Case C-418/22

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:

21 June 2022

Referring Court:

Tribunal de première instance du Luxembourg (Belgium)

Date of the decision to refer:

8 June 2022

Applicant:

SA CEZAM

Defendant:

Belgian State

Subject matter of the main proceedings

The applicant in the main proceedings seeks, inter alia, a fresh calculation of the proportionate tax penalties which the Belgian tax authority is claiming from it following its failure to submit periodic VAT returns. It maintains that the basis on which those tax penalties should be calculated is not the gross amount of VAT, but the net amount, which is to say, the VAT due after account is taken of input VAT paid.

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

The Tribunal de première instance du Luxembourg (Court of First Instance of Luxembourg, Belgium) considers that, in order for it to be able to give judgment in the main proceedings, it must refer questions to the Court of Justice of the European Union, pursuant to Article 267 TFEU, for a preliminary ruling on the compatibility of the provisions of domestic law relating to the tax penalties that are payable when there is failure to pay VAT with Directive 2006/112/EC and with the principles of tax neutrality and proportionality.

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Questions referred for a preliminary ruling

1. Do Articles 62[(2)], 63, 167, 206, 250 and 273 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax and the principle of proportionality, as interpreted, in particular, in the judgment of the Court of Justice of 8 May 2019, *EN.SA* (C-712/17), taken together with the principle of neutrality, preclude provisions of national legislation such as Article 70[(1)] of the VAT Code, Article 1 of and part V of Table G in the annex to Royal Decree No 41 setting the amounts of the proportionate tax penalties in relation to value added tax, pursuant to which:

– in the event of errors as to content discovered on the inspection of accounts,

– and in order to sanction the failure, in whole or in part, to enter taxable transactions in relation to which the amount of tax due is greater than EUR 1 250 euros,

that infringement is penalised by a flat-rate fine at a reduced rate of 20% of the tax due, without it being possible, for the purposes of calculating the fine, to deduct therefrom any input tax paid, on account of the fact that it has not been deducted because no return was submitted, where, pursuant to [Article 1(2) of] Royal Decree No 41, the scale of reductions set out in Tables A to J of the annex to that decree applies only where the infringements sanctioned have been committed without any intention to evade or to facilitate the evasion of the tax?

2. Is the answer to that question different if the taxable person has, voluntarily or otherwise, paid the amount of tax that has become chargeable following the inspection, so as to make good the shortfall in payment of the tax and thereby to allow the attainment of the objective of ensuring the correct collection of the tax?

Provisions of EU law relied on

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax

Article 62(2):

‘For the purposes of this directive:

…

(2) VAT shall become “chargeable” when the tax authority becomes entitled under the law, at a given moment, to claim the tax from the person liable to pay, even though the time of payment may be deferred.’

Article 63:

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‘The chargeable event shall occur and VAT shall become chargeable when the goods or the services are supplied.’

Article 167:

‘A right of deduction shall arise at the time the deductible tax becomes chargeable.’

Article 206:

‘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. Member States may, however, set a different date for payment of that amount or may require interim payments to be made.’

Article 250:

‘1. Every taxable person shall submit a VAT return setting out all the information needed to calculate the tax that has become chargeable and the deductions to be made including, in so far as is necessary for the establishment of the basis of assessment, the total value of the transactions relating to such tax and deductions and the value of any exempt transactions.

…’

Article 273:

‘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.

The option under the first paragraph may not be relied upon in order to impose additional invoicing obligations over and above those laid down in Chapter 3.’

Provisions of national law relied on

Code de la taxe sur la valeur ajoutée (The VAT Code)

Article 70:

‘1. In respect of any infringement of the obligation to pay the tax, a penalty equal to twice the unpaid tax or twice the tax paid late shall be incurred.

…’

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Article 84

‘ …

Within the limits laid down by law, the amounts of the proportionate tax penalties provided for by this Code … shall be set according to a scale determined by the King.’

Arrêté royal No 41 du 30 janvier 1987 fixant le montant des amendes fiscales proportionnelles en matière de taxe sur la valeur ajoutée (Royal Decree No 41 of 30 January 1987 setting the amounts of the proportionate tax penalties in relation to value added tax)

Article 1

‘The scale for the reduction of the proportionate tax penalties in relation to value added tax shall be set as follows:

(1) In respect of the infringements referred to in Article 70(1) of the VAT Code, in the case of infringements committed before 1 November 1993, according to Table A, and in the case of infringements committed after 31 October 1993, according to Table G set out in the annex to this decree;

…’

Annex

‘Table G – PENALTIES APPLICABLE IN RESPECT OF THE INFRINGEMENTS REFERRED TO IN ARTICLE 70(1) OF THE CODE

Section 1 – Domestic and intra-Community transactions

…

V. Errors as to content discovered on inspection of accounts;

Failure, in whole or in part, to enter taxable transaction or the late entry of taxable transaction in the relevant return;

A person who is not required to submit a return fails to pay the tax due within the prescribed period and in the prescribed manner.

The amount of tax due in respect of a period subject to inspection of one year is:

– less than or equal to EUR 1 250: 10 percent of the tax due

– greater than EUR 1 250: 20 percent of the tax due

…’

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Succinct presentation of the facts and procedure in the main proceedings

1 The applicant in the main proceedings has failed to submit periodic VAT returns since June 2013.

2 A statement of adjustment was drawn up on 10 November 2015 in respect of the year 2013. That statement drew no response, and so a reminder was sent, again to no effect. A formal record of assessment in respect of the year 2013 was therefore drawn up and sent to the company.

3 No periodic VAT returns were submitted for the years 2014 and 2015, despite observations and reminders, and so an *ex officio* assessment was made in respect of those two years.

4 Subsequently, in 2017, a special account was set up, since the applicant had once again failed to submit all the relevant returns and had not paid the VAT due that had been reported in the returns which it had submitted.

5 According to the demands served, the sums due are as follows:

– in respect of 2013:

– VAT payable after set off: EUR 278 880.50;

– penalties: EUR 265 940;

– interest calculated up to 20 March 2016: EUR 58 007.04.

– in respect of 2014 and 2015:

– VAT payable after set off: EUR 1 430 991.16;

– penalties: EUR 923 650.00;

– interest calculated up to 20 January 2017: EUR 137 375.04.

– as regards the special account relating to the period 31 January 2017 to 30 June 2017:

– VAT payable: EUR 88 610.36;

– penalties: EUR 14 290;

– interest calculated up to 20 December 2017: EUR 4 962.16.

6 The penalties claimed amount to 20% of the gross amount of VAT, which is to say, with no account being taken of deductible VAT.

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The essential arguments of the parties in the main proceedings

7 According to the applicant, the penalty should be calculated on the basis of the tax payable after deductible VAT has been taken into account, which is to say, on the basis of the net amount of the tax (after deduction of the input tax paid), and not on the basis of the gross amount.

8 First of all, national law provides that the penalty amounts to 20% of 'the tax due' (part V of Table G in the annex to Royal Decree No 41), which is to say, after deductible VAT has been taken into account. Otherwise, the penalty will be calculated on the basis of the value added tax which is not ultimately owed by the taxable person.

9 Next, that conclusion follows from the principle of tax neutrality.

10 The applicant refers, in this connection, to the judgment of 8 May 2019, *EN.SA.* (C-712/17, EU:C:2019:374), in which the Court essentially held that, while the Member States have the power to choose the sanctions which seem to them to be appropriate in the event that conditions laid down by EU legislation for the exercise of the right to deduct VAT are not observed, they must nevertheless exercise that power in compliance with EU law and its principles, inter alia, the principles of proportionality and of VAT neutrality.

11 Accordingly, the Court went on to hold that 'the penalties must not go beyond what is necessary to attain the objectives referred to in Article 273 of the VAT Directive and must not undermine the neutrality of that tax' and that 'a fine equal to the full amount of the input tax improperly deducted, imposed without taking account of the fact that the same amount of output VAT had been duly paid and that the Treasury had not, as a result, lost any tax revenue, constitutes a penalty that is disproportionate to the objective which it pursues' (judgment of 8 May 2019, *EN.SA.* (C-712/17, EU:C:2019:374, paragraphs 39 and 42).

12 The applicant infers from that judgment that:

(i) 'the tax liability of the taxable person is always composed of the tax owed from the outputs minus the deductible tax in respect of the inputs from the same tax period' (Opinion of Advocate General Kokott in *EN.SA.*, C-712/17, EU:C:2019:35, point 62; see also the judgment of 8 May 2019, *EN.SA.*, C-712/17, EU:C:2019:374, paragraph 41;

(ii) As regards the same tax year, output transactions are inseparable from input transactions;

(iii) The principle of proportionality requires that the Member States should not impose penalties of an amount equal to the deductible VAT, otherwise the deduction of VAT would no longer serve any purpose and would be meaningless;

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(iv) Consideration must be given to the question of whether the risk of loss of tax revenue has been eliminated.

13 In that it disregarded the right of deduction, the Belgian tax authority failed to calculate its fine on the basis of the actual tax debt owed by the taxable person, since the proportionate tax penalty of 20% is calculated, in part, on the basis of the deductible VAT (the amount of which the tax authority does not dispute in this case). That reduces the scope/purpose of the right of deduction and undermines the neutrality of the tax, by depriving the taxable person of the (positive) consequences of its right to deduct.

14 Indeed, 'the two calculation methods can … lead to very different results. In the most extreme case, where the amount of tax due and the amount of deductible tax are the same, … the proportionate fine could [if the calculation of the fine were based on the net amount] be zero, since the set-off between the two amounts would also produce a zero balance.' (Houet, C., *Amendes proportionnelles TVA, la règlementation belge est-elle conforme à la directive?* available at: https://expert.taxwin.be/fr/tw_actu_h/document/ht20200221-1-fr).

15 For example, if a fine calculated at 20%, as in the case in the main proceedings, were applied in respect of an infringement relating to a payable amount of tax of EUR 10 000 against which a right to deduct EUR 5 000 could be claimed, a calculation based on the gross amount would result in a proportionate fine of EUR 2 000 (EUR 10 000 x 20%), whereas a calculation based on the net amount would result in a fine of EUR 1 000 (20% of the final balance of 10 000 minus 5 000) (see, by analogy, Houet, C., *op.cit.*)

16 As regards the risk of loss of tax revenue, the applicant assets that there is none in this case, inasmuch as the deductible portion, included in the tax authority's calculation of its proportionate fine, does not form part of the Belgian State's tax revenue.

17 The applicant adds that, in a previous case, the tax authority accepted that the proportionate fine should be calculated on the basis of 'the tax due in respect of the recorded output transactions less the deductible input tax relating to input transactions from the same tax year' (the judgement of this court of 17 February 2021).

The essential arguments of the defendant in the main proceedings

18 The Belgian State emphasises that Article 70(1) of the VAT Code provides that, 'in respect of any infringement of the obligation to pay the tax, a penalty equal to twice the unpaid tax or twice the tax paid late shall be incurred.' Accordingly, the basis on which the fine is calculated is indeed the amount of VAT that has not been declared, since no provision provides that the fine should be calculated on the basis of the tax due after the deduction of deductible VAT. The only tax in respect of which there is a payment obligation is the tax that has become

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chargeable, and pursuant to Article 62(2) of Directive 2006/112/EC, 'VAT shall become "chargeable" when the tax authority becomes entitled under the law, at a given moment, to claim the tax from the person liable to pay, even though the time of payment may be deferred.'

19 As regards the judgment of 8 May 2019, *EN.SA.* (C-712/17, EU:C:2019:374), that does not apply in the present case, since it concerns the special mechanism under Article 168 of Directive 2006/112/EC (the right of deduction) and Article 203 of that directive, which provides that 'VAT shall be payable by any person who enters the VAT on an invoice.'

20 That particular case concerned fictitious transactions (companies within the same group which sold and then repurchased at the same price identical quantities of electricity). The issuer of the invoices had paid the VAT shown on the invoices relating to the transactions held to be fictitious and had then deducted it on repurchasing the electricity. The requirements laid down in Articles 168 and 203 of Directive 2006/112/EC therefore both applied to the same operator, although the transactions had not procured any tax advantage for their authors or, by the same token, resulted in any loss to the Revenue.

21 It was in that specific context that the Court of Justice held the national rules – under which a fine for the unlawful deduction of VAT was imposed in equal amount to the deduction made, with no account being taken of the actual tax debt – to be contrary to the principles of proportionality and neutrality. The guidance provided by that judgment cannot therefore extend to other cases such as those, like the present case, in which it is an irregularity in the payment of VAT (and not in the deduction of VAT) that is sanctioned.

22 In the present case, the fines were in fact imposed not for unlawful deduction entailing no loss to the Treasury (a zero tax debt), but because VAT had not been paid in respect of output transactions, entailing an advantage for the taxable person (in the form of a line of credit to the detriment of the Treasury) and a loss of tax revenue, if the tax due is not recovered. Moreover, the penalty is not in the full amount of the unlawful deductions, but is 20% of the VAT due, which the Belgian Courts of Appeal and Court of Cassation have held to be proportionate.

23 Taking the net amount of the VAT as the basis for the calculation could also have the absurd result of the proportionate fine being zero (see paragraph 14 of the summary), and a taxable person would not incur a fine even after infringing its obligation to pay the tax.

24 The defendant states that, by way of a measure of moderation, it has allowed the direct deduction of deductible taxes in this case. Nevertheless, that deduction is configured as a settlement accommodation and in no way alters the basis for the calculation of fines.

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Succinct presentation of the grounds for the reference for a preliminary ruling

25 Pursuant to Article 273 of Directive 2006/112/EC, the Member States remain free to adopt measures to ensure the correct collection of VAT and to prevent evasion.

26 'In the absence of harmonisation of EU legislation in the field of sanctions applicable where conditions laid down by arrangements under that legislation are not complied with, Member States remain empowered to choose the sanctions which seem to them to be appropriate. Nevertheless, the Member States must exercise that power in accordance with EU law and its general principles and, consequently, in accordance with the principle of proportionality' (judgment of 26 April 2017, *Farkas*, C-564/15, EU:C:2017:302, paragraph 59). Accordingly, the measures must not go further than is necessary to attain the objectives thereby pursued and may not, therefore, be used in such a way that they would have the effect of undermining the neutrality of VAT, which is a fundamental principle of the common system of VAT established by the relevant EU law (judgment of 11 April 2013, *Rusedespred*, C-138/12, EU:C:2013:233, paragraphs 28 and 29).

27 In order to assess whether a penalty is consistent with the principle of proportionality, account must be taken inter alia of the nature and the degree of seriousness of the infringement which the penalty seeks to sanction, and of the means of establishing the amount of the penalty (judgments of 26 April 2017, *Farkas*, C-564/15, EU:C:2017:302, paragraph 60, of 8 May 2019, *EN.SA.*, C-712/17, EU:C:2019:374, paragraph 40, and of 15 April 2021, *Grupa Warzywna*, C-935/19, EU:C:2021:287, paragraph 27).

28 The Tribunal de première instance du Luxembourg (Court of First Instance of Luxembourg, Belgium) wonders whether, despite the fact that the principle of neutrality does not apply directly to the penalties laid down for the failure of a taxable person to comply with obligations, that principle should be taken into consideration, immediately or indirectly, in an examination of whether a system of proportionate penalties such as that established by Belgian law, and by Article 70(1) of the VAT Code and Royal Decree No 41 setting the amounts of the proportionate tax penalties in relation to value added tax especially, complies with the principle of proportionality.

29 There is, therefore, a difficulty of interpretation of EU law in relation to which this court considers it necessary to consult the Court of Justice, in accordance with Article 267 TFEU, by referring to it the questions for a preliminary ruling set out above.

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