a court decision declaring the debtor insolvent.

Question referred

Is national legislation contrary to the purpose of Article 90(1) and (2) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ L 347, 11.12.2006, p. l) if it lays down a condition preventing value added taxpayers, where tax becomes chargeable on a taxable supply to another taxpayer who paid for the supply only in part or not at all, from making a correction to the amount of output tax in respect of the value of the claim if that

claim arose less than six months before a court decision declaring the other taxpayer insolvent?

Provisions of EU law relied on

Articles 63 and 73, Article 90(1) and (2) and Article 273 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ L 347, 11.12.2006, p. l) ('the Directive').

Provisions of national law applied

Corrections to amounts of tax in relation to claims against debtors who are subject to insolvency proceedings are regulated by Paragraph 44 of Zákon č. 235/2004 Sb., o dani z přidané hodnoty (Law No 235/2004 on value added tax) ('the Law on VAT'), the relevant sections of which were as follows at the material time:

'(1) *A taxpayer for whom tax becomes chargeable on a taxable supply to another taxpayer and who has a claim that has not yet been settled arising no later than 6 months before a court decision declaring insolvency relating to such supply ("the creditor") may make a correction to the amount of output tax based on the claim identified […[1]].*

[…]

(3) The creditor may correct the amount of output tax at the earliest during the tax year in which the conditions laid down in Paragraph 44(1) have been met. Correction cannot be carried out after the expiry of 3 years from the end of the tax year in which the original taxable supply took place or if the debtor has ceased to be a taxpayer.[2]]

[…]

(5) *If a creditor corrects an amount of tax in accordance with Paragraph 44(1), the debtor shall reduce its own input tax in respect of the taxable supply it has received by the amount of tax corrected by the creditor, this being the amount of the tax deduction it applied in respect of the taxable supply received. […]*

1 In cases where, among other things, the debtor has entered into insolvency proceedings in which the insolvency court has decided to declare the debtor bankrupt and the creditor has duly declared its claims in the proceedings and they have been identified and taken into account.

2 As mentioned below, the condition that tax corrections can no longer be made in cases where the debtor has ceased to be a value added tax payer is not applicable due to conflict with Article 90 of the Directive, as found by the Court of Justice in its judgement of 8 May 2019 in *A-PACK CZ*, C-127/18, ECLI:EU:C:2019:377.

(6) *If a claim in respect of which a creditor corrects the amount of tax in accordance with Paragraph 44(1) is subsequently settled in full or in part, the tax shall become chargeable for the creditor on the payment received as of the day on which the claim was settled in full or in part, and the creditor shall deliver to the debtor the tax document it is obliged to issue […].'*

Brief description of the facts and main proceedings

1 ELVOSPOL, s.r.o. ('the applicant'), in its tax declarations for May 2015, corrected the amount of value added tax ('VAT') pursuant to Paragraph 44(1) of Law No 235/2004 on value added tax ('the Law on VAT'), on the grounds that MPS Mont a.s. had failed to pay an invoice for the supply of goods in respect of which tax became chargeable on 29 November 2013 ('the disputed tax correction').

2 On 19 May 2014, MPS Mont a.s. was declared insolvent by an insolvency court.

3 On 14 December 2015, the Finanční úřad pro Jihomoravský kraj (the Tax Office for the Region of Southern Moravia) ('the tax authority') called on the applicant to eliminate uncertainties as to the correctness and completeness of values in the disputed tax correction. The applicant, in its statement of 6 January 2016, questioned the tax authority's interpretation of Paragraph 44(1) of the Law on VAT, asserting that the conditions for the disputed tax correction laid down in the provision in question had, in its opinion, been met. The tax authority, however, concluded that the interpretation of Paragraph 44(1) of the Law on VAT put forward by the applicant was incorrect, rejected the disputed tax correction and, in its decision of 22 February 2016, set the applicant's VAT at CZK 160 896 for the tax period of May 2015.

4 The applicant lodged an appeal against this decision before the Appellate Tax Directorate, which, in its decision of 2 May 2018, confirmed the refusal of the disputed tax correction on the grounds of the age of the claim in question, i.e. on the grounds that it arose less than six months before the decision of an insolvency court declaring MPS Mont a.s. insolvent ('the condition concerning the age of the claim').

5 Neither the tax authority nor the Appellate Tax Directorate therefore doubted, in their decisions, that MPS Mont a.s. had failed to pay the applicant, even in part, for the taxable supply. Non-fulfilment of the condition concerning the age of the claim was thus the sole ground for setting the tax and refusing the disputed tax correction.

6 The applicant challenged the decision of the Appellate Tax Directorate before the Krajský soud v Brně (Regional Court in Brno, Czech Republic) through an application in which it again asserted that it had met the legal conditions for the disputed tax correction and that the condition concerning the age of the claim was contrary to Article 90 of the Directive.

The concept of the condition concerning the age of the claim in Czech law

7 The Regional Court in Brno stated that as long as a taxpayer (creditor) had met the conditions set out in Paragraph 44(1) of the Law on VAT, it could make a correction to the amount of output tax in respect of a claim, **but that, even where it had met the other conditions of the Law on VAT, the taxpayer (creditor) could not do so where a claim relating to a taxable supply to another taxpayer had arisen less than six months prior to a court decision declaring insolvent the other taxpayer (the debtor).**

8 This interpretation was confirmed in the ruling of the Extended Composition of the Nejvyšší správní soud (Supreme Administrative Court, Czech Republic) of 16 July 2019 (No. 3922/2019 Sb. NSS), according to which Paragraph 44(1) of the Law on VAT, in the version effective from 1 April 2011 to 28 July 2016, must be interpreted as meaning that the right to correct the amount of output tax in respect of an identified claim applies only to claims arising from supply within a period ending six months prior to a court decision declaring insolvency.

9 The Supreme Administrative Court also found relevance in an argument based on an economic assumption that '*professionals on the market are capable of recognising the signs of imminent bankruptcy in their business partners, and all the more so when the period in which they are negotiating or concluding a transaction is closer to the future bankruptcy. Conversely, when the period in which they are negotiating or concluding a transaction is further away in time from the future bankruptcy, it will usually be less obvious that their business partner is in difficulties'.*

10 The Supreme Administrative Court also referred in its ruling to the former Zákon č. 328/1991 Sb., o konkursu a vyrovnání (Law No 328/1991 on bankruptcy and creditor arrangement), in which certain legal actions taken by a debtor in the final six months prior to the filing of a petition for the opening of bankruptcy proceedings were declared ineffective as a matter of law. According to the court '*in situations that are heading towards insolvency, a distinction is usually drawn as well in currently applicable insolvency law between the shorter period immediately preceding the initiation of insolvency proceedings and the longer period, usually of several years, prior to this, in terms of the demands that are placed on market entities entering into transactions and in terms of how "simply" and to what extent such transactions may be annulled (or declared ineffective) and on what grounds. […] . [The purpose of the six-month period] should be to protect, by conferring an advantage under Paragraph 44 of the Law on VAT, those business partners of the debtor who traded with the debtor in the period preceding the final six months before the court decision declaring insolvency. It can be assumed that such business partners were trading with the future bankrupt in good faith with regard to its solvency and could not see that their claims might later become unrecoverable. Conversely, business partners who traded with the future bankrupt in the final six months before the court decision declaring insolvency, would have had, according to general economic knowledge, a greater*

chance to recognise the risk of insolvency, and there was therefore no reason to provide them with more advantageous tax arrangements. This is linked to the general historical context for the adoption of decisive legal measures in 2011, when the mounting economic crisis was creating financial difficulties for many formerly prospering businesses. […] In this regard it was thus also logical to "protect" mainly those who had supplied future bankrupts some time before the court decision declaring their insolvency, rather than those who had traded with bankrupts immediately before that decision.'

Analysis of the case-law of the Court of Justice relating to Article 90 of the Directive

11 According to the Court of Justice, the conditions for a derogation from Article 90(1) of the Directive were not met, for example by **(i)** legislation which allowed a reduction in the taxable amount in the case of partial or total non-payment of a claim only in the case of pecuniary claims (judgement of 3 July 1997, *Goldsmiths*, **C-330/95**, ECLI:EU:C:1997:339), **(ii)** legislation which made a reduction in the taxable amount conditional on lack of success in an insolvency procedure where such procedures may last for over ten years (judgement of 23 November 2017, *Enzo Di Maura*, **C-246/16**, ECLI:EU:C:2017:887), **(iii)** legislation stipulating that a taxpayer may not correct the taxable amount in the case of total or partial non-payment of the sum which the debtor was to have paid in relation to a supply that was subject to VAT where the debtor has ceased to be a value added tax payer (judgement of 8 May 2019, *A-PACK CZ s.r.o.*, **C-127/18**, ECLI:EU:C:2019:377), or **(iv)** legislation on the basis of which claims from taxable persons for a reduction in VAT in connection with unrecoverable claims may be rejected where such taxable persons have omitted to declare such claims in insolvency proceedings initiated against their debtor, even where such taxable persons prove that they could not have recovered the claim if they had declared it (judgement of 11 June 2020, *SCT d.d.*, **C-146/19**, ECLI:EU:C:2020:464).

12 On the other hand, the requirements of Article 90 of the Directive were satisfied by legislation making a reduction in the taxable amount contingent on the creditor receiving from the recipient of the goods or services (the debtor) an acknowledgement of receipt of a corrective invoice, unless it is impossible or excessively difficult for the creditor to obtain such acknowledgement within a reasonable period of time (judgement of 26 January 2012, *Kraft Foods Polska*, **C-588/10**, ECLI:EU:C:2012:40).

13 According to the Regional Court, it follows from the aforementioned judgements of the Court of Justice, among other things, that:

– Article 90(1) of the Directive constitutes an expression of a fundamental principle, according to which the taxable amount is the consideration actually received and the corollary of this is that a tax

authority may not collect an amount of VAT exceeding the tax which the taxable person received; [3]

– allowing Member States to exclude such reductions in the taxable amount would be contrary to the principle of VAT neutrality; [4]

– Article 90(2) of the Directive allows Member States to derogate from this rule where non-payment of a consideration may be difficult to verify or only temporary, but the derogation must be justifiable and reasonable; [5]

– a derogation that pursues the objective of ensuring the correct collection of VAT and preventing evasion must be strictly necessary for achieving that aim and may not be used in a way that would undermine the neutrality of VAT . [6]

Findings

14 According to the Regional Court in Brno, the cited national legislation in Paragraph 44 of the Law on VAT is directed towards situations where the debtor has failed to pay the creditor in full or in part for a taxable supply. These are thus cases in which Member States may, according to Article 90(2) of the Directive, derogate from the general provision in Article 90(1) of the Directive.

15 The Regional Court in Brno has doubts, however, as to whether the condition concerning the age of the claim contained in Paragraph 44(1) of the Law on VAT complies with Article 90 of the Directive and with the purpose thereof and with the requirements of the case-law of the Court of Justice relating to Article 90 of the Directive.

16 In a situation where the other conditions laid down by the Law on VAT have been met, the Regional Court in Brno believes that the refusal of the disputed tax correction based on the condition concerning the age of the claim will result in an infringement of the principle of tax neutrality.

17 Finally, the case in hand is, in the opinion of the Regional Court in Brno, different from any case yet addressed by the Court of Justice.

[3] See paragraphs 17 to 22 of the judgement of 8 May 2019, *A-PACK CZ s.r.o.*, C-127/18, ECLI:EU:C:2019:377.

[4] See the judgements of 13 March 2008, Securenta, C-437/06, ECLI:EU:C:2008:166, and of 13 March 2014, *Malburg*, C-204/13, ECLI:EU:C:2O14:147.

[5] Ibid.

[6] See paragraphs 25 to 27 of the judgement of 8 May 2019, *A-PACK CZ s.r.o.*, C127/18, ECLI:EU:C:2019:377 and paragraph 28 of the judgement of 26 January 2012, *Kraft Foods Polska*, C-588/10, ECLI:EU:C:2012:40.