Case C-188/09

Dyrektor Izby Skarbowej w Bia?ymstoku

v

Profaktor Kulesza, Frankowski, Jó?wiak, Or?owski sp. j, formerly Profaktor Kulesza, Frankowski, Trzaska sp. j

(Reference for a preliminary ruling from the

Naczelny S?d Administracyjny (Poland))

(Reference for a preliminary ruling – VAT – Right to deduct – Reduction of the extent of the right to deduct in the event of breach of the obligation to use a cash register)

Summary of the Judgment

1. *Tax provisions – Harmonisation of laws – Turnover taxes – Common system of value added tax – Deduction of input tax*

(Council Directives 67/227, Art. 2(1) and (2), and 77/388, Arts 2, 10(1) and (2), and 17(1) and (2))

2. *Tax provisions – Harmonisation of laws – Turnover taxes – Common system of value added tax – Directive 77/388 – National measures derogating therefrom – Meaning*

(Council Directive 77/388, Art. 27(1))

3. *Tax provisions – Harmonisation of laws – Turnover taxes – Common system of value added tax – Prohibition on the levying of other domestic taxes that can be characterised as turnover taxes – Meaning of 'turnover taxes' – Scope*

(Council Directive 77/388, Art. 33)

1. The common system of value added tax, as defined in Article 2(1) and (2) of First Directive 67/227 on the harmonisation of legislation of Member States concerning turnover taxes and in Articles 2, 10(1) and (2) and 17(1) and (2) of Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes, as amended by Directive 2004/7, does not preclude a Member State from imposing a temporary restriction on the extent of the right of taxable persons who have not complied with a formal requirement to keep accounting records of their sales to deduct input tax paid, on condition that the sanction thus provided for comply with the principle of proportionality.

In so far as it seeks to ensure that the tax is levied accurately and to prevent tax evasion, such an obligation is among the measures which Member States may adopt on the basis of Article 22(8) of the Sixth Directive. In that context, by providing that, in cases where that accounting obligation is not complied with, the proportion of the tax which the taxable person may deduct is reduced by 30%, that measure must be regarded as constituting an administrative sanction, the deterrent effect of which is intended to ensure compliance with that obligation. It is, however, for the referring court to check that the detailed rules for determining the amount of the sanction and the conditions in which the facts relied on by the tax authorities are recorded, investigated and, as the

case may be, adjudicated upon to implement that sanction, do not render the right to deduct value added tax meaningless or, therefore, adversely affect the principle that the tax burden must be neutral in relation to all economic activities. In that regard, a withholding rate limited to 30%, which thus preserves the greater part of the input tax paid, appears neither excessive nor inadequate for ensuring that the sanction in question is deterrent and, therefore, effective. Moreover, such a reduction on the basis of the amount of tax paid by the taxable person is not manifestly without any link to the level of the economic activity of the person concerned. Furthermore, in so far as the purpose of that sanction is not to correct accounting errors but to prevent them, its flat-rate nature, resulting from the application of the fixed rate of 30%, and, consequently, the lack of any correspondence between the amount of that sanction and the extent of any errors which may have been made by the taxable person cannot be taken into account in the assessment of whether that sanction is proportionate.

(see paras 27-28, 34-37, 39, operative part 1)

2. National provisions, which provide that an administrative sanction be imposed on persons taxable for the purposes of value added tax where it is found that they have not complied with the obligation to keep accounting records of turnover and the amount of tax due through the use of a cash register, do not constitute ‘special measures for derogation’ intended to prevent certain types of tax evasion or avoidance within the meaning of Article 27(1) of Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes, as amended by Directive 2004/7. Such a measure cannot fall within the scope of Article 27(1), since it constitutes a measure referred to in Article 22(8) of the Sixth Directive, by virtue of which Member States may impose other obligations which they deem necessary for the correct levying and collection of the tax and for the prevention of fraud.

(see paras 41-43, operative part 2)

3. Article 33 of Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes, as amended by Directive 2004/7, does not preclude the maintenance of provisions such as those of the Polish Law on the Tax on Goods and Services, which provide that an administrative sanction may be imposed on persons taxable for the purposes of value added tax if it is established that they have failed to use a cash register to record turnover and the amount of the tax due in their accounting documents.

(see para. 49, operative part 3)

JUDGMENT OF THE COURT (Fourth Chamber)

29 July 2010 (*)

(Reference for a preliminary ruling – VAT – Right to deduct – Reduction of the extent of the right to deduct in the event of breach of the obligation to use a cash register)

In Case C?188/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Naczelny S?d Administracyjny

(Poland), made by decision of 21 May 2009, received at the Court on 28 May 2009, in the proceedings

Dyrektor Izby Skarbowej w Bia?ymstoku

v

Profaktor Kulesza, Frankowski, Jó?wiak, Or?owski sp. j., formerly Profaktor Kulesza, Frankowski, Trzaska sp. j.,

THE COURT (Fourth Chamber),

composed of J.-C. Bonichot (Rapporteur), President of the Chamber, C. Toader, K. Schiemann, L. Bay Larsen and D. Šváby, Judges,

Advocate General: J. Mazák,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 20 May 2010,

after considering the observations submitted on behalf of:

– the Polish Government, by M. Dowgielewicz, A. Rutkowska and A. Kramarczyk, acting as Agents,

– the European Commission, by D. Triantafyllou and K. Herrmann, acting as Agents,

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

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of First Council Directive 67/227/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes (OJ, English Special Edition 1967, p. 14; 'the First VAT Directive') and 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, as amended by Council Directive 2004/7/EC of 20 January 2004 (OJ 2004 L 27, p. 44) ('the Sixth VAT Directive').

2 The reference has been submitted in the course of proceedings between Profaktor Kulesza, Frankowski, Jó?wiak, Or?owski sp. j., a partnership, formerly Profaktor Kulesza, Frankowski, Trzaska sp. j. ('Profaktor') and the Dyrektor Izby Skarbowej w Bia?ymstoku (Director of the Bia?ystok Tax Office) concerning the restriction on the right to deduct the value added tax ('VAT') levied on input transactions imposed in cases where the taxable person did not comply with the obligation to use a cash register to keep accounting records of sales made to 'natural persons not engaged in economic activity'.

Legal context

European Union law

3 Pursuant to the first and second paragraphs of Article 2 of the First VAT Directive:

‘The principle of the common system of [VAT] involves the application to goods and services of a general tax on consumption exactly proportional to the price of the goods and services, whatever the number of transactions which take place in the production and distribution process before the stage at which tax is charged.

On each transaction, [VAT], calculated on the price of the goods or services at the rate applicable to such goods or services, shall be chargeable after deduction of the amount of [VAT] borne directly by the various cost components.’

4 Article 2 of the Sixth VAT Directive provides:

‘The following shall be subject to [VAT]:

1. the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such;

2. the importation of goods.’

5 Article 10(1)(a) of that directive defines the ‘chargeable event’ which gives rise to the tax as ‘the occurrence by virtue of which the legal conditions necessary for tax to become chargeable are fulfilled’. Article 10(2) provides:

‘The chargeable event shall occur and the tax shall become chargeable when the goods are delivered or the services are performed. Deliveries of goods other than those referred to in Article 5(4)(b) and supplies of services which give rise to successive statements of account or payments shall be regarded as being completed at the time when the periods to which such statements of account or payments pertain expire. …’

6 According to Article 17 of that directive:

‘1. The right to deduct shall arise at the time when the deductible tax becomes chargeable.

2. In so far as the goods and services are used for the purposes of his taxable transactions, the taxable person shall be entitled to deduct from the tax which he is liable to pay:

(a) [VAT] due or paid in respect of goods or services supplied or to be supplied to him by another taxable person;

(b) [VAT] due or paid in respect of imported goods;

(c) [VAT] due under Articles 5(7)(a) and 6(3).

…

4. The Council shall endeavour to adopt before 31 December 1977, on a proposal from the Commission and acting unanimously, Community rules laying down the arrangements under which refunds are to be made in accordance with paragraph 3 to taxable persons not established in the territory of the country. Until such Community arrangements enter into force, Member States shall themselves determine the method by which the refund concerned shall be made. Where the taxable person is not resident in the territory of the Community, Member States may refuse the refund or impose supplementary conditions.’

7 Article 22 of the Sixth VAT Directive, which is included under Title XIII thereof, entitled ‘Obligations of persons liable for payment’, provides:

‘…

2. Every taxable person shall keep accounts in sufficient detail to permit application of the [VAT] and inspection by the tax authority.

…

8. Without prejudice to the provisions to be adopted pursuant to Article 17(4), Member States may impose other obligations which they deem necessary for the correct levying and collection of the tax and for the prevention of fraud.

…’

8 Under Article 27(1) of the Sixth VAT Directive:

‘The Council, acting unanimously on a proposal from the Commission, may authorise any Member State to introduce special measures for derogation from the provisions of this Directive, in order to simplify the procedure for charging the tax or to prevent certain types of tax evasion or avoidance. Measures intended to simplify the procedure for charging the tax, except to a negligible extent, may not affect the overall amount of the tax revenue of the Member State collected at the stage of final consumption.’

9 Article 33(1) of the Sixth VAT Directive provides:

‘Without prejudice to other Community provisions, in particular those laid down in the Community provisions in force relating to the general arrangements for the holding, movement and monitoring of products subject to excise duty, this Directive shall not prevent a Member State from maintaining or introducing taxes on insurance contracts, taxes on betting and gambling, excise duties, stamp duties and, more generally, any taxes, duties or charges which cannot be characterised as turnover taxes, provided however that those taxes, duties or charges do not, in trade between Member States, give rise to formalities connected with the crossing of frontiers.’

National legislation

10 Pursuant to Article 111(1) and (2) of the Law on the Tax on Goods and Services (ustawa o podatku od towarów i us?ug, Dz. U. No 54, position 535) of 11 March 2004 (‘the 2004 Law on VAT’):

‘1. Taxable persons effecting sales to natural persons not engaged in economic activity … are required to keep records of turnover and the amount of tax due through the use of cash registers.

2. Until such time as they use cash registers in order to keep a record of turnover and amounts of tax due, taxable persons failing to fulfil the obligation laid down in paragraph 1 shall forfeit the right to reduce the amount of tax due in an amount equivalent to 30% of the amount of input tax paid on the acquisition of goods and services.’

11 Article 87(1) of that law provides:

‘Where the amount of input tax referred to in Article 86(2) is greater than the amount of tax due during an accounting period, the taxable person has the right to a reduction, by that difference, of

the amount of input tax due for subsequent periods or to repayment of the difference to a bank account.'

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

12 By a decision of 17 October 2006, the Dyrektor Urz?du Kontroli Skarbowej w Bia?ymstoku (Director of the Tax Inspection Authority, Bia?ystok) fixed the VAT owed by Profaktor in respect of certain months of 2004 and 2005 at a different amount than that which, according to that partnership, ought to have resulted from the tax returns which it had lodged. Pursuant to Article 111 of the 2004 Law on VAT, the Dyrektor reduced by 30% the input tax paid on the acquisition of goods and services which had been set against the amount of tax due, on the ground that Profaktor had not complied with the obligation to record its turnover and the amount of tax due by means of cash registers.

13 Following an appeal by Profaktor, the contested decision was confirmed on 7 February 2007 by the Dyrektor Izby Skarbowej w Bia?ymstoku.

14 Profaktor applied to the Wojewódzki S?d Administracyjny w Bia?ymstoku (Regional Administrative Court, Bia?ystok) to have the decision of 7 February 2007 set aside. That court upheld that application in part after forming the view that, for the period following the Republic of Poland's accession to the European Union, the disputed provisions of Article 111 of the 2004 Law on VAT were incompatible with European Union law, specifically with Articles 17 and 27 of the Sixth VAT Directive. It held that the restriction of the right to deduct input VAT, contained in the provisions of Article 111 of the 2004 Law on VAT, amounted to a derogation from that right provided for in Article 17 of the Sixth VAT Directive, and thus was in fact in the nature of a special measure which had not been implemented by the Republic of Poland in accordance with the conditions set out in Article 27 of that directive.

15 The Dyrektor Izby Skarbowej w Bia?ymstoku appealed in cassation against that ruling, contending that the provisions at issue were in the nature of a sanction only, which therefore did not constitute a derogation from the Sixth VAT Directive and the objective of which was not to restrict the right to deduct but to prevent tax evasion.

16 The Naczelny S?d Administracyjny (Supreme Administrative Court), before which that appeal was brought, took the view, inter alia, that that sanction constituted, for a taxable person who has failed to comply with the recording obligation, an infringement of the principle of the neutrality of VAT inasmuch as it shifted to that person the burden of a portion of the input VAT. It held that doubt remained as to whether the provisions at issue complied with the principle of proportionality, as to whether they constituted an administrative sanction or a special measure within the meaning of Article 27 of the Sixth VAT Directive, and as to whether the measure could itself be regarded as a tax or as a charge equivalent to a turnover tax.

17 In those circumstances, the Naczelny S?d Administracyjny decided to stay the proceedings and to refer to the Court the following questions for a preliminary ruling:

‘1. Do the first and second paragraphs of Article 2 of [the] First [VAT] Directive …, in conjunction with Articles 2, 10(1) and (2) and 17(1) and (2) of [the] Sixth [VAT] Directive …, rule out the possibility of introducing temporary forfeiture of the right to reduce the amount of tax due by an amount equivalent to 30% of the input tax on the acquisition of goods and services in relation to taxable persons who effect sales to natural persons not engaged in economic activity, … and who fail to fulfil the obligation to keep records of turnover and amounts of tax due by using cash registers, pursuant to Article 111(2) of the [2004 Law on VAT], in conjunction with Article 111(1) thereof?

2. Can “special measures” within the terms of Article 27(1) of [the] Sixth [VAT] Directive … consist, regard being had to their character and purpose, in a temporary restriction of the scope of a taxable person’s right to reduce tax referred to in Article 111(2) of the [2004 Law on VAT], in conjunction with Article 111(1) thereof, in relation to taxable persons who fail to fulfil the obligation to keep records of turnover and amounts of tax by using cash registers, with the result that the introduction thereof requires compliance with the procedure set out in Article 27(2) to (4) of the … Sixth [VAT] Directive?

3. Does the right of a Member State referred to in Article 33(1) of [the] Sixth [VAT] Directive … encompass the right to impose a sanction on taxable persons who fail to fulfil the obligation to keep records of turnover and amounts of tax by using cash registers in the form of temporary forfeiture of the right to reduce the amount of tax due by an amount equivalent to 30% of the input tax on the acquisition of goods and services referred to in Article 111(2) of the [2004 Law on VAT], in conjunction with Article 111(1) thereof?’

Consideration of the questions referred

The first question

18 By its first question, the referring court asks, essentially, whether the common system of VAT, as defined in Article 2(1) and (2) of the First VAT Directive and in Articles 2, 10(1) and (2) and 17(1) and (2) of the Sixth VAT Directive, precludes a Member State from imposing a temporary restriction on the extent of the right of taxable persons who have not complied with a formal requirement to retain accounting records of their sales to deduct input VAT.

19 It should be recalled that the right to deduct provided for in Articles 17 to 20 of the Sixth VAT Directive is an integral part of the VAT scheme and in principle may not be limited. The right to deduct is exercisable immediately in respect of all the taxes charged on input transactions (see, inter alia, Case C?437/06 *Securenta* [2008] ECR I?1597, paragraph 24; Case C?102/08 *SALIX Grundstücks-Vermietungsgesellschaft* [2009] ECR I?4629, paragraph 70; and Case C?29/08 *SKF* [2009] ECR I-0000, paragraph 55).

20 The deduction system is intended to relieve the trader entirely of the burden of the VAT payable or paid in the course of all his economic activities. The common system of VAT consequently ensures neutrality of taxation of all economic activities, whatever their purpose or results, provided that they are themselves subject in principle to VAT (see, inter alia, Case C?137/02 *Faxworld* [2004] ECR I?5547, paragraph 37, and *SKF*, paragraph 56).

21 The normal functioning of the common system of VAT, which must thereby ensure the neutrality of taxation of all economic activities, requires that the tax be collected accurately. It follows from Articles 2 and 22 of the Sixth VAT Directive, and from Article 10 EC, that every Member State is under an obligation to take all legislative and administrative measures appropriate for ensuring collection of all the VAT due on its territory. In that regard, Member States

are required to check taxable persons' returns, accounts and other relevant documents, and to calculate and collect the tax due (Case C-132/06 *Commission* v *Italy* [2008] ECR I-5457, paragraph 37).

22 Under the common system of VAT, Member States are required to ensure compliance with the obligations to which taxable persons are subject and they enjoy in that respect a certain measure of latitude, inter alia, as to how they use the means at their disposal (*Commission* v *Italy*, paragraph 38).

23 Among those obligations, Article 22(2) of the Sixth VAT Directive provides, inter alia, that every taxable person is to keep accounts in sufficient detail to permit application of the VAT and inspection by the tax authority.

24 In addition, according to Article 22(8) of the Sixth VAT Directive, the Member States, without prejudice to the provisions to be adopted pursuant to Article 17(4) thereof, may impose other obligations which they deem necessary for the correct levying and collection of the tax and for the prevention of fraud.

25 It must be pointed out in this connection that the prevention of potential tax evasion, avoidance and abuse is an objective which is recognised and encouraged by the Sixth VAT Directive (see Joined Cases C-487/01 and C?7/02 *Gemeente Leusden and Holin Groep* [2004] ECR I-5337, paragraph 76; Case C-255/02 *Halifax and Others* [2006] ECR I-1609, paragraph 71; and *Commission* v *Italy*, paragraph 46).

26 However, the measures which the Member States may thus adopt must not go further than is necessary to attain the objectives of ensuring the correct levying and collection of the tax and the prevention of tax evasion. Such measures 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 (see, to that effect, inter alia, Joined Cases C?286/94, C?340/95, C?401/95 and C?47/96 *Molenheide and Others* [1997] ECR I?7281, paragraph 47; Case C?25/03 *HE* [2005] ECR I?3123, paragraph 80; and Joined Cases C?95/07 and C-96/07 *Ecotrade* [2008] ECR I-3457, paragraph 66).

27 So far as concerns the national measure at issue in the main proceedings, as set out in Article 111(1) and (2) of the 2004 Law on VAT, it is common ground that this seeks, by requiring taxable persons to use cash registers in order to retain accounting records of turnover and the amount of tax due, to ensure that the tax is levied accurately and to prevent tax evasion. It cannot be disputed that the obligation thus imposed on taxable persons is among the measures which Member States may adopt on the basis of Article 22(8) of the Sixth VAT Directive.

28 In that context, by providing that, in cases where that accounting obligation is not complied with, the proportion of the VAT which the taxable person may deduct is reduced by 30%, that measure must be regarded as constituting an administrative sanction, the deterrent effect of which is intended to ensure compliance with that obligation.

29 It is necessary to point out in this connection that, in the absence of harmonisation of European Union legislation in the field of sanctions applicable where conditions laid down by arrangements under that legislation are not complied with, Member States are empowered to choose the sanctions which seem to them to be appropriate. They must, however, exercise that power in accordance with European Union law and its general principles, and consequently in accordance with the principle of proportionality (Case C-262/99 *Louloudakis* [2001] ECR I?5547, paragraph 67).

30 As regards the specific application of that principle of proportionality, it is for the national court to determine whether the national measures are compatible with European Union law, the competence of the Court of Justice being limited to providing the national court with all the criteria for the interpretation of European Union law which may enable it to make such a determination as to compatibility (see, inter alia, Case C?55/94 *Gebhard* [1995] ECR I?4165 and *Molenheide and Others*, paragraph 49).

31 It must therefore be stated, first, that the provisions of the 2004 Law on VAT do not bring into question the actual principle of the right to deduct, to which every taxable person continues to be entitled. That right is not lost even though the taxable person concerned has failed to comply with the obligation set out in those provisions.

32 Secondly, the administrative sanction attached to that obligation is in the nature of a financial burden which the national legislature seeks to impose on the taxable person in breach of those provisions, and solely for the duration of that infringement. Such a choice, which comes within the competence of the Member State concerned, does not appear to be manifestly inappropriate in relation to the objective which it seeks to attain.

33 Thirdly, the choice made to apply that financial burden by withholding a portion of the tax which may be deducted from the VAT payable and not, inter alia, by means of payment by the taxable person of a sum to the public purse, also comes within the competence of the Member State concerned.

34 However, in so far as they affect the extent of the right to deduct, those rules are liable to undermine the principle that the tax burden must be neutral in relation to all economic activities if, inter alia, the procedure for determining the amount of the sanction and the conditions under which the facts relied on by the tax authorities in order to apply that sanction are recorded, investigated and, as the case may be, adjudicated upon effectively render meaningless the right to deduct VAT.

35 Although it is for the referring court to check that that procedure and those conditions, as they follow from the 2004 Law on VAT, do not lead to such a consequence, it must be observed in this connection that the rate of the amount withheld in the main proceedings, which is limited to 30% and thus preserves the greater part of the input tax paid, appears neither excessive nor inadequate for the purpose of ensuring that the sanction in question is deterrent and, therefore, effective.

36 Moreover, such a reduction on the basis of the amount of tax paid by the taxable person is not manifestly without any link to the level of the economic activity of the person concerned.

37 Furthermore, in so far as the purpose of that sanction is not to correct accounting errors but to prevent them, its flat-rate nature, resulting from the application of the fixed rate of 30%, and, consequently, the lack of any correspondence between the amount of that sanction and the extent of any errors which may have been made by the taxable person cannot be taken into account in the assessment of whether that sanction is proportionate. Moreover, it is precisely the absence of cash registers which prevents the amount of sales made from being accurately established and therefore precludes any assessment as to whether the sanction is commensurate with the amount of any accounting errors.

38 In addition, in the event, as described by the Commission, that the failure to use cash registers resulted from circumstances outside the taxpayer’s control, it would be for the national court, were such circumstances to be duly established in accordance with the national rules governing procedure and evidence, to take this into account in order to establish, in the light of all

the factors in the case, whether the fiscal sanction must nevertheless be applied and, if so, to ascertain that it is not disproportionate.

39 It follows from the foregoing that the answer to the first question is that the common system of VAT, as defined in Article 2(1) and (2) of the First VAT Directive and in Articles 2, 10(1) and (2) and 17(1) and (2) of the Sixth VAT Directive, does not preclude a Member State from imposing a temporary restriction on the extent of the right of taxable persons who have not complied with a formal requirement to keep accounting records of their sales to deduct input tax paid, on condition that the sanction thus provided for complies with the principle of proportionality.

The second question

40 By its second question, the referring court asks, essentially, whether the provisions of Article 111(1) and (2) of the 2004 Law on VAT may be regarded as 'special measures for derogation' intended to prevent certain types of tax evasion or avoidance, within the meaning of Article 27(1) of the Sixth VAT Directive.

41 Suffice it, in that regard, to note that the measure at issue in the main proceedings, as set out in Article 111(1) and (2) of the 2004 Law on VAT, is an administrative sanction imposed where it is found that the taxable person has not complied with the obligation to keep accounting records of turnover and the amount of tax due through the use of a cash register. Such a measure, which is of the type envisaged in Article 22(8) of the Sixth VAT Directive, cannot therefore constitute a special measure for derogation within the meaning of Article 27(1) of that directive (see, to that effect, Joined Cases 123/87 and 330/87 *Jeunehomme and EGI* [1988] ECR 4517, paragraph 15, and Case C?502/07 *K-1* [2009] ECR I-161, paragraph 23).

42 Accordingly, provisions such as those of Article 111(1) and (2) of the 2004 Law on VAT cannot come within the scope of Article 27(1) of the Sixth VAT Directive.

43 The answer to the second question is therefore that provisions such as those of Article 111(1) and (2) of the 2004 Law on VAT are not 'special measures for derogation' intended to prevent certain types of tax evasion or avoidance within the meaning of Article 27(1) of the Sixth VAT Directive.

The third question

44 By its third question, the referring court asks, essentially, whether Article 33 of the Sixth VAT Directive precludes the maintenance of provisions such as those of Article 111(1) and (2) of the 2004 Law on VAT.

45 Article 33 of the Sixth VAT Directive permits a Member State to maintain or introduce duties or charges on the supply of goods, the provision of services or imports only if they cannot be characterised as turnover taxes (see Case C-475/03 *Banca popolare di Cremona* [2006] ECR I-9373, paragraph 24, and *K-1*, paragraph 27).

46 In order to decide whether a tax, duty or charge can be characterised as a turnover tax within the meaning of Article 33 of the Sixth VAT Directive, it is necessary, in particular, to determine whether it has the effect of jeopardising the functioning of the common system of VAT by being levied on the movement of goods and services and on commercial transactions in a manner comparable to VAT (Joined Cases C?283/06 and C?312/06 *KÖGÁZ and Others* [2007] ECR I?8463, paragraph 34).

47 It is settled case-law that VAT has four essential characteristics: VAT applies generally to

transactions relating to goods or services; it is proportional to the price charged by the taxable person in return for the goods and services which he has supplied; that tax is charged at each stage of the production and distribution process, including that of retail sale, irrespective of the number of transactions which have previously taken place; and the amounts paid during the preceding stages of the production and distribution process are deducted from the VAT payable by a taxable person, with the result that that tax applies, at any given stage, only to the value added at that stage and the final burden of that tax rests ultimately on the consumer (*Banca popolare di Cremona*, paragraph 28; *KÖGÁZ and Others*, paragraph 37; and *K-1*, paragraph 17).

48 The measure provided for by the provisions of the 2004 Law on VAT at issue in the main proceedings does not correspond to those characteristics. As is apparent from the assessment made in paragraph 28 of the present judgment, those provisions merely provide for an administrative sanction which may be imposed on persons liable to VAT where it is found that they have not complied with one of their accounting obligations. That sanction, which is triggered, not by any transaction, but by the failure to comply with an accounting obligation, therefore cannot be characterised as a turnover tax within the meaning of Article 33 of the Sixth Directive.

49 Accordingly, the answer to the third question is that Article 33 of the Sixth VAT Directive does not preclude the maintenance of provisions such as those of Article 111(1) and (2) of the 2004 Law on VAT.

Costs

50 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 (Fourth Chamber) hereby rules:

1. **The common system of value added tax, as defined in Article 2(1) and (2) of First Council Directive 67/227/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes and in Articles 2, 10(1) and (2) and 17(1) and (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, as amended by Council Directive 2004/7/EC of 20 January 2004, does not preclude a Member State from imposing a temporary restriction on the extent of the right of taxable persons who have not complied with a formal requirement to keep accounting records of their sales to deduct input tax paid, on condition that the sanction thus provided for complies with the principle of proportionality.**

2. **Provisions such as those of Article 111(1) and (2) of the Law on the Tax on Goods and Services (ustawa o podatku od towarów i us?ug) of 11 March 2004 are not ‘special measures for derogation’ intended to prevent certain types of tax evasion or avoidance within the meaning of Article 27(1) of Sixth Directive 77/388, as amended by Directive 2004/7.**

3. **Article 33 of Sixth Directive 77/388, as amended by Directive 2004/7, does not preclude the maintenance of provisions such as those of Article 111(1) and (2) of the Law on the Tax on Goods and Services of 11 March 2004.**

[Signatures]

* Language of the case: Polish.