Case C-392/09

Uszodaépít? kft

v

APEH Központi Hivatal Hatósági F?osztály

(Reference for a preliminary ruling from the Baranya Megyei Bíróság)

(Sixth VAT Directive – Directive 2006/112/EC – Right to deduct input tax – New national legislation – Requirements as to the content of an invoice – Retroactive application – Loss of the right to deduct)

Summary of the Judgment

Tax provisions – Harmonisation of laws – Turnover taxes – Common system of value added tax – Deduction of input tax – Reverse charge procedure – Taxable person liable for value added tax as the person to whom goods or services provided – Right to deduct

(Council Directive 2006/112, Arts 167, 168 and 178)

Articles 167, 168 and 178 of Directive 2006/112, on the common system of value added tax, must be interpreted as precluding the retroactive application of national legislation which, in the context of a reverse charge regime, makes the deduction of value added tax relating to construction works conditional upon the amendment of invoices for those services and the submission of a supplementary, amending tax declaration, while the tax authority concerned has all the information necessary to establish that the taxable person is, as the recipient of the supply of services at issue, liable to value added tax, and to ascertain the amount of tax deductible.

The fact that a taxpayer opts to apply a new value added tax law rather than a previous one cannot of itself affect its right to deduct the input value added tax paid, which arises directly from Articles 167 and 168 of Directive 2006/112. The principle of fiscal neutrality also requires deduction of input tax to be allowed if the substantive requirements are satisfied, even if the taxable person has failed to comply with some of the formal requirements. Therefore, when the tax authority has the information necessary to establish that the taxable person is, as the recipient of the supply of services at issue, liable to value added tax, Articles 167, 168 and 178(f) of Directive 2006/112 preclude legislation which imposes, in relation to the right of that taxable person to deduct that tax, additional conditions which may have the effect of rendering that right ineffective for practical purposes. This could be the case when the substantive conditions in order to benefit from the right to deduct, laid down in Article 168(a) of Directive 2006/112, have been fulfilled and, at the time the tax authority denies the taxpayer the right to deduct the value added tax, that authority has all the information necessary to establish that the taxpayer is liable to value added tax.

(see paras 36, 39-40, 42-43, 46, operative part)

JUDGMENT OF THE COURT (Third Chamber)

30 September 2010 (*)

(Sixth VAT Directive – Directive 2006/112/EC – Right to deduct input tax – New national legislation – Requirements as to the content of an invoice – Retroactive application – Loss of the right to deduct)

In Case C?392/09,

REFERENCE for a preliminary ruling under Article 234 EC, by the Baranya Megyei Bíróság (Hungary), made by decision of 2 April 2009, received at the Court on 5 October 2009, in the proceedings

Uszodaépít? kft

v

APEH Központi Hivatal Hatósági F?osztály,

THE COURT (Third Chamber),

composed of K. Lenaerts (Rapporteur), President of the Chamber, R. Silva de Lapuerta, E. Juhász, J. Malenovský and D. Šváby, Judges,

Advocate General: N. Jääskinen,

Registrar: R. Grass,

after considering the observations submitted on behalf of:

– the Hungarian Government, by J. Fazekas, M. Fehér and Z. Tóth, acting as Agents,

– the European Commission, by B.D. Simon, acting as Agent,

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 Articles 17 and 20 of the 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), as amended by Council Directive 2001/115/EC of 20

December 2001 (OJ 2002 L 15, p. 24, ‘the Sixth Directive’) and the interpretation of the general principles of European Union law.

2 The reference has been made in proceedings between Uszodaépít? kft and APEH Központi Hivatal Hatósági F?osztály (central office of the administrative department of the tax and finance inspection office, ‘the APEH’) in relation to the latter’s denial of the right of the applicant in the main proceedings to deduct, from the value added tax (‘VAT’) which it was liable to pay, the VAT relating to the supply of construction work which had been made to it.

Legal context

European Union legislation

3 Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1) repealed and replaced from 1 January 2007, pursuant to Articles 411 and 413 thereof, European Union law on VAT, in particular the Sixth Directive. According to the first and third recitals in the preamble to Directive 2006/112, the recasting of the Sixth Directive was necessary to ensure that the provisions on the harmonisation of the laws of the Member States relating to VAT are presented in a clear and rational manner in a revised structure and wording while, in principle, not making material changes. The provisions of Directive 2006/112 are therefore identical, essentially, to the corresponding provisions of the Sixth Directive.

4 Under Article 167 of Directive 2006/112, which repeats the wording of Article 17(1) of the Sixth Directive, ‘[a] right of deduction shall arise at the time when the deductible tax becomes chargeable’.

5 Article 168(a) of Directive 2006/112, the wording of which is essentially identical to that of Article 17(2)(a) of the Sixth Directive, in the version given in Article 28f(1) of that directive, provides:

‘In so far as the goods and services are used for the purposes of the taxed transactions of a taxable person, the taxable person shall be entitled, in the Member State in which he carries out these transactions, to deduct the following from the VAT which he is liable to pay:

(a) the VAT due or paid in that Member State in respect of supplies to him of goods or services, carried out or to be carried out by another taxable person’.

6 Article 178 of Directive 2006/112, which essentially repeats the wording of Article 18(1) of the Sixth Directive, in the version given in Article 28f(2) of that directive, contains the following provisions:

‘In order to exercise the right of deduction, a taxable person must meet the following conditions:

…

(f) when required to pay VAT as a customer where Articles 194 to 197 or Article 199 apply, he must comply with the formalities as laid down by each Member State.’

7 Article 199(1)(a) of Directive 2006/112 provides:

‘1. Member States may provide that the person liable for payment of VAT is the taxable person to whom any of the following supplies are made:

(a) the supply of construction work …’.

8 A regime such as that arising from Article 199(1)(a) of Directive 2006/112 is known as the ‘reverse charge procedure’ and was previously provided for under Article 21(1) of the Sixth Directive.

National legislation

9 Paragraph 127(1)(a) of Law CXXVII of 2007 on value added tax (Általános forgalmi adóról szóló 2007. évi CXXVII törvény, ‘the new VAT Law’), which came into force on 1 January 2008, provides that ‘[a]n objective condition for the exercise of the right to deduct is that the taxable person personally have … an invoice issued in his name which attests to the performance of the transaction’.

10 Paragraph 142(1)(b) of the new VAT Law provides:

‘1. The tax shall be paid by the acquirer of the goods or the recipient of the services:

…

(b) in the event of construction … work …’.

11 Paragraph 142(7) of the new VAT Law states that ‘[w]here subparagraph 1 applies, the transferor of the goods or supplier of the service shall undertake to issue an invoice in which the tax charged and the rate … do not appear’.

12 Paragraph 169(k) of the new VAT Law provides:

‘The invoice must contain the following details:

(k) … where the acquirer of the goods or the recipient of the service is liable for the tax, a reference to a legal rule or some other unequivocal indication that the sale of the goods or provision of the service

…

(k)(b)is liable to tax in the hands of the acquirer of the goods or the recipient of the service’.

13 Paragraph 269(1) of the new VAT Law further provides:

‘In the event that both the present law and Law LXXIV of 1992 on value added tax [‘the previous VAT Law’] govern, for the person or persons concerned, the rights and obligations which are to be exercised with regard to self-assessment and which arise as a result of a taxable transaction constituted by the same events, the determination and application of such rights and obligations shall continue to be governed, once the present law has entered into force, exclusively by the provisions of the [previous] VAT Law, unless the present law removes obligations with regard to all the persons concerned taken together, or imposes less onerous obligations or establishes new rights or improvements compared with the [previous] VAT Law. In such a case, the rights and obligations may be determined and applied – on the basis of a joint decision by all those concerned – having regard to the provisions of this law, even where such rights and obligations arose prior to the entry into force of the present law, within the limitation period, provided that the persons concerned have previously notified their joint decision to that effect in writing to the State tax authority by means of a joint application which must be received by the competent office of that

authority by 15 February 2008 at the latest. That time-limit is mandatory and may not be extended. If the application is submitted late, a supplementary declaration may be made free of surcharge.'

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

14 On 9 June 2006, the applicant in the main proceedings concluded a contract for works with NÁS MPS-4 kft, the developer, relating to construction work. The applicant in the main proceedings carried out the works with the participation of various subcontractors.

15 The work began in the spring of 2007 but came to a halt in the summer of 2007 because of financial problems. The invoices relating to the work completed at that point were issued. Both the applicant in the main proceedings and its subcontractors complied with their obligations as regards the declaration and payment of VAT under the previous VAT law.

16 On 14 February 2008, following the entry into force of the new VAT law, the applicant in the main proceedings, the developer and the subcontractors, by a joint decision and in accordance with Paragraph 269(1) of that law, requested that the provisions of the new VAT Law be applied to the work carried out under both the contract between the applicant in the main proceedings and the developer and the contract entered into between the applicant and its subcontractors ('the declaration of 14 February 2008').

17 Following an examination by the tax authority of the VAT declaration made by the applicant in the main proceedings for the financial year 2007, by decision of 23 May 2008 the authority made a determination of a VAT debt of HUF 52 822 000 in respect of the period from April to September 2007 for which the applicant in the main proceedings was liable. In that connection, the tax authority reasoned that the invoices issued by the subcontractors did not provide a basis for the applicant's right to deduct, since those invoices did not comply with the provisions of the new VAT Law. Following the declaration of 14 February 2008, the new VAT law's provisions relating to the reverse charge procedure were applicable retroactively to the invoices issued during the financial year 2007. The authority submits that the invoices issued by the subcontractors ought to have complied with the provisions of Paragraphs 142(7) and 169(k) of the new law. Consequently, in order for the applicant in the main proceedings to be able to exercise its right to deduct in accordance with the provisions of the new VAT Law, the subcontractors should have amended the invoices issued and the applicant should have amended its VAT declaration for the financial year 2007 by means of a supplementary declaration.

18 By a decision of 5 September 2008, the APEH upheld the decision of 23 May 2008.

19 The applicant in the main proceedings brought an action before the Baranya Megyei Bíróság (Baranya regional court) for the annulment of the APEH's decision of 5 September 2008. The Baranya Megyei Bíróság considers that, by cancelling retroactively the right to deduct lawfully exercised by the applicant in the main proceedings in accordance with the previous VAT law, Paragraph 269(1) of the new VAT law infringes Articles 17 and 20 of the Sixth Directive and various general principles of European Union law.

20 In those circumstances the Baranya Megyei Bíróság decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Is a provision of a law of a Member State, which entered into force on 1 January 2008, after the right to deduct had arisen, and which, for the purposes of the deduction of VAT paid and declared in relation to supplies of goods or services made in the 2007 financial year, requires the amendment of the content of invoices and the submission of a supplementary declaration, compatible with Articles 17 and 20 of the Sixth Directive?

(2) Is the measure laid down by Paragraph 269(1) of the new VAT Law, according to which, if the conditions set out in that paragraph are met, rights and obligations must be determined and applied in accordance with the provisions of that Law, even where they arose before the entry into force thereof, subject to limitation, compatible with the general principles of [European Union] law, and, in particular, is it objectively justifiable, reasonable, proportionate and consistent with the principle of legal certainty?’

Consideration of the questions referred

Admissibility

21 The Hungarian Government submits that the main proceedings do not require an interpretation of the provisions and legal principles referred to in the order for reference. In that connection, it points out, first, that the retroactive application of the provisions of the new VAT law is based exclusively on an explicit and voluntary expression of the will of the applicant in the main proceedings and the other taxpayers concerned. Since the applicant in the main proceedings specifically requested the retroactive application of that law, it must comply with the legal consequences flowing therefrom. Second, the main proceedings arise from the misinterpretation by the applicant in the main proceedings of the transitional provisions of the new VAT law. The proceedings raise a question of the interpretation of national law not European Union law.

22 In that regard, it should be borne in mind that, in accordance with settled case-law, in the context of the cooperation between the Court of Justice of the European Union and the national courts provided for by Article 267 TFEU, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where questions submitted by national courts concern the interpretation of a provision of European Union law, the Court of Justice is bound, in principle, to give a ruling (see, inter alia, Case C?379/98 *PreussenElektra* [2001] ECR I?2099, paragraph 38; Case C?103/08 *Gottwald* [2009] ECR I?9117, paragraph 16; and Case C?82/09 *Dimos Agiou Nikolaou* [2010] ECR I?0000, paragraph 14).

23 It follows that the presumption that questions referred by national courts for a preliminary ruling are relevant may be rebutted only in exceptional cases, where it is quite obvious that the interpretation which is sought of the provisions of European Union law referred to in the questions bears no relation to the actual facts of the main action or to its purpose (see, inter alia, *Gottwald*, paragraph 17 and case-law cited).

24 In the present case, notwithstanding the fact that the applicant in the main proceedings opted to apply the new VAT law, and even if the choice made by it is based on a misinterpretation of the law in question, it is nevertheless the case that the provisions of that new law are applicable to the main proceedings and that the national court is uncertain as to whether the transitional measures of that law are compatible with various provisions of European Union law, since those measures prevent the applicant from exercising its right to deduct VAT.

25 Clearly, therefore, it is not obvious that the interpretation of European Union law sought is irrelevant in light of the decision which the national court is called upon to give.

26 Consequently, the reference for a preliminary ruling must be declared admissible.

The first question

27 As regards, first, the subject-matter of the first question, it should be stated that the national court's reference concerns the interpretation of Articles 17 and 20 of the Sixth Directive.

28 However, in accordance with Articles 411 and 413 of Directive 2006/112, that directive repealed and replaced the Sixth Directive from 1 January 2007.

29 Thus, since the relevant facts in the main proceedings post-date 1 January 2007, only the interpretation of the provisions of Directive 2006/112 is relevant to the present case.

30 The fact that the national court has, formally speaking, worded the questions referred for a preliminary ruling with reference solely to provisions of the Sixth Directive does not preclude the Court from providing to the national court all the elements of interpretation which may be of assistance in adjudicating on the case pending before it, whether or not that court has referred to them in the wording of its questions (see, to that effect, Case C?115/08 *?EZ* [2009] ECR I?10265, paragraph 81, and Case C?341/08 *Petersen* [2010] ECR I?0000, paragraph 48).

31 In that regard, it must be observed that, as is clear from the third recital of Directive 2006/112, that directive is a recasting of the existing legislation on the harmonisation of the laws of the Member States relating to VAT, and in particular the Sixth Directive, and does not in principle involve any material changes to that legislation.

32 In those circumstances, it must be held that the first question referred concerns the interpretation of Articles 167 and 168 of Directive 2006/112, which correspond to the provisions of the Sixth Directive mentioned in the order for reference. In addition, since the first question concerns, in essence, the procedure for exercising the right to deduct VAT, it must be held that it also concerns the interpretation of Article 178 of Directive 2006/112.

33 Second, as regards the substance, the national court asks, in essence, whether Articles 167, 168 and 178 of Directive 2006/112 preclude national legislation, such as that at issue in the main proceedings, which, in the context of the retroactive application of new provisions relating to the reverse charge procedure, makes the deduction of VAT conditional upon the amendment of invoices for the services provided before the new law entered into force and the submission of a supplementary tax declaration.

34 In that regard, it must be recalled, first, that the right to deduct provided for in Articles 167 and 168 of Directive 2006/112 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 transactions relating to inputs (Case C?368/09 *Pannon Gép Centrum* [2010] ECR I?0000, paragraph 37 and case-law cited).

35 The deduction system is meant to relieve the taxpayer 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 complete neutrality of taxation of all economic activities provided that they are themselves subject in principle to VAT (Case C?408/98 *Abbey National* [2001] ECR I-1361, paragraph 24; Case C?25/03 *HE* [2005] ECR I?3123, paragraph 70; and Joined Cases C?439/04 and C-440/04 *Kittel and Recolta Recycling* [2006] ECR I?6161, paragraph 48).

36 The fact that the taxpayer opted to apply the new VAT law rather than the previous one cannot therefore of itself affect its right to deduct the input VAT paid, which arises directly from Articles 167 and 168 of Directive 2006/112.

37 As regards, second, the procedures for exercising the right to deduct VAT, such as those referred to in Article 178 of Directive 2006/112, since a reverse charge procedure under Article 199(1)(a) of that directive is at issue, only the procedure referred to in Article 178(f) is applicable. Therefore, a taxable person who is liable as the recipient of services for the VAT relating thereto is not obliged to hold an invoice drawn up in accordance with the formal requirements of Directive 2006/112 in order to be able to exercise his right to deduct, and only has to fulfil the formalities laid down by the Member State concerned in the exercise of the option conferred by Article 178(f) of that directive (see, to that effect, Case C?90/02 *Bockemühl* [2004] ECR I-3303, paragraph 47).

38 It is apparent from the case-law that the formalities thus laid down by the Member State concerned, which must be complied with by a taxable person in order to be able to exercise the right to deduct VAT, should not exceed what is strictly necessary for the purposes of verifying the correct application of the reverse charge procedure (see, to that effect, *Bockemühl*, paragraph 50).

39 In that regard, it has already been held that the principle of fiscal neutrality requires deduction of input tax to be allowed if the substantive requirements are satisfied, even if the taxable person has failed to comply with some of the formal requirements (Joined Cases C?95/07 and C-96/07 *Ecotrade* [2008] ECR I-3457, paragraph 63).

40 Therefore, where the tax authority has the information necessary to establish that the taxable person is, as the recipient of the supply of services at issue, liable to VAT, Articles 167, 168 and 178(f) of Directive 2006/112 preclude legislation which imposes, in relation to the right of that taxable person to deduct that tax, additional conditions which may have the effect of rendering that right ineffective for practical purposes (see, to that effect, *Bockemühl*, paragraph 51 and *Ecotrade*, paragraph 64).

41 In the context of the main proceedings, the tax authority denied the applicant the right to deduct the VAT relating to the construction work carried out during 2007 by its subcontractors, on the ground that, first, the applicant did not hold invoices for the services amended in accordance with the provisions of Paragraphs 142(7) and 169(k) of the new VAT Law, which were applicable retroactively from 1 January 2008, and that, second, it had failed to amend its tax declaration for 2007 on the basis of the invoices thus amended.

42 First, it is apparent from the file that the substantive conditions in order to benefit from the right to deduct VAT, laid down in Article 168(a) of Directive 2006/112, have been fulfilled so that the applicant in the main proceedings is entitled to deduct the VAT relating to the construction work carried out by its subcontractors. It should be noted that those services were used for the purposes of the taxable person’s taxable transactions in the Member State concerned. In addition, on the basis of the tax declaration for 2007, the tax authority in question was informed that the substantive conditions had been fulfilled.

43 Second, it is not disputed that, at the time the tax authority denied the applicant in the main proceedings the right to deduct the VAT, that authority had, on the basis of the tax declaration for the financial year 2007 and the declaration of 14 February 2008, all the information necessary to establish that the applicant in the main proceedings was, as the recipient of the construction work carried out by its subcontractors, liable to VAT.

44 As the European Commission points out, the imposition of formal requirements such as those at issue in the main proceedings could have the effect of rendering the applicant's right to deduct ineffective.

45 Having regard to the case-law referred to at paragraphs 39 and 40 above, it must therefore be held that Articles 167, 168 and 178 of Directive 2006/112 preclude the imposition of formal requirements such as those at issue in the main proceedings.

46 In those circumstances, Articles 167, 168 and 178 of Directive 2006/112 must be interpreted as precluding the retroactive application of national legislation which, in the context of a reverse charge regime, makes the deduction of VAT relating to construction works conditional upon the amendment of invoices for those services and the submission of a supplementary, amending tax declaration, while the tax authority concerned has all the information necessary to establish that the taxable person is, as the recipient of the supply of services at issue, liable to VAT, and to ascertain the amount of tax deductible.

The second question

47 In view of the answer to the first question, there is no need to answer the second question.

Costs

48 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 (Third Chamber) hereby rules:

Articles 167, 168 and 178 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as precluding the retroactive application of national legislation which, in the context of a reverse charge regime, makes the deduction of value added tax relating to construction works conditional upon the amendment of invoices for those services and the submission of a supplementary, amending tax declaration, while the tax authority concerned has all the information necessary to establish that the taxable person is, as the recipient of the supply of services at issue, liable to value added tax, and to ascertain the amount of tax deductible.

[Signatures]

* Language of the case: Hungarian.