Case C-624/23

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:

10 October 2023

Referring court:

Administrativen sad Varna (Bulgaria)

Date of the decision to refer:

27 September 2023

Applicant:

'SEM Remont' EOOD

Defendant:

Direktor na direktsia 'Obzhalvane i danachno-osiguritelna praktika' Varna pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite

Subject matter of the main proceedings

The subject matter of the action before the Administrativen sad Varna (Administrative Court, Varna) concerns the tax assessment notice No R – 03000322001265-091-001 of 25 August 2022 issued by the revenue office of the Varna regional directorate of the Natsionalnata agentsia za prihodite (National Revenue Agency, 'the NAP'), refusing the applicant 'SEM Remont' EOOD the right of deduction for the tax period from 1 December 2021 to 31 December 2021.

Subject matter and legal basis of the request

Request for a preliminary ruling under Article 267 TFEU concerning the interpretation of Articles 63, 167, 168(a), 176, 178(a), 218, 219, 220, 203, 226 and 228 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax

Questions referred for a preliminary ruling

1. Is a practice on the part of the revenue office permitted pursuant to Articles 63, 167, 168(a), 178(a), 218, 219, 220, 226 and 228 of Council Directive 2006/112/EC on the common system of value added tax as regards the application of national provisions and in particular of Article 71(1) of the Zakon za danak varhu dobavenata stoynost (Bulgarian Law on Value Added Tax, 'the ZDDS') in conjunction with Article 25(1) of the ZDDS in conjunction with Articles 102(4), 114, 116 and 117 of the ZDDS in conjunction with Articles 125 and 126 of the ZDDS, that practice being one in accordance with which the recipient of a service subject to VAT was refused the right of deduction both for the period in which the service was rendered and also for the period of its declaration in the tax return on the ground that no VAT was indicated on the invoice issued to the recipient by the service provider and, at a later date (during the tax audit of the service provider), a document was issued that does not meet the requirements regarding the content of invoices (a memorandum was drawn up in which its author was described as both the recipient and provider of the service according to the memorandum) and in which the invoice issued to the recipient of the service was declared and VAT was calculated on the basis of the taxable amount indicated therein, which VAT was paid, and the recipient of the service only afterwards claimed the right of deduction ('right to claim a tax credit' under the ZDDS) on the basis of that memorandum, and is the exercise of the right of deduction rendered practically impossible or excessively difficult for the taxable person as a result of such a practice?

2. If the first question is answered in the negative: At what point can the right of deduction be exercised, at the time when the invoice is issued without VAT being indicated therein or at the time when the memorandum is issued by the service provider?

3. Is a provision such as Article 102(4) of the ZDDS and a practice on the part of the national tax authority permitted under Article 203, in conjunction with Articles 178(a) and 176 of the VAT Directive and the principle of tax neutrality, whereby a provider of a service that is subject to VAT who has not submitted an application for registration under the ZDDS within the period prescribed by law from the time when he was required to register under the ZDDS is required only to pay VAT in respect of the services he provided in the period from the date on which the registration obligation arose until registration with the revenue office, without any provision being made for the service provider in respect of whom VAT liability has been established pursuant to Article 102(4) of the ZDDS to be able to issue corrected invoices (or another document) to the recipients of services so that they can exercise the right of deduction?

Provisions of European Union law and case-law relied on

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax ('the VAT Directive'), Articles 63, 167, 168(a), 176, 178(a), 218, 219, 220, 203, 226 and 228

Judgment of the Court of Justice of the European Union ('Court of Justice') of 21 June 2012, Mahagében and Dávid, C-80/11 and C-142/11, EU:C:2012:373

Judgment of the Court of Justice of 6 February 2014, Fatorie, C-424/12, EU:C:2014:50

Judgment of the Court of Justice of 15 September 2016, Senatex, C-518/14, EU:C:2016:691

Judgment of the Court of Justice of 15 September 2016, Barlis 06 – Investimentos Imobiliários e Turísticos, C-516/14, EU:C:2016:690

Judgment of the Court of Justice of 12 April 2018, Biosafe – Indústria de Reciclagens, C-8/17, EU:C:2018:249

Judgment of the Court of Justice of 8 December 2022, Finanzamt Österreich (Wrongly invoiced VAT to final consumers), C-378/21, EU:C:2022:968

Judgment of the Court of Justice of 15 September 2022, HA.EN., C-227/21, EU:C:2022:687

Judgment of the Court of Justice of 9 July 2015, Salomie and Oltean, C-183/14, EU:C:2015:454

Provisions of national law relied on

Zakon za danak varhu dobavenata stoynost (Law on Value Added Tax, 'the ZDDS'), Articles 25(1), 71(1), 102(4), 114, 116, 117, 125 and 126

Succinct presentation of the facts and procedure in the main proceedings

1 At issue in the proceedings before the Administrative Court, Varna, is the tax assessment notice No R-03000322001265-091-001 of 25 August 2022, issued by the revenue office of the Varna regional directorate of the NAP.

2 In issuing this tax assessment notice, the revenue office found that there had been irregularities on the part of 'SEM Remont' EOOD in the application of the provisions of the ZDDS, and, on the basis of those findings, refused it the right of deduction of 752 305.05 Bulgarian leva (BGN).

3 ‘SEM Remont’ EOOD is a taxable person within the meaning of Article 3 of the ZDDS.

4 ‘Gidrostroy-Rusia’ OOD is a company that is registered in the Russian Federation, but also pursuant to the ZDDS, and operates in the field of hydraulic engineering, hiring out ships with technical crew for dredging work.

5 ‘SEM Remont’ EOOD and ‘Gidrostroy-Rusia’ OOD are not affiliated undertakings.

6 On 4 August 2020, ‘Gidrostroy-Rusia’ OOD entered into a contract with ‘SEM Remont’ EOOD to carry out dredging work in the port of Varna, Channel 1 and Channel 2. Under that contract, ‘Gidrostroy-Rusia’ OOD is the service provider and ‘SEM Remont’ EOOD is the customer.

7 ‘Gidrostroy-Rusia’ OOD issued invoices No 1010 of 31 October 2020 and No 1017 of 15 November 2020 to ‘SEM Remont’ EOOD in respect of the contractual activities carried out. No VAT on the value of the service was shown on either of the invoices.

8 Before the date on which the service was rendered and ‘SEM Remont’ EOOD was invoiced, ‘Gidrostroy-Rusia’ OOD had already achieved a turnover requiring compulsory registration pursuant to the ZDDS, but had not fulfilled its registration obligation under the ZDDS at the time the invoices were issued to ‘SEM Remont’ EOOD.

9 Declarations were submitted by ‘SEM Remont’ EOOD in respect of the dredging and excavation operations completed and accepted.

10 By letter of 12 July 2021, in the context of a tax audit, ‘Gidrostroy-Rusia’ OOD issued memorandum No 1 of 29 June 2021 in accordance with Article 117(1) of the ZDDS, in which ‘Gidrostroy-Rusia’ OOD was recorded as the organisation providing and receiving the service, that is to say one and the same person, and in which invoices No 1010 of 31 October 2020 and No 1017 of 15 November 2020 were each described with the taxable amount stated and VAT calculated accordingly.

11 On the basis of that memorandum, ‘SEM Remont’ EOOD included the services referred to in the aforementioned invoices in its VAT return and purchase ledger as services in respect of which there was a right of deduction for the tax period from 1 December 2021 to 31 December 2021.

12 The revenue offices found that ‘EIS-Stroitelna kompania’ AD is an authorised representative of ‘Gidrostroy-Rusia’ OOD and that ‘EIS-Stroitelna kompania’ AD and ‘SEM Remont’ EOOD had concluded a loan agreement dated 13 July 2021 for the sum of BGN 752 303.05, that is to say, the amount for which a right of deduction was refused by way of the tax assessment notice at issue.

13 By letter of 13 July 2021, ‘EIS-Stroitelna kompania’ AD informed ‘SEM Remont’ EOOD that the amount in question was used to pay the VAT due, which had been calculated in memorandum No 1 of 29 June 2021 in respect of the two invoices issued to ‘SEM Remont’ EOOD.

The essential arguments of the parties in the main proceedings

Opinion of ‘SEM Remont’ EOOD

14 The company contests the tax assessment notice, asserting that it is entitled to deduction as a result of its having declared memorandum No 1, issued by the service provider, in the tax return, on the following grounds: **1.** The service provider, it argued, is a registered person for the purposes of the ZDDS; **2.** The tax was calculated in memorandum No 1 of 29 June 2021; **3.** The customer ‘SEM Remont’ EOOD is a registered person pursuant to the ZDDS; **4.** The services are taxable with place of performance in the sovereign territory of the Republic of Bulgaria; **5.** The services had actually been provided; **6.** The customer ‘SEM Remont’ EOOD uses the product of the services received in its commercial activity, that is to say, for the subsequent supply of taxable services; **7.** The VAT due was stated in the tax return by the service provider ‘Gidrostroy’ and had been duly paid to the tax authorities.

Opinion of the Direktor na Direktsia ‘Obzhalvane i danachno-osiguritelna praktika’ Varna pri Tsentralno upravlenie na Natsionalnata agentsia po prihodite (Director of the ‘Appeals and Tax and Social Security Practice’ Directorate Varna within the Central Administration of the National Revenue Agency, Bulgaria; ‘the Director’)

15 The Director considers that, at the time that memorandum No 1 of 29 June 2021 was issued, no taxable event had yet occurred and that no tax was then chargeable. ‘SEM Remont’ EOOD did not satisfy the conditions laid down in Article 71 of the ZDDS, he argued, since it was not in possession of an invoice showing VAT, but merely of a memorandum which exclusively dealt with estimates of the VAT owed by the company (‘Gidrostroy-Rusia’ OOD) registered late under the ZDDS as between ‘Gidrostroy-Rusia’ OOD and the NAP and which consequently did not constitute appropriate proof of the existence of the right of deduction. The provisions of domestic law mentioned were consistent with the provisions of Council Directive 2006/112/EC.

16 Having regard to the fact that the supplying undertaking did not issue a corrected invoice, but, by means of the memorandum that it did issue, calculated the full amount of the tax under the reverse charge procedure, since it had been established by the revenue office in the tax audit report, it must be assumed that the service provider would not have issued the memorandum if it had not been the subject of an audit. Furthermore, he argued, the memorandum does not substantiate a VAT liability for the customer since ‘SEM Remont’ EOOD is not

shown as the customer according to the information in the memorandum. The memorandum is a stand-alone document, distinct from the invoice, by means of which the service provider calculates the VAT 'using the reverse charge procedure' for the [relevant] period and undertakes to pay the tax by stating it in the VAT return. The corresponding memorandum cannot be regarded as an invoice, he argues, either within the meaning of the Directive or of the ZDDS, since it contains neither the necessary information for that purpose nor any basis for the customer's liability for payment of the tax. On the contrary, the issuer of the memorandum is liable for payment of the tax for the reasons mentioned above.

17 It must be concluded, he contends, that the loan agreement had been signed in order to justify payment of the liabilities of the service provider 'Gidrostroy-Rusia' OOD to the NAP by a third party, namely 'EIS – Stroitelna kompania' AD, and that the contract between 'EIS – Stroitelna kompania' AD and 'SEM Remont' EOOD is a sham agreement.

Succinct presentation of the reasoning in the request for a preliminary ruling

18 In the proceedings before the Administrative Court, Varna, it is disputed whether the VAT Directive permits provisions of national law and a practice on the part of the national tax authority, such as those in the present proceedings, whereby the customer would be denied the right of deduction in the following circumstances: **1.** The provision of the service is not in dispute; **2.** An invoice was issued for the supply of the service in which the service provider did not indicate any VAT; **3.** The VAT liability of the service provider was established in the course of the tax audit of that service provider, on the basis of the special provision of Article 102(4) of the ZDDS (the service provider achieved a turnover, before providing the service and issuing the invoice without specifying VAT, which required compulsory registration pursuant to the ZDDS); **4.** The service provider was registered in accordance with the ZDDS at the request of the revenue office after providing the service; **5.** During the tax audit to which it was subject, the service provider issued a memorandum in which it stated that it was both the service provider and also the customer; furthermore, the invoices issued to the customer were declared and the VAT was calculated on the basis of the taxable amount of those invoices; **6.** An authorised representative of the service provider paid the VAT for this service to the tax authorities using funds from a loan which it had obtained from the customer; and **7.** The basis on which the customer exercised the right of deduction is the memorandum referred to above and not a corrected invoice issued by the service provider.

19 The present dispute differs from the cases dealt with in the abovementioned judgments of the Court of Justice, so that the guidance provided by the Court of Justice on the interpretation and application of the national provisions which implement the provisions of the VAT Directive are to some extent not relevant. This request for a preliminary ruling must therefore be made.

20 Thus, the judgment of 21 June 2012 in Mahagében and Dávid (C-80/11 and C-142/11) concerned the question of irregularities by the service provider or by one of its suppliers, and the obligations of the customer to satisfy himself when exercising the right of deduction that his supplier had the status of a taxable person.

21 The judgment of 6 February 2014 in Fatorie (C-424/12) examined whether the national tax authority can refuse the right of deduction to a person to whom the reverse charge procedure applies but who has paid the VAT to the supplier because it had been shown on the invoice issued by that supplier.

22 As is evident from the grounds and operative part of the judgment of 15 September 2016 in Senatex (C-518/14), the question in that case concerned the correction of specific information in the invoice, namely the VAT identification number, and the period in respect of which the right to deduct may be exercised in the light of the correction of the invoice.

23 In the judgment of 15 September 2016 in Barlis 06 – Investimentos Imobiliários e Turísticos (C-516/14), the question as to the content of invoices was examined, in particular as regards missing information, whereas the present dispute relates to another tax document drawn up in accordance with the ZDDS, namely a memorandum, and relates in fact not to missing information but to the manner in which it was issued and the fact that the same person, namely the service provider, was described both as the service provider and the customer.

24 In the judgment of 12 April 2018 in Biosafe – Indústria de Reciclagens (C-8/17), the provisions regarding the period laid down for the exercise of the right of deduction were interpreted in the event of invoices being issued to correct invoices already issued after an additional VAT liability of the supplier had been established. The difference between the present case and that one lies in the document that was issued with regard to the correction, its content and the national provision of Article 102(4) of the ZDDS.

25 In the judgment of 8 December 2022 in Finanzamt Österreich (Wrongly invoiced VAT to final consumers) (C-378/21), the Court examined the consequences, for the issuer of invoices, of calculating VAT on the basis of the wrong rate of tax.

26 In the judgment of 15 September 2022 in ‘HA.EN’ (C-227/21), the tax authority’s practice was examined as regards the denial of the right of the purchaser to deduct the VAT paid on the basis of the supplier’s failure to pay the tax.

27 In the judgment of 9 July 2015 in Salomie and Oltean (C-183/14), the Court of Justice examined the rules regarding the registration of the holder of the right under the ZDDS and his right to deduct following his registration under the ZDDS for transactions carried out prior to registration but used in the course of his economic activity.