

JUDGMENT OF THE COURT (Sixth Chamber)

16 May 2013 (*)

(Value added tax – Directive 2006/112/EC – Article 66(a) to (c) – Transport and shipping services – Chargeability – Date on which payment is received and no later than 30 days from the date on which the services are supplied – Invoice issued earlier)

In Case C-169/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Naczelny Sąd Administracyjny (Poland), made by decision of 4 January 2012, received at the Court on 10 April 2012, in the proceedings

TNT Express Worldwide (Poland) sp. z o.o.

v

Minister Finansów,

THE COURT (Sixth Chamber),

composed of M. Berger, President of the Chamber, A. Borg Barthet (Rapporteur) and E. Levits, Judges,

Advocate General: M. Wathelet,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- TNT Express Worldwide (Poland) sp. z o.o., by Z. Modzelewski and M. Militz, acting as advisors,
- the Polish Government, by M. Szpunar and B. Majczyna, acting as Agents,
- the European Commission, by J. Hottiaux and C. Soulay, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion, gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 66(a) to (c) 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 by Council Directive 2008/117/EC of 16 December 2008 (OJ 2009 L 14, p. 7) ('the VAT Directive').

2 The request has been made in proceedings between TNT Express Worldwide (Poland) sp. z

o.o. ('TNT') and the Minister Finansów (Minister for Finance) concerning the time at which the liability to pay value added tax ('VAT' or 'the tax') arises.

Legal context

European Union legislation

3 According to recital 24 in the preamble to the VAT Directive:

'The concepts of chargeable event and of the chargeability of VAT should be harmonised if the introduction of the common system of VAT and of any subsequent amendments thereto are to take effect at the same time in all Member States.'

4 Under Article 63 of that directive:

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

5 Article 64 of that directive provides:

'1. Where it gives rise to successive statements of account or successive payments, the supply of goods, other than that consisting in the hire of goods for a certain period or the sale of goods on deferred terms, as referred to in point (b) of Article 14(2), or the supply of services shall be regarded as being completed on expiry of the periods to which such statements of account or payments relate.

2. ...

Member States may provide that, in certain cases other than those referred to in the previous paragraph, the continuous supply of goods or services over a period of time is to be regarded as being completed at least at intervals of one year.'

6 Under Article 65 of the VAT Directive:

'Where a payment is to be made on account before the goods or services are supplied, VAT shall become chargeable on receipt of the payment and on the amount received.'

7 In accordance with Article 66 of that directive:

'By way of derogation from Articles 63, 64 and 65, Member States may provide that VAT is to become chargeable, in respect of certain transactions or certain categories of taxable person at one of the following times:

- (a) no later than the time the invoice is issued;
- (b) no later than the time the payment is received;
- (c) where an invoice is not issued, or is issued late, within a specified period from the date of the chargeable event.

...'

8 Under Article 167 of that directive:

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

9 Council Directive 2010/45/EU of 13 July 2010 (OJ 2010 L 189, p. 1) inserted in Directive 2006/112 a new article, Article 167a, which the Member States had to transpose into national law by 31 December 2012 at the latest and which is worded as follows:

‘Member States may provide within an optional scheme that the right of deduction of a taxable person whose VAT solely becomes chargeable in accordance with Article 66(b) be postponed until the VAT on the goods or services supplied to him has been paid to his supplier.

Member States which apply the optional scheme referred to in the first paragraph shall set a threshold for taxable persons using the scheme within their territory, based on the annual turnover of the taxable person calculated in accordance with Article 288. That threshold may not be higher than EUR 500 000 or the equivalent in national currency. Member States may increase that threshold up to EUR 2 000 000 or the equivalent in national currency after consulting the VAT Committee. However, such consultation of the VAT Committee shall not be required for Member States which applied a threshold higher than EUR 500 000 or the equivalent in national currency on 31 December 2012.

Member States shall inform the VAT Committee of national legislative measures adopted pursuant to the first paragraph.’

Polish legislation

10 Pursuant to Article 19(1), (4) and (13)(2) of the Law on the tax on goods and services (ustawa o podatku od towarów i usług) of 11 March 2004 (Dz. U. No 54, item 535; ‘the VAT Law’):

‘1. The liability to pay the tax shall arise when the goods or services are supplied, subject to paragraphs 2 to 21, and to Article 14(6), Article 20 and Article 21(1).

...

4. Where the supply of goods or services must be confirmed by an invoice, the liability to pay the tax shall arise when the invoice is issued, but no later than seven days from the date on which the goods or services are supplied.

...

13. The liability to pay the tax shall arise:

...

(2) on receipt in full or in part of the payment, but no later than 30 days from the date on which the following services are supplied:

- (a) services relating to the transportation of people and goods by train, road vehicle, seagoing vessel, inland and coastal waterways vessel, ferry, aircraft and helicopter,
- (b) shipping and transshipment services,
- (c) services in seaports and commercial ports,
- (d) construction or assembly services.’

The dispute in the main proceedings and the questions referred for a preliminary ruling

11 In the course of its economic activity, TNT – a limited liability company established in Warsaw (Poland) – carries out supplies of courier, postal, transport and shipping services.

12 TNT issues VAT invoices to its customers once a week. For certain customers, who purchase numerous services, the frequency at which invoices are issued is a matter of agreement. In that case, the invoices cover all the services supplied to that specific customer in a particular taxable period. The deadline for payment of the amount due stated in the invoices is normally given as 7, 14 or 21 days after the date on which the invoice is issued. TNT takes account of the turnover arising from a given invoice in the taxable period in respect of which the invoice was issued.

13 Accordingly, for the purposes of establishing the time at which the liability to pay the tax arises, TNT does not divide the services covered by the invoice into courier/postal services and transport/shipping services. Since the invoices are issued no later than the final days of the taxable period, the tax on the services supplied in a given month is included in the registers and the VAT return is drawn up for the month of supply.

14 In the light of the above situation, TNT asked the Minister Finansów to issue an individual interpretation concerning the provisions of tax law applicable in the area of the tax on goods and services and, inter alia, on the question whether TNT had the right under Article 19(13)(2) of the VAT Law to take account of turnover in the taxable period in which the invoice was issued, even though it did not receive any payment in that period and 30 days had not elapsed since the service was supplied; and whether, if the first question is answered in the negative, TNT had the right to consider that the date on which the liability to pay the tax arose was the date on which the invoice was issued, in accordance with Article 19(4) of the VAT Law, without taking into account the requirements under Article 19(13)(2) of the VAT Law, contrary to Article 66 of Directive 2006/112.

15 In his individual interpretation of 14 December 2009, the Minister Finansów stated that TNT's view was incorrect. As regards the courier and postal services supplied by TNT, the Minister Finansów considered that the liability to pay the tax arises under the general rules laid down in Article 19(1) and (4) of the VAT Law. In relation to the other services (transport and shipping services), the time when the liability to pay the tax arises must be fixed in accordance with Article 19(13)(2) of the VAT Law. In the case of those services, the tax due must be indicated in the VAT return for the month in which the liability to pay the tax arises and not in the return for the month in which the invoice documenting supply of the service is issued.

16 TNT subsequently brought an action before the Wojewódzki Sąd Administracyjny (Regional Administrative Court) in Warsaw. In support of its action, it claimed that it was entitled, in respect of all services supplied – whether mail delivery services or transport and shipping services – to take into account for VAT purposes turnover in the taxable period in which the invoice documenting the relevant services was issued, even though it did not receive any payment in that period and 30 days had not elapsed since the service was supplied.

17 By its judgment of 30 September 2010, the Wojewódzki Sąd Administracyjny dismissed the action brought by TNT, which then brought an appeal on a point of law before the Naczelny Sąd Administracyjny (Supreme Administrative Court).

18 By its appeal, TNT claims that the Wojewódzki Sąd Administracyjny erred in its interpretation of Article 19(13)(2)(a) and (b) of the VAT law, as it failed to take into account Articles 63 to 66 of the VAT Directive. TNT argues that, under Article 66 of the VAT Directive, the liability to

pay VAT arises in relation to a particular event, but no later than the date on which the payment is received. The provisions of national law, however, provide – wrongly, according to TNT – that receipt of payment gives rise to the liability to pay VAT, but that such liability arises at the latest at a particular time (30 days) from the date on which the service is supplied.

19 During the examination of the appeal, the referring court has expressed doubts concerning the interpretation of Article 66 of the VAT Directive and considered that the substance of the pleas put forward by TNT should be assessed in the light of the interpretation of the provisions of that directive.

20 In those circumstances, the Naczelny Sąd Administracyjny decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘1. Are points (a), (b) and (c) of Article 66 of [the VAT Directive] to be interpreted as meaning that, where a taxable person issues an invoice documenting the supply of a service covered by the power conferred on Member States by that article (by way of derogation from Articles 63, 64 and 65 of [the VAT Directive]), it is possible to determine the chargeability of the tax (liability to pay the tax) on the basis of Article 66(b) of [the VAT Directive] as arising on the date of payment, but no later than 30 days from the date on which the service is supplied?’

2. Are points (a) and (b) of Article 66 of [the VAT Directive] to be interpreted as precluding the provisions of Polish national law laid down in Article 19(13)(2)(a) and (b) of the [VAT Law], under which the time when the liability to pay the tax arises (the event on whose occurrence the tax becomes chargeable in respect of certain transactions) occurs in respect of transport and shipping services on receipt of payment in full or in part, but no later than 30 days from the date on which those services are supplied, even where an invoice laying down a later deadline for payment is issued and presented to the purchaser no later than seven days after the service is supplied and the purchaser of the service has the right to deduct input tax during the period in which he received the invoice, irrespective of whether or not he has paid for the service?’

Consideration of the questions referred

21 By those two questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 66 of the VAT Directive is to be interpreted as precluding national legislation which provides that, in respect of transport and shipping services, VAT is to become chargeable on the date on which payment is received in full or in part, but no later than 30 days from the date on which those services are supplied, even where the invoice has been issued earlier and specifies a later deadline for payment.

22 It must be found, first of all, that it follows from the VAT Directive that, as a rule, VAT becomes chargeable at the time the chargeable event occurs. Article 63 of that directive reflects that fundamental principle, providing that the chargeable event is to occur and VAT is to become chargeable on the date on which the goods or the services are supplied.

23 However, Article 66 of the VAT Directive authorises the Member States to provide that VAT is to become chargeable after the chargeable event has occurred, at one of the following times: no later than the time the invoice is issued; no later than the time the payment is received; or, where an invoice is not issued or is issued late, within a specified period from the date of the chargeable event.

24 Since it constitutes a derogation from the rule laid down in Article 63 of the VAT Directive, Article 66 of that directive must be interpreted strictly (see, by analogy, Case C-19/12 *Efir* [2013] ECR, paragraph 31).

25 Although the fact that the legislature substantially extended the scope of the permitted derogations suggests that it intended to allow the Member States a wide margin of discretion (see Case C-144/94 *Italitica* [1995] ECR I-3653, paragraph 15), that does not allow the inference that a Member State has a discretion to establish a time at which the VAT becomes chargeable other than one of those specified in points (a), (b) and (c) of Article 66 of the VAT Directive.

26 First, Article 19(13)(2) of the VAT Law provides that, in respect of certain transaction — in the present case, transport and shipping services — the liability to pay the tax arises on the date on which the payment is received in full or in part, but no later than 30 days from the date on which the service in question is supplied.

27 Secondly, it must be observed that, in accordance with Article 66(b) of the VAT Directive, the Member States may provide that VAT is to become chargeable, in respect of certain transactions or certain categories of taxable person ‘...no later than the time the payment is received’. That provision sets deadlines and indicates the final time at which the VAT is to become chargeable in respect of particular transactions that a Member State has decided to regulate in that manner. That time corresponds to the receipt of the payment for the transaction.

28 The Court has held that Article 10(2) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1) (now Article 66(a) of the VAT Directive) is to be interpreted as meaning that where a Member State opts for the derogation allowed under the first indent of the third subparagraph of Article 10(2) of Directive 77/388, (now Article 66(c) of the VAT Directive), that is to say, where it makes the tax chargeable no later than the issue of the invoice or the document serving as invoice, it may, in accordance with the third indent, provide that the tax is to become chargeable ‘where an invoice or document serving as invoice is not issued, or is issued late, within a specified period from the date of the chargeable event’ (see *Italitica*, paragraph 22).

29 It must also be noted that, in that judgment, the Court added that the fact that ‘there is no such possibility where a Member State opts for the derogation laid down in the second indent [of Article 10(2) of Directive 77/388, now Article 66(b) of the VAT Directive] is probably due to the fact that the [European Union] legislature considered that a trader’s interest in receiving consideration for the service carried out was a sufficient incentive to ensure prompt payment for the service’ (see, to that effect, *Italitica*, paragraph 23).

30 It follows that the legislature has not made it possible for a Member State which chooses the option under Article 66(b) of the VAT Directive to establish a time-period in which the tax is to become chargeable. Moreover, the application of Article 66(c) of that directive, and the time period that it envisages, can be coupled only with the application of Article 66(a), since the time-period is conditional upon an invoice not having been issued or having been issued late, and not upon the non-receipt or late receipt of payment.

31 It should also be recalled that, as is clear from recital 24 in the preamble to the VAT Directive, the concepts of ‘chargeable event’ and ‘chargeability of VAT’ should be harmonised if the introduction of the common system of VAT and of any subsequent amendments thereto are to take effect at the same time in all Member States. The European Union legislature intended maximum harmonisation of the date on which liability to pay VAT arises in all the Member States

in order to ensure the uniform collection of that tax.

32 Accordingly, a situation in which liability to pay the tax is to arise no later than 30 days from the date on which the service in question is supplied, provided that the payment has not been received before that date, is not in conformity with the VAT Directive, as such a rule would mean that the wording of Article 66(b) of that directive had been combined with a time-period in which the tax was to become chargeable.

33 In that regard, the referring court considers that certain doubts remain as to whether, in the course of the period preceding the adoption of Article 167a of Directive 2006/112, as amended by Directive 2010/45, the Member States were authorised to introduce a system in which the postponement of the time when the tax becomes chargeable to the supplier does not correspond to the postponement of the time when the right to deduct VAT arises upstream for the purchaser, which was entitled to carry out that deduction upon receipt of the invoice.

34 It should be pointed out that the purpose underlying the insertion of that Article 167a was to enable all the Member States to introduce a derogation concerning the date on which the right of deduction may be exercised by taxable persons declaring VAT in the context of an optional cash accounting scheme intended to simplify the payment of VAT for small businesses.

35 In that regard, it must be held that, although Article 167a of Directive 2006/112, as amended by Directive 2010/45, refers directly to Article 66(b) of the VAT Directive, it concerns the establishment of the time at which the purchaser may exercise the right to deduct VAT upstream. The case pending before the referring court, on the other hand, is concerned only with the chargeability of VAT to the supplier.

36 In the light of the foregoing, the answer to the questions referred is that Article 66 of the VAT Directive is to be interpreted as precluding national legislation which provides that, in respect of transport and shipping services, VAT is to become chargeable on the date on which payment is received in full or in part, but no later than 30 days from the date on which those services are supplied, even where the invoice has been issued earlier and specifies a later deadline for payment.

Costs

37 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Sixth Chamber) hereby rules:

Article 66 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, as amended by Council Directive 2008/117/EC of 16 December 2008, is to be interpreted as precluding national legislation which provides that, in respect of transport and shipping services, value added tax is to become chargeable on the date on which payment is received in full or in part, but no later than 30 days from the date on which those services are supplied, even where the invoice has been issued earlier and specifies a later deadline for payment.

[Signatures]

* Language of the case: Polish.