Case C-234/24

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

Date lodged:

27 March 2024

Referring court:

Varhoven administrativen sad (Bulgaria)

Date of the decision to refer:

27 March 2024

Appellant on a point of law:

Brose Prievidza spol.

Respondent on a point of law:

Director na Direktsia 'Obzhalvane i danachno-osiguritelna praktika' Sofia

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Subject matter of the dispute in the main proceedings

The subject of the appeal on a point of law is the judgment of the Administrativen sad Sofia-grad (Administrative Court, Sofia City – 'the ASSG') No 4639 of 11 July 2023 in administrative case No 10613/2022, which dismissed the action brought by Brose Prievidza against offsetting and recovery notice No P-22221122043497-004-001 of 15 July 2022 ('the notice') confirmed by Decision No 1568 of 3 October 2022 of the Direktor na Direktsia 'Obzhalvane i danachno-osiguritelna praktika' Sofia (Director of the Appeals and Tax and Social Security Practice Directorate, Sofia, at the Tsentralno upravlenie na Natsionalnata agentsia za prihodite (Central Administration of the National Revenue Agency, Bulgaria) – 'the Director'). The notice rejected the claim for refund of the amount of 24 251.92 leva (BGN) paid in value added tax for the period from 1 January to 31 December 2021 on invoice No 703047 dated 7 June 2021, which was issued in accordance with the Zakon za danak varhu dobavenata stoynost (Law on value added tax – 'the ZDDS') by the appellant's Bulgarian-registered company Brose Fahrzeugteile SE & Co. KG Coburg (Brose Coburg) for the sale of tooling (tools

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and tooling devices) – ‘spindle set as per Annex S-T-08-P-9965 – automatic workpiece clamping in welding system’.

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

Interpretation of EU law; Article 267 TFEU

Question referred

Does Directive 2008/9 confer a right to obtain a refund of value added tax paid which is claimed by the recipient of a supply of devices (tooling) where the subject of the supply has not left the territory of the supplier’s Member State and the supply of the tooling has been artificially split from the intra-Community supply, to the same recipient, of goods manufactured by means of those devices?

Provisions of European Union law and the case-law cited

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax: Article 138(1)(a) and (b) and Articles 168 to 171

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, Articles 3 and 4

Judgments of the Court of Justice of the European Union of 25 February 1999, *Card Protection Plan* (C-349/96, ECLI:EU:C:1999:93); of 27 October 2005, *Levob Verzekeringen and OV Bank* (C-41/04, ECLI:EU:C:2005:49); of 21 February 2008, *Part Service* (C-425/06, ECLI:EU:C:2008:108); and of 21 October 2021, *Wilo Salmson France* (C-80/20, ECLI:EU:C:2021:870)

Provisions of national law cited

Zakon za danak varhu dobavenata stoynost (Law on value added tax – ‘the ZDDS’), in force since 1 January 2007: Articles 53(1) to (3), 68(1) and (2), 69(1) and (2), 81(1) and (2) and 128

Naredba No N-9 of 16 December 2009 on the refund of value added tax under Directive 2006/112/EC to taxable persons not established in the Member State of refund but established in another Member State of the European Union (‘Regulation No N-9’): Articles 1(1) and (2) and 2(1)

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Brief description of the facts and procedure

1 Brose Prievidza is a company founded, registered for VAT purposes and established in Slovakia. It manufactures window regulators, door systems and power liftgates for vehicles. For its activity, the company purchases from the Bulgarian company 'Integrated Micro-Electronics Bulgaria' EOOD ('IME Bulgaria'), based in Botevgrad, components which are the subject of intra-Community supplies.

2 IME Bulgaria received from Brose Coburg, a company which is incorporated in Germany, is registered for VAT purposes in both Germany and Bulgaria and is linked with Brose Prievidza, an order for the production of special devices (tooling) for the manufacture of the components to be supplied to the appellant.

3 After fulfilling the order, IME Bulgaria issued Brose Coburg with invoice No 4921038649, dated 14 May 2020, for the net amount of EUR 62 000 plus value added tax of BGN 24 000, indicating the recipient's Bulgarian VAT number. The special devices which were the subject of the invoice became the customer's property but remained on the premises of IME Bulgaria, which uses them only to manufacture products for Brose Prievidza.

4 On 7 June 2021, Brose Coburg transferred the devices to Brose Prievidza, for which it issued invoice No 703047, the invoice at issue, for EUR 62 000 net, plus VAT amounting to BGN 24 251.92.

5 On 10 March 2022, in accordance with Directive 2008/9 and Regulation No N-9, Brose Prievidza applied for a refund, for the period from 1 January to 31 December 2021, of the VAT amounting to BGN 24 251.92 which it had paid on that invoice.

6 The application made by Brose Prievidza was rejected in the notice challenged before the ASSG on the following grounds, which were set out both in the notice and in the Director's decision confirming it: the supply of the devices and the supplies of the end products constituted an economically indivisible supply operation in which the devices (tooling) lost their economic significance once the end products had been manufactured. Since the appellant received the end products manufactured by IME Bulgaria as intra-Community supplies, the ancillary service of supplying the tooling must also be treated as such.

7 Issuing an invoice for the supply of the devices was not held to alter Brose Prievidza's economic objective of obtaining the components which were the subject of intra-Community supplies. The invoicing at issue for devices located and used in Bulgaria was held to be not a supply contract but, in essence, a contract to finance the purchase of the devices. This followed from the fact that the transaction did not entail a payment, for no consideration was payable by the Bulgarian contracting party for the receipt and use of the devices. In that regard, the foreign contracting party was considered to be neither the recipient nor the actual user of the manufactured devices, even though it had paid the price for

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them. The buyer was held to be a formal owner, as the supplier, the Bulgarian company IME Bulgaria, used the special devices to manufacture the end products and exercised control and oversight over them.

8 In the course of the proceedings, the court of first instance (the ASSG) justified its dismissal of the action against the notice by stating that, although the appellant met the conditions for a refund of the VAT indicated on the invoice to a taxable person established and registered for VAT purposes in another Member State of the EU, conditions which were laid down in Directive 2008/9 and Article 1(2) of Regulation No N-9, those rules did not apply to amounts constituting unlawfully indicated VAT, including such VAT which was charged on intra-Community supplies.

9 The court of first instance bases its conclusions on the interpretation of the VAT Directive set out in the Court's judgments in Cases C-349/96 and C-41/04. The ASSG held, as explained in those judgments, that a supply which comprised a single service from an economic point of view should not be artificially split, so as not to distort the functioning of the VAT system. In particular, it considered that a service should be regarded as ancillary to a principal service if it did not constitute an aim in itself for customers but the means of availing themselves of the provider's principal service in optimal conditions.

10 The ASSG concurred with the tax authorities' finding that the present case relates to precisely such a situation, in that the supply of tooling constitutes a service which is ancillary to intra-Community supplies of components produced for and supplied to Brose Prievidza by IME Bulgaria. That was demonstrated, the court found, by the order placed with the tool manufacturer IME Bulgaria, contained in the file, from which it emerged clearly that the manufacture of the devices had been ordered by an entity from the Brose group linked to the recipient and had been ordered for the sole purpose of manufacturing the workpieces required for the activity of Brose Prievidza, the manufacture of the devices and of the workpieces both being carried out by the same supplier, namely the company IME Bulgaria. Ownership of the manufactured devices had been transferred after their production, first to Brose Coburg and then by Brose Coburg to the appellant, but the devices had not left Bulgaria and were used by the supplier, IME Bulgaria, for the sole purpose of executing the appellant's orders for the production of the workpieces.

11 The production and delivery of the workpieces therefore constituted the main purpose of the transactions between Brose Prievidza and IME Bulgaria, whereas the supply of the devices was ancillary to the intra-Community supplies which constituted the principal service; the tooling devices, the ASSG held, would lose their economic significance once the end products had been manufactured. The ancillary supply, the ASSG ruled, should receive the same tax treatment as the principal supply. That taxation regime, it stated, was based on the case-law of the Court of Justice of the European Union, according to which two or more formally distinct supplies, which may be effected separately and thus be individually

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taxable or exempt, must be regarded in certain circumstances as a single transaction if they are not independent of each other. In these cases, the ancillary supply shared the tax treatment of the principal supply (statements from the judgment in Case C-41/04, paragraph 21). It was irrelevant in that regard, the court held, that payment for the principal and ancillary services was not made as an aggregated amount and that the suppliers of the principal service and the service at issue were formally different.

12 If the supply of the finished products was an intra-Community supply, the supply of the invoiced tooling also constituted an intra-Community supply, which meant that it was zero-rated under Article 53(1) of the ZDDS. Accordingly, the ASSG held that, since the end products for which the tooling devices were used were intra-Community supplies, the tax authorities' decision that the supplier could not lawfully enter VAT in the invoice at issue for the supply of the devices was correct. Under Article 1(2) of Regulation No N-9 of 16 December 2009, which transposed Article 4 of Directive 2008/9, the appellant was therefore not entitled to a refund of the VAT paid.

Main arguments of the parties in the main proceedings

13 In the appeal on a point of law, Brose Prievidza objects to the court of first instance (the ASSG) having, without foundation, upheld the view of the tax authorities that the direct supplier, Brose Coburg, had unlawfully entered VAT on the invoice at issue. Since the supplied tooling devices were not transported to another Member State, the transaction was a taxable supply, the appellant argues, the place of performance being within the national territory.

14 The appellant submits that the court of first instance assumed, without foundation, that the supply of the tooling devices was ancillary to the supply of the workpieces which the devices were used to manufacture and which were the subject of intra-Community supply to a recipient which had been subjected to a tax audit because the two sales had to be regarded in economic terms as a single supply which had been artificially split. The appellant asserts that the court relied on case-law of the Court of Justice of the European Union from Cases C-41/04 and C-349/96 which is not transposable to the present case. It argues that the court was also wrong in citing the grounds from judgments of the Varhoven administrativen sad (Supreme Administrative Court – 'the VAS') in administrative cases in which legal disputes regarding the VAT liability of the upstream supplier and manufacturer of equipment such as the devices in dispute (IME Bulgaria) were finally settled.

15 The court of first instance, Brose Prievidza argues, failed to consider that, in the present case, IME Bulgaria transferred the devices to Brose Coburg, which had in turn transferred them to Brose Prievidza together with the invoice at issue, although the subject of the supply had not been transported to Slovakia. Nor did it take account of the fact that an ancillary service required both supplies to have been effected by the same supplier, which they were not in the present case.

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16 Finally, the appellant submits that there was also no joint payment for the supply of the manufactured workpieces and of the devices, which Article 128 of the ZDDS requires if a supply is to be classed as an ancillary service. The case-law of the Court of Justice of the European Union according to which the classification of a supply as an ancillary service does not depend on joint payment being made is irrelevant, Brose Prievidza asserts, because of the manner of implementation of the VAT Directive, which is not to be interpreted to the detriment of a taxable person.

17 Contrary to the settled case-law of the Court of Justice of the European Union, the ASSG considered that the supply at issue was zero-rated, particularly since the VAT exemption for which Article 138 of the VAT Directive provided was a right of the taxable person which the taxable person could not be required to exercise. Nor was there any joint payment for the supply of the manufactured workpieces on the one hand and the devices on the other.

Succinct presentation of the grounds for the referral

18 The referring court considers that the court of first instance was correct in its factual finding that there was an artificial split between the supplies of components for Brose Prievidza's activity and the supplies of the tooling devices without which the manufacture of the components would have been impossible. That conclusion is based on the interpretation guidance set out in paragraphs 56 and 57 of the judgment of 21 February 2008 in Case C-425/06.

19 Applying this guidance to the present case, the following factors should be taken into account: the de facto links between Brose Coburg and Brose Prievidza; the fact that the supplies effected by IME Bulgaria to Brose Prievidza are split into parts, as the supplier sells the manufactured components directly to the appellant, whereas it sells the devices which are imperative for the manufacture of those components to Brose Prievidza through an intermediary linked to the recipient; taken in isolation, the supply of the tooling devices seems economically illogical, because the devices remain with the supplier, IME Bulgaria, and without them it is not possible to manufacture the components which are delivered to Brose Prievidza as intra-Community supplies.

20 In the view of the referring court, it has been neither alleged nor demonstrated that the sole purpose of splitting the supplies is to obtain a tax benefit for Brose Prievidza, nor is it evident what the nature of any such benefit would be.

21 Given that the question at issue in the present case is whether Brose Coburg lawfully entered the tax on the supply invoice for the tooling devices and whether, under Directive 2008/9, Brose Prievidza is ultimately entitled to a refund of the VAT it paid in respect of that supply, the referring court considers the following to be established:

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22 As the ASSG has held, under Article 1(2) of Regulation No N-9, which transposes Article 4(b) of Directive 2008/9, the Directive and the Regulation do not apply to invoiced VAT amounts for supplies of goods which are or may be exempted from that tax under Article 138 or Article 146(1)(b) of Directive 2006/112/EC.

23 The dispute concerns, first of all, whether the supply ancillary to the supply of the tooling can be classed as exempted or subject to exemption where it is certain that the subject of that supply has not left the State of the supplier.

24 It has also been established that there is case-law of the VAS, which the ASSG also cited, which settled the disputes concerning the VAT liability of the upstream supplier and manufacturer of equipment such as the devices at issue (IME Bulgaria). According to the grounds of those judgments, supplies of equipment such as the devices at issue in the main proceedings constitute a service ancillary to the intra-Community supply of workpieces manufactured by means of those devices, for which reason they are zero-rated. Those grounds are partly based on the interpretation of the VAT Directive in Cases C-425/06, paragraph 48, C-349/96, paragraph 26, and C-41/04.

25 There is also case-law of the VAS in other similar cases, according to which a company established in another Member State of the European Union and receiving tooling has no right in Bulgaria to a refund of the VAT paid on the acquisition of that equipment under Directive 2008/9, because the supplies of the tooling constitute a service which is ancillary to the intra-Community supply, to the same company, of workpieces produced with that equipment. The difference from the facts of the present case lies solely in the absence of an intermediary company in the transfer of ownership of the devices; in the previous cases they were transferred directly by the manufacturer to the company which made the refund application and which was the recipient of the manufactured workpieces.

26 If one follows the logic that artificially split supplies must be subject to a single tax regime, namely that which applies to the principal service, the supply of the tooling devices will be zero-rated, as will supplies of components manufactured with the devices. According to that logic, Brose Prievidza would have no right to a refund of the VAT paid on the supply of the devices under the transposed provision of Directive 2008/9, as the court of first instance held.

27 In view of the Court's interpretation of the VAT Directive in its judgment in Case C-80/20, it seems questionable to the referring court whether that outcome in the present case is actually compatible with EU law. In the main proceedings in Case C-80/20, the dispute concerned the right to a refund under Directive 2008/9 of the VAT paid on the supply of tooling which was applied for by the recipient, established in France, which was also the recipient of the intra-Community supplies of goods manufactured by means of that same tooling by its supplier, which was established and registered for VAT purposes in Romania. As in the present case, the subject of the tooling supply at issue had not left the territory of

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the supplier's State, and the goods manufactured with it were the subject of intra-Community supplies.

28 Although the questions referred to the Court for a preliminary ruling in that case and the answers given concerned the conditions for the exercise of the right to a refund under Directive 2008/9, the existence of that right does not appear to have been called into question in a case similar to the present one.

29 The referring court points to the appellant's reasoned view that the main proceedings in Cases C-41/04, C-572/07 and C-392/11 differ from the present case in so far as the supplies classed there as ancillary services were effected between the same two parties as the principal supplies. The same applies, according to the appellant, to the main proceedings in Case C-80/20, in which the manufacturer of the tooling and the workpieces produced with it supplied both the tooling and the workpieces directly to a person established outside Romania, who claimed a refund of the VAT on the purchase of the equipment. On the other hand, in Case C-425/06, as in the present case, various suppliers and one recipient of the supplies were involved, but the purpose of any splitting of supplies in that case was tax abuse, whereas such a purpose has been neither alleged nor demonstrated in the present case.

30 For those reasons, the referring court stays the appeal proceedings and requests a preliminary ruling from the Court of Justice of the European Union.

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