

Case C-588/10

Minister Finansów

v

Kraft Foods Polska SA

(Reference for a preliminary ruling from the Naczelny Sąd Administracyjny)

(Taxation — VAT — Directive 2006/112/EC — Article 90(1) — Price reduced after the supply has taken place — National legislation which makes the reduction of the taxable amount contingent on the supplier of the goods or services possessing acknowledgment of receipt of a correcting invoice by the purchaser of the goods or services — Principle of VAT neutrality — Principle of proportionality)

Summary of the Judgment

1. *Tax provisions — Harmonisation of laws — Turnover taxes — Common system of value added tax — Taxable amount — Reduced in the case of cancellation, refusal, non-payment or reduction of the price*

(Council Directive 2006/112, Art. 90(1))

2. *Tax provisions — Harmonisation of laws — Turnover taxes — Common system of value added tax — Taxable amount — Reduced in the case of cancellation, refusal, non-payment or reduction of the price — National legislation which makes such a reduction contingent on the supplier of the goods or services possessing acknowledgment of receipt of a correcting invoice by the purchaser — Breach of the principles of fiscal neutrality and proportionality*

(Council Directive 2006/112, Arts 90(1) and 273)

1. The requirement that, in order to be entitled to reduce the taxable amount as set out in the initial invoice, the taxable person must be in possession of acknowledgment of receipt of a correcting invoice by the purchaser of the goods or services constitutes a condition for the purpose Article 90(1) of Directive 2006/112 on the common system of value added tax.

(see para. 42, operative part)

2. The principles of the neutrality of value added tax and proportionality do not, in principle, preclude the requirement that, in order to be entitled to reduce the taxable amount as set out in the initial invoice, the taxable person must be in possession of acknowledgment of receipt of a correcting invoice by the purchaser of the goods or services. However, where it is impossible or excessively difficult for the taxable person who is a supplier of goods or services to obtain such acknowledgment of receipt within a reasonable period of time, he cannot be denied the opportunity of establishing, by other means, before the national tax authorities, first, that he has taken all the steps necessary in the circumstances of the case to satisfy himself that the purchaser of the goods or services is in possession of the correcting invoice and is aware of it and, second, that the transaction in question was in fact carried out in accordance with the conditions set out in the correcting invoice.

Copies of the correcting invoice and the reminder addressed to the purchaser of the goods or services to send acknowledgment of receipt and proof of payment or the production of entries from the accounts which make it possible to identify the amount actually paid to the taxable person in connection with the transaction in question by the purchaser of the goods or services may serve that purpose.

(see paras 41, 42, operative part)

JUDGMENT OF THE COURT (Second Chamber)

26 January 2012 (*)

(Taxation — VAT — Directive 2006/112/EC — Article 90(1) — Price reduced after the supply has taken place — National legislation which makes the reduction of the taxable amount contingent on the supplier of the goods or services possessing acknowledgment of receipt of a correcting invoice by the purchaser of the goods or services — Principle of VAT neutrality — Principle of proportionality)

In Case C-588/10,

REFERENCE for a preliminary ruling under article 267 TFEU from the Naczelny Sąd Administracyjny (Poland), made by decision of 16 September 2010, received at the Court on 14 December 2010, in the proceedings

Minister Finansów

v

Kraft Foods Polska SA,

THE COURT (Second Chamber),

composed of J.N. Cunha Rodrigues, President of the Chamber, U. Lõhmus, A. Rosas, A. Ó Caoimh and A. Arabadjiev (Rapporteur), Judges,

Advocate General: J. Kokott,

Registrar: K. Sztranc-Szawiczek,

having regard to the written procedure and further to the hearing on 15 November 2011,

after considering the observations submitted on behalf of:

- the Minister Finansów, by J. Kwaśnicki, legal adviser,
- Kraft Food Polska SA, by P. Żurowski, tax advisor, and A. Smolińska-Winiuch, adwokat,

- the Polish Government, by A. Kraińska, A. Kramarczyk and M. Szpunar, acting as Agents,
- the Portuguese Government, by L. Inez Fernandes, acting as Agent,
- the European Commission, by K. Herrmann and L. Lozano Palacios, 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 Article 90(1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1) ('the VAT Directive') and the principles of the neutrality of value added tax ('VAT') and proportionality.

2 The reference was made in proceedings between the Minister Finansów (Polish Finance Minister) and Kraft Foods Polska SA ('KFP') concerning an individual opinion addressed to KFP to the effect that, under national law, the reduction of the taxable amount and the amount of VAT due on the basis of a correcting invoice issued to the other party to the contract was unlawful if, on the date on which the VAT declaration was submitted, KFP was not in possession of acknowledgment of receipt of the correcting invoice by the other party to the contract.

Legal context

European Union legislation

3 Article 1(2) of the VAT Directive provides that 'the principle of the common system of VAT entails the application to goods and services of a general tax on consumption exactly proportional to the price of the goods and services, however many transactions take place in the production and distribution process before the stage at which the tax is charged'.

4 Article 73 of the VAT Directive provides that '[i]n respect of the supply of goods or services, other than as referred to in Articles 74 to 77, the taxable amount shall include everything which constitutes consideration obtained or to be obtained by the supplier, in return for the supply, from the customer or a third party, including subsidies directly linked to the price of the supply'.

5 Article 79 of the VAT Directive is worded as follows:

'The taxable amount shall not include the following factors:

- (a) price reductions by way of discount for early payment;
- (b) price discounts and rebates granted to the customer and obtained by him at the time of the supply;
- (c) amounts received by a taxable person from the customer, as repayment of expenditure incurred in the name and on behalf of the customer, and entered in his books in a suspense account.

The taxable person must furnish proof of the actual amount of the expenditure referred to in point (c) of the first paragraph and may not deduct any VAT which may have been charged.'

6 Article 90(1) of the VAT Directive provides that '[i]n the case of cancellation, refusal or total or partial non-payment, or where the price is reduced after the supply takes place, the taxable amount shall be reduced accordingly under conditions which shall be determined by the Member States'.

7 Article 273 of the VAT Directive provides as follows:

'Member States may impose other obligations which they deem necessary to ensure the correct collection of VAT and to prevent evasion, subject to the requirement of equal treatment as between domestic transactions and transactions carried out between Member States by taxable persons and provided that such obligations do not, in trade between Member States, give rise to formalities connected with the crossing of frontiers.

The option under the first paragraph may not be relied upon in order to impose additional invoicing obligations over and above those laid down in Chapter 3'.

8 Article 183 of the VAT Directive is worded as follows:

'Where, for a given tax period, the amount of deductions exceeds the amount of VAT due, the Member States may, in accordance with conditions which they shall determine, either make a refund or carry the excess forward to the following period.

However, Member States may refuse to refund or carry forward if the amount of the excess is insignificant.'

National legislation

9 Article 29(4a) to (4c) of the Law on the tax on goods and services of 11 March 2004 (ustawa z dnia 11 marca 2004 r. o podatku od towarów i usług) (Dz. U. No 54, item 535, 'the Law on VAT') provides as follows:

4a. In the cases provided for, the taxable person may reduce the taxable amount in relation to the amount set out in the invoice on condition that, before the expiry of the time limit for submitting the VAT declaration for the tax period in which the purchaser of the goods or services received the correcting invoice, he is in possession of acknowledgement of receipt of that invoice by the purchaser. Where the purchaser of the goods or services receives the invoice after the expiry of the time limit for submitting the tax declaration for a given tax period, the taxable person shall be entitled to take account of the correcting invoice for the tax period in which he obtained acknowledgement of receipt by the purchaser.

4b. The condition that the taxable person must obtain acknowledgement of receipt of the invoice by the purchaser of the goods or services shall not apply:

(1) in the case of the export of goods, intra-Community supply of goods or the supply of goods in respect of which the place of taxation is outside the territory of the country;

(2) in relation to purchasers to whom electrical and thermal energy, mains gas, telecommunication and radio-communication services or services referred to at points 138 and 153 of Annex No 3 to this law are sold.

4c. Paragraph 4a shall apply *mutatis mutandis* where an error is found in the amount of tax set out in the invoice and an invoice is issued correcting the invoice showing an amount of tax greater than that due.'

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

10 KFP produces and distributes foodstuffs. In the course of sales of its goods to a wide range of contractors, it issues a significant number of invoices and correcting invoices, the latter being issued, *inter alia*, where discounts are given, goods returned or errors identified.

11 KFP often receives acknowledgments of receipt of correcting invoices from its purchasers with significant delay or does not even receive them at all. In order to obtain such acknowledgments of receipt, it is often necessary to send reminders and engage in correspondence, giving rise to the need to monitor the receipt of the acknowledgments.

12 Taking the view that it was entitled to reduce the taxable amount and the amount of VAT payable on the basis of the correcting invoice taken into account in the VAT declaration for the period in which that invoice was issued, even where, on that date on which the declaration was submitted, it had not received acknowledgment of receipt of the correcting invoice, KFP submitted a request to the Minister Finansów seeking confirmation of its interpretation of Article 29 of the Law on VAT.

13 In an individual opinion of 10 April 2009, the Minister Finansów stated that it can be seen from the literal wording of Article 29(4a) of the Law on VAT that, in order for the seller to be able to reduce the amount of VAT payable, it is necessary for it to be in possession of acknowledgment of receipt of the correcting invoice by the purchaser and any practical difficulties KFP might experience in obtaining such acknowledgment of receipt were irrelevant.

14 Following an unsuccessful administrative action, KFP brought proceedings before the Wojewódzki Sąd Administracyjny w Warszawie (Administrative Court, Warsaw) alleging infringement of: (i) Article 29(4a) and (4c) of the Law on VAT, in conjunction with Articles 73 and 79 of the VAT Directive, as a result of failure to observe the principle of VAT neutrality; (ii) the principle of proportionality; (iii) the principle of the primacy of European Union law; and (iv) rules of procedure, by reason, *inter alia*, of the refusal to apply the case-law of the Court of Justice.

15 On the one hand, the Wojewódzki Sąd Administracyjny w Warszawie considered that Article 29(4a) of the Law on VAT requires the taxable person intending to reduce the taxable amount to obtain proof of issue of the correcting invoice to the purchaser of the goods or services in question.

16 On the other hand, that court took the view that Article 29(4a) of the Law on VAT is inconsistent with European Union law, since Articles 73 to 92 of the VAT Directive do not lay down any requirement to be in possession of acknowledgment of receipt of a correcting invoice and that the introduction of such a requirement by the national legislature is contrary to the principles of VAT neutrality and proportionality. The effect of that provision of national law is that the actual reduced taxable amount is not taken into account and it lays down formal requirements which go beyond what is necessary for the purpose of monitoring any abuse.

17 The Minister Finansów lodged an appeal in cassation against that decision before the referring court. In his view, by requiring acknowledgment of receipt of a correcting invoice, the national legislature simply made use of the option given to it by the VAT Directive to choose the forms and methods of applying the right to reduce the taxable amount. That requirement is intended to ensure that transactions are lawful and does not infringe the principle of VAT neutrality

or the principle of proportionality.

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

‘May a condition such as that laid down in Article 29(4a) of the [Law on VAT], which makes the right to reduce the taxable amount set out in an invoice contingent on the taxable person holding, before the expiry of the time limit for submitting the tax declaration for the tax period in which the purchaser of the goods or services received a correcting invoice, acknowledgement of receipt of the correcting invoice by the purchaser of the goods or services constitute a condition for the purpose of Article 90(1) of [the VAT] Directive, which provides that, where the price is reduced after the supply has taken place, the taxable amount is to be reduced accordingly under conditions to be determined by the Member States, and does that condition infringe the principles of VAT neutrality and proportionality?’

The question referred for a preliminary ruling

19 By the question referred, the Naczelny Sąd Administracyjny asks, in essence, whether the requirement that, in order to be able to reduce the taxable amount as set out in the initial invoice, the taxable person must be in possession of acknowledgment of receipt of a correcting invoice by the purchaser of the goods or services may constitute a condition for the purpose of Article 90(1) of the VAT Directive and whether the principles of VAT neutrality and proportionality preclude such a requirement.

20 As to whether the requirement at issue in the main proceedings may constitute a condition for the purpose of Article 90(1) of the VAT Directive, it is apparent from Articles 1(2) and 73 of the VAT Directive that the principle of the common system of VAT entails the application to goods and services of a general tax on consumption exactly proportional to the price of the goods and services and that the taxable amount is to include everything which constitutes consideration obtained or to be obtained by the supplier of the goods or services, in return for the supply in question, from the customer or a third party.

21 In particular, where the price is reduced after the supply takes place, Article 90(1) of the VAT Directive provides that ‘the taxable amount shall be reduced accordingly under conditions which shall be determined by the Member States’.

22 Moreover, Article 273 of the VAT Directive provides that the Member States may impose the obligations which they deem necessary to ensure the correct collection of VAT and to prevent evasion, subject to the requirement of equal treatment as between domestic transactions and transactions carried out between Member States by taxable persons and provided that such obligations do not, in trade between Member States, give rise to formalities connected with the crossing of frontiers and that that option is not relied upon in order to impose additional invoicing obligations over and above those laid down in Chapter 3 of the directive.

23 Given that Articles 90(1) and 273 of the VAT Directive do not, outside the limits laid down therein, specify either the conditions or the obligations which the Member States may impose, it must be held that those provisions give the Member States a margin of discretion, inter alia as to the formalities to be complied with by taxable persons vis-à-vis the tax authorities of those States in order to ensure that, where the price is reduced after the supply has taken place, the taxable amount is reduced accordingly.

24 In the present case, it is common ground that, where the price is reduced after the supply has taken place, under the Polish legislation at issue in the main proceedings, the corresponding

reduction of the taxable amount is contingent on the taxable person being in possession of acknowledgment of receipt of a correcting invoice by the purchaser of the goods or services and that the purpose of that requirement is to ensure the correct collection of VAT and to prevent evasion, as submitted by, among others, the Polish Government.

25 Such a requirement amounts, at the same time, to a condition for the purpose of Article 90(1) of the VAT Directive and an obligation for the purpose of Article 273 of the directive.

26 As to whether the principles of VAT neutrality and proportionality preclude such a requirement, it must be noted that Article 90(1) of the VAT Directive requires the Member States to reduce the taxable amount and, consequently, the amount of VAT payable by the taxable person whenever, after a transaction has been concluded, part or all of the consideration has not been received by the taxable person (see Case C-330/95 *Goldsmiths* [1997] ECR I-3801, paragraph 16).

27 That provision embodies one of the fundamental principles of the VAT Directive, according to which the basis of assessment is the consideration actually received and the corollary of which is that the tax authorities may not in any circumstances charge an amount of VAT exceeding the tax paid by the taxable person (see, to that effect, *Goldsmiths*, paragraph 15).

28 It is also apparent from case-law that measures to prevent tax evasion or avoidance may not, in principle, derogate from the basis for charging VAT except within the limits strictly necessary for achieving that specific aim. They must have as little effect as possible on the objectives and principles of the VAT Directive and may not therefore be used in such a way that they would have the effect of undermining VAT neutrality, which is a fundamental principle of the common system of VAT established by the relevant European Union legislation (see, to that effect, *Goldsmiths*, paragraph 21; Case C-566/07 *Stadeco* [2009] ECR I-5295, paragraph 39 and the case-law cited; and Case C-489/09 *Vandoorne* [2011] ECR I-225, paragraph 27).

29 Consequently, if reimbursement of the VAT becomes impossible or excessively difficult as a result of the conditions under which applications for reimbursement of tax may be made, those principles may require that the Member States provide for the instruments and the detailed procedural rules necessary to enable the taxable person to recover the unduly invoiced tax (*Stadeco*, paragraph 40 and the case-law cited).

30 Moreover, as regards the possibility, under Article 183 of the VAT Directive, of providing that excess VAT is to be carried forward to the following tax period or refunded, the Court has made it clear that the conditions for the refund of excess VAT cannot undermine the principle of fiscal neutrality by making the taxable person bear the burden of the VAT in whole or in part (Case C-274/10 *Commission v Hungary* [2011] ECR I-7289, paragraph 45).

31 The Court has stated that such conditions must enable the taxable person, in appropriate circumstances, to recover the entirety of the credit arising from that excess VAT. This implies that the refund is to be made within a reasonable period of time (*Commission v Hungary*, paragraph 45).

32 In the present case, it is to be noted that possession on the part of the supplier of goods or services of acknowledgment of receipt of a correcting invoice by the purchaser of the goods or services is capable of proving that the latter is aware of the fact that he must calculate any entitlement to deduct VAT on the basis of the correcting invoice.

33 The requirement at issue in the main proceedings may, in principle, contribute not only to ensuring the correct collection of VAT and preventing evasion but also to eliminating the risk of

loss of tax revenue. It follows that the Republic of Poland is fully entitled to submit that that requirement pursues the legitimate objectives set out in Articles 90(1) and 273 of the VAT Directive.

34 The Republic of Poland stated before the Court that the requirement at issue in the main proceedings, first, applies only to domestic transactions and, second, is not qualified by any condition as to form and may therefore be satisfied by any appropriate means. It argued that that requirement may be regarded, in principle, as not excessively onerous for taxable persons who are suppliers of goods or services.

35 However, KFP submitted at the hearing that, in practice, the tax authorities will accept only a specific form of acknowledgment of receipt, namely a copy of the correcting invoice bearing the stamp of the purchaser of the goods or services.

36 It is for the referring court to verify which forms of acknowledgment of receipt the tax authorities will accept as proof that the requirement at issue in the main proceedings has been satisfied.

37 Moreover, given that possession of the acknowledgment of receipt in question enables the supplier of goods or services to calculate the VAT payable on the basis of the amounts set out in the corrected invoice or to recover all the excess VAT paid to the tax authorities, that requirement does not, in principle, undermine VAT neutrality.

38 However, possession of acknowledgment of receipt being, under national law, an essential condition for calculating the VAT payable on the basis of the amounts set out in the correcting invoice or for recovering the excess VAT paid, it must be held that, in the light of the case-law cited at paragraphs 29 to 31 above, VAT neutrality is affected when it is impossible or excessively difficult for the supplier of goods or services to obtain such acknowledgment of receipt within a reasonable period of time.

39 KFP stated, without being contradicted on this point, that, under Polish law, the purchaser of goods or services is not under any legally binding obligation to acknowledge receipt of a correcting invoice, which is a matter for verification by the referring court.

40 If it is impossible or excessively difficult for the supplier of goods or services to recover, within a reasonable period, the excess VAT paid to the tax authorities on the basis of the initial invoice because of the condition at issue in the main proceedings, the principles of VAT neutrality and proportionality require the Member State concerned to permit the taxable person to establish by other means before the national tax authorities, first, that he has taken all the steps necessary in the circumstances of the case to satisfy himself that the purchaser of the goods or services is in possession of the correcting invoice and that he is aware of it and, second, that the transaction in question was in fact carried out in accordance with the conditions set out in the correcting invoice.

41 Copies of the correcting invoice and the reminder addressed to the purchaser of the goods or services to send acknowledgment of receipt and, as KFP submitted at the hearing without being contradicted on that point, proof of payment or the production of entries from the accounts which make it possible to identify the amount actually paid to the taxable person in connection with the transaction in question by the purchaser of the goods or services may serve that purpose.

42 In the light of all the foregoing considerations, the answer to the question referred is that:

— the requirement that, in order to be entitled to reduce the taxable amount as set out in the initial invoice, the taxable person must be in possession of acknowledgment of receipt of a

correcting invoice by the purchaser of the goods or services constitutes a condition for the purpose of Article 90(1) of the VAT Directive;

– the principles of VAT neutrality and proportionality do not, in principle, preclude such a requirement. However, where it is impossible or excessively difficult for the taxable person who is a supplier of goods or services to obtain such acknowledgment of receipt within a reasonable period of time, he cannot be denied the opportunity of establishing, by other means, before the national tax authorities, first, that he has taken all the steps necessary in the circumstances of the case to satisfy himself that the purchaser of the goods or services is in possession of the correcting invoice and is aware of it and, second, that the transaction in question was in fact carried out in accordance with the conditions set out in the correcting invoice.

Costs

43 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 (Second Chamber) hereby rules:

The requirement that, in order to be entitled to reduce the taxable amount as set out in the initial invoice, the taxable person must be in possession of acknowledgment of receipt of a correcting invoice by the purchaser of the goods or services constitutes a condition for the purpose Article 90(1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax.

The principles of the neutrality of value added tax and proportionality do not, in principle, preclude such a requirement. However, where it is impossible or excessively difficult for the taxable person who is a supplier of goods or services to obtain such acknowledgment of receipt within a reasonable period of time, he cannot be denied the opportunity of establishing, by other means, before the national tax authorities of the Member State concerned, first, that he has taken all the steps necessary in the circumstances of the case to satisfy himself that the purchaser of the goods or services is in possession of the correcting invoice and is aware of it and, second, that the transaction in question was in fact carried out in accordance with the conditions set out in the correcting invoice.

[Signatures]

* Language of the case: Polish.