

JUDGMENT OF THE COURT (Third Chamber)

19 July 2012 (*)

(Directive 2006/112/EC — VAT — Article 136 — Exemptions — Articles 313 to 315 — Special margin scheme — Supply of second-hand vehicles by a taxable dealer — Vehicles previously supplied exempt from VAT to a taxable dealer by another taxable person which had a right of partial deduction of input tax)

In Case C-160/11,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Naczelny Sąd Administracyjny (Poland), made by decision of 25 February 2011, received at the Court on 1 April 2011, in the proceedings

Bawaria Motors sp. z o.o.

v

Minister Finansów,

THE COURT (Third Chamber),

composed of K. Lenaerts (Rapporteur), President of the Chamber, R. Silva de Lapuerta, G. Arestis, T. von Danwitz and D. Šváby, Judges,

Advocate General: J. Mazák,

Registrar: A. Impellizzeri, Administrator,

having regard to the written procedure and further to the hearing on 16 February 2012,

after considering the observations submitted on behalf of:

- Bawaria Motors sp. z o.o., by D. Baczewska-Golińska, adwokat, and M. Zajac, tax adviser,
- the Minister Finansów, by T. Tratkiewicz and J. Kaute, acting as Agents,
- the Polish Government, by M. Szpunar and by A. Gawłowska and A. Krawczyńska, acting as Agents,
- the European Commission, by L. Lozano Palacios and K. Herrmann, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 24 May 2012,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 313(1) and 314 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p 1), read in conjunction with Articles 136 and 315 of that directive.

2 The reference has been made in proceedings between Bawaria Motors sp. z o.o. ('Bawaria Motors') and the Minister Finansów (Minister for Finance) regarding the applicability of the margin scheme to certain activities of that company consisting in the reselling of second-hand vehicles.

Legal context

European Union law

3 Pursuant to Article 1(2) of Directive 2006/112:

'The principle of the common system of [value added tax ("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 Title IX of Directive 2006/112, entitled 'Exemptions', contains a Chapter 3, entitled 'Exemptions for other activities'. Article 136 of that title, included under that chapter, provides:

'Member States shall exempt the following transactions:

(a) the supply of goods used solely for an activity exempted under Articles 132, 135, 371, 375, 376 and 377, Article 378(2), Article 379(2) and Articles 380 to 390, if those goods have not given rise to deductibility;

(b) the supply of goods on the acquisition or application of which VAT was not deductible, pursuant to Article 176.'

5 Title X of Directive 2006/112, entitled 'Deductions', contains a Chapter 3, entitled 'Restrictions on the right of deduction'. Article 176 of that title, which is included under that chapter, provides:

'The Council, acting unanimously on a proposal from the Commission, shall determine the expenditure in respect of which VAT shall not be deductible. VAT shall in no circumstances be deductible in respect of expenditure which is not strictly business expenditure, such as that on luxuries, amusements or entertainment.

Pending the entry into force of the provisions referred to in the first paragraph, Member States may retain all the exclusions provided for under their national laws at 1 January 1979 or, in the case of the Member States which acceded to the Community after that date, on the date of their accession.'

6 Title XII of Directive 2006/112, entitled 'Special arrangements', includes a Chapter 4, entitled 'Special arrangements for second-hand goods, works of art, collectors' items and antiques',

consisting of Articles 311 to 343.

7 Under Article 311(1)(1) and 311(1)(5) of Directive 2006/112:

‘For the purposes of this Chapter, and without prejudice to other Community provisions, the following definitions shall apply:

(1) “second-hand goods” means movable tangible property that is suitable for further use as it is or after repair, other than works of art, collectors’ items or antiques and other than precious metals or precious stones as defined by the Member States;

...

(5) “taxable dealer” means any taxable person who, in the course of his economic activity and with a view to resale, purchases, or applies for the purposes of his business, or imports, second-hand goods, works of art, collectors’ items or antiques, whether that taxable person is acting for himself or on behalf of another person pursuant to a contract under which commission is payable on purchase or sale.’

8 Article 313(1) of Directive 2006/112 states:

‘In respect of the supply of second-hand goods, works of art, collectors’ items or antiques carried out by taxable dealers, Member States shall apply a special scheme for taxing the profit margin made by the taxable dealer, in accordance with the provisions of this Subsection.’

9 Article 314 of Directive 2006/112 provides:

‘The margin scheme shall apply to the supply by a taxable dealer of second-hand goods, works of art, collectors’ items or antiques where those goods have been supplied to him within the Community by one of the following persons:

(a) a non-taxable person;

(b) another taxable person, in so far as the supply of goods by that other taxable person is exempt pursuant to Article 136;

(c) another taxable person, in so far as the supply of goods by that other taxable person is covered by the exemption for small enterprises provided for in Articles 282 to 292 and involves capital goods;

(b) another taxable dealer, in so far as VAT has been applied to the supply of goods by that other taxable dealer in accordance with this margin scheme.’

10 Article 315 of Directive 2006/112 provides:

‘The taxable amount in respect of the supply of goods as referred to in Article 314 shall be the profit margin made by the taxable dealer, less the amount of VAT relating to the profit margin.’

The profit margin of the taxable dealer shall be equal to the difference between the selling price charged by the taxable dealer for the goods and the purchase price.’

National law

11 The Law on tax on goods and services (Ustawa o podatku od towarów i usług) of 11 March 2004 (Dz. U. No 54, position 535), as applicable to the facts at issue in the main proceedings (‘the

Law on VAT') states, in Article 15(1) thereof:

“Taxable persons” are legal persons, organisational units without legal personality and natural persons pursuing an independent economic activity, as referred to in paragraph 2, regardless of the purpose or result of such activity.’

12 Under Article 43(1)(2) of the Law on VAT, the supply of second-hand goods is exempt from tax, provided that the person effecting the supply did not have a right of deduction with regard to those goods.

13 Second-hand goods, within the meaning of that provision, are defined in Article 43(2) as ‘movable tangible property whose period of use by the economic operator effecting the supply thereof amounted to at least six months following acquisition of the right to dispose of those goods as owner’.

14 Under Article 86(3) of the Law on VAT:

‘In the case of the purchase of passenger vehicles and other motor vehicles with a total authorised weight not exceeding 3.5 tonnes, the amount of input tax shall correspond to 60% of the amount of tax set out in the invoice or of the amount of tax due on the intra-Community acquisition of goods or of the amount of tax due on the supply of goods purchased by the taxable person, but not more than PLN 6 000.’

15 Article 113(1) of the Law on VAT provides:

‘Taxable persons shall be exempt from tax if their total taxed sales in the preceding tax year did not exceed PLN 50 000. The value of the sales shall not include the amount of tax.’

16 Article 120 of the Law on VAT, concerning the margin scheme, contains the following provisions:

‘1. ...

(4) For the purposes of this Chapter “second-hand goods” shall mean tangible movable property that is suitable for further use as it is or after repair, other than [works of art, collectors’ items and antiques] and goods other than precious metals or precious stones ...

...

4. In the case of a taxable person effecting transactions consisting in the supply of second-hand goods, works of art, collectors’ items or antiques acquired previously by that taxable person for the purposes of the activity carried out or imported for the purpose of resale, the taxable amount shall be the margin constituting the difference between the total amount which the purchaser of the goods is to pay and the amount of the acquisition, minus the amount of tax.

...

10. Paragraphs 4 and 5 shall concern supplies of second-hand goods, works of art, collectors’ items or antiques which the taxable person has acquired from:

(1) a natural person, a legal person or an organisational unit without legal personality which is not a taxable person for the purposes of Article 15 or which is not a taxable person for the purposes of [VAT];

- (2) taxable persons as referred to in Article 15, where the supply of those goods was exempt from tax under Article 43(1)(2) or Article 113;
- (3) taxable persons, where the supply of those goods was taxed under paragraphs 4 and 5;
- (4) taxable persons for the purposes of [VAT], where the supply of those goods was exempt from tax under Article 43(1)(2) or Article 113;
- (5) taxable persons for the purposes of VAT, where VAT is imposed on the supply of those goods under rules provided for in paragraphs 4 and 5 and the acquirer holds documents confirming unequivocally that the goods were acquired under those rules.'

17 Paragraph 13(1)(5) of the Decree of the Minister for Finance implementing certain provisions of the Law on tax on goods and services (rozporządzenie Ministra Finansów r.w sprawie wykonania niektórych przepisów ustawy o podatku od towarów i usług, Dz. U. No 212, position 1336), of 28 November 2008 ('the Decree on VAT'), provides:

'The supply of passenger vehicles and other motor vehicles by taxable persons who, on acquisition thereof, had the right to deduct input tax referred to in Article 86(3) of the law shall be exempt from tax where those passenger vehicles or motor vehicles are second-hand goods within the meaning of Article 43(2) of the Law on VAT.'

Background to the dispute and the question referred for a preliminary ruling

18 Bawaria Motors is a taxable person for VAT purposes, within the meaning of Article 15 of the Law on VAT. It carries out an economic activity consisting in the operation of car showrooms, in the course of which it acquires and then subsequently sells passenger vehicles, both new and second-hand. As part of its activities, it purchases second-hand vehicles from economic operators which, not having been able to deduct the VAT paid on the purchase of those vehicles, issue Bawaria, at the time of the supply, with invoices marked 'exempt', so far as concerns the rate of VAT applicable, and referring to Article 43(1)(2) of the Law on VAT. On the resale of those second-hand vehicles, Bawaria makes use of the margin scheme set out in Article 120 of the Law on VAT.

19 Situations also arise in which Bawaria Motors purchases second-hand vehicles from economic operators who, on acquisition, have deducted VAT within the limits set in Article 86(3) of the Law on VAT. In such situations, the operator issues Bawaria Motors with an invoice marked 'exempt', so far as concerns the rate of VAT payable on the supply, and referring to Paragraph 13(1)(5) of the Decree on VAT.

20 Taking the view that it was entitled, in the cases referred to in the preceding paragraph of this judgment, to apply the margin scheme provided for in Article 120 of the Law on VAT, on 9 February 2009 Bawaria Motors sent the Minister Finansów a request for an individual interpretation.

21 The Minister Finansów responded to that request on 20 February 2009. He took the view that, having regard to the wording of Article 120(10) of the Law on VAT, Bawaria Motor's position was not justified. He submitted that Paragraph 13 of the Decree on VAT does not constitute an extension of the situations covered by Article 43 of the Law on VAT, to which Article 120(10) refers. In his opinion that law otherwise complies with Articles 312 to 325 of Directive 2006/112, which allow the application of the margin scheme only in cases where the taxable dealer has acquired the second-hand good from an economic operator which did not have the right to deduct input VAT and therefore incorporated it in the supply price charged to that taxable dealer.

22 Bawaria Motors brought an action against that interpretation before the Wojewódzki Sąd Administracyjny w Warszawie (Regional Administrative Court, Warsaw), claiming that the Minister Finansów's position was derived from a literal interpretation of Article 120 of the VAT Law, incompatible with the fundamental principles of VAT, that is to say fiscal neutrality, the effective taxation of only one particular marketing stage and the principle of maintaining competitive conditions.

23 By a judgment of 10 November 2009, the Wojewódzki Sąd Administracyjny w Warszawie annulled the contested interpretation. It held that Paragraph 13(1)(5) of the Decree on VAT, which introduces a tax exemption not provided for under EU law, does not exempt the economic operator which supplies a second-hand vehicle to a taxable dealer from the obligation to tax that supply where, on acquisition of that vehicle, that economic operator was not entitled to deduct the input VAT in full. According to that court, the exemption set out in that provision of the Decree on VAT concerns only the part of the VAT remaining payable by the economic operator, having regard to the limits provided for in Article 86(3) of the Law on VAT, excluding the amount, corresponding to 60% of the tax indicated on the invoice or to PLN 6 000, as the case may be, which that economic operator deducted on the purchase of the vehicle. It follows, according to that court, that Bawaria Motors is entitled to apply the margin scheme, but only in respect of an amount limited to the input tax which the economic operator which supplied it with the vehicle was unable to deduct, corresponding to 40% of the amount of the tax indicated on the invoice or to the part of that tax in excess of PLN 6 000, as the case may be.

24 Bawaria Motors lodged an appeal in cassation against that judgment before the Naczelny Sąd Administracyjny, submitting, essentially, that the fact that it was impossible for it to apply the margin scheme in full to the resale of second-hand goods acquired in the context of an exempt supply under Paragraph 13(1)(5) of the Decree on VAT infringed, inter alia, Article 120(4) and (10) of the Law on VAT and the abovementioned provision of the Decree on VAT.

25 The Minister Finansów also lodged an appeal in cassation, in which he maintained his original position that, in the circumstances of the present case, the taxable dealer is not eligible to apply, even in part, the margin scheme.

26 Accordingly, the Naczelny Sąd Administracyjny decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'Are the provisions of Articles 313(1) and 314 of [Directive 2006/112], read in conjunction with Articles 136 and 315 thereof, to be interpreted as permitting the application of the special "margin" scheme for taxable dealers in relation to supplies of second-hand goods also where they resell the purchased passenger vehicles and other motor vehicles to which the tax exemption for the supply of passenger vehicles and other vehicles by taxable persons who only have a partial right to deduct input tax on the purchase thereof, as laid down in Article 86(3) of the [Law on VAT], was applied pursuant to the Polish national provisions laid down in Paragraph 13(1)(5) of the [Decree on VAT], where those passenger vehicles and motor vehicles were second-hand goods within the

meaning of Article 43(2) of the Law on VAT and Article 311(1)(1) of [Directive 2006/112]?’

On the question referred

27 By its question, the referring court asks, essentially, whether Articles 313(1) and 314 of Directive 2006/112, read in conjunction with Articles 136 and 315 of that directive, must be interpreted as meaning that a taxable dealer is eligible for the application of the margin scheme where it supplies motor vehicles considered to be second-hand goods, within the meaning of Article 311(1)(1) of that directive, which it has previously acquired exempt from VAT from another taxable person which had only a right to partial deduction of input VAT paid on the purchase price of those vehicles.

28 In this connection it should be noted that the scheme for the taxation of the profit margin made by the taxable dealer on the supply of second-hand goods such as those at issue in the main proceedings constitutes a special arrangement for VAT — derogating from the general scheme of Directive 2006/112 (see Case C-280/04 *Jyske Finans* [2005] ECR I-10683, paragraph 35, and Case C-203/10 *Auto Nikolovi* [2011] ECR I-1083, paragraph 46).

29 Consequently, Article 314 of Directive 2006/112, which identifies the cases in which this special arrangement is to be applied, must be construed narrowly. It follows that those cases are exhaustively listed, as the Advocate General pointed out in point 29 of his Opinion.

30 It is apparent from the file submitted to the Court that the facts at issue in the main proceedings do not fall within any of the cases referred to in Article 314(a), (c) and (d). According to the information in that file, the supplies of second-hand vehicles to Bawaria Motors at issue in the main proceedings were carried out by persons who were themselves taxable persons for VAT purposes and who were neither covered by the exemption for small enterprises set out in Articles 282 to 292 of Directive 2006/112, nor subject to the margin scheme.

31 Since those supplies were exempt from VAT under Paragraph 13(1)(5) of the Decree on VAT, it is necessary, in those circumstances, to examine whether they may fall within the case specifically referred to in Article 314(b) of Directive 2006/112, that is, where the supply of goods to the taxable dealer by another taxable person is exempt pursuant to Article 136 of that directive.

32 First, the application of Article 136(a) of that directive must be ruled out in the case in the main proceedings. As the Advocate General observed in point 37 of his Opinion, it is apparent from the file that the supplies of vehicles to Bawaria Motors, at issue in the main proceedings, bear no relation to any of the exempt activities pursuant to the provisions listed in Article 136(a).

33 As regards, secondly, the application of Article 136(b) of Directive 2006/112 to that case, it must be pointed out that that provision provides for the exemption of supplies of goods on the acquisition or application of which VAT was not deductible, pursuant to Article 176 of that directive. Article 176, in the second paragraph thereof, contains a ‘standstill’ clause which authorises the Member States to retain, pending the entry into force of the Council provisions, referred to in the first paragraph of that article and determining the expenditure in respect of which VAT is not deductible, all the exclusions provided for under their national laws at 1 January 1979 or, in the case of the Member States which acceded to the Community after that date, such as the Republic of Poland, at the date of their accession.

34 Article 136(b) must be construed narrowly. The exemption which it introduces constitutes an exception to the general principle that VAT is to be levied on all goods supplied for consideration by a taxable person (see, to that effect, *Jyske Finans*, paragraph 21). Moreover, that exemption falls, by virtue of the reference made to Article 136 in Article 314(b) of that directive, within the

scope of the derogating margin scheme.

35 The exemption provided for by Article 136(b) of Directive 2006/112 therefore can apply only to supplies of goods on the acquisition of which value added tax did not become deductible in accordance with national legislation (see, to that effect, *Jyske Finans*, paragraph 24).

36 That construction is borne out by the wording of Article 176 of Directive 2006/112 which mentions, in the first paragraph thereof, expenditure 'in respect of which VAT shall not be deductible' and, in the second paragraph thereof, 'exclusions' provided for under the existing national laws, this article being referred to in Article 136(b) of that directive.

37 Otherwise, it reflects the general scheme of Article 314 of Directive 2006/112. As the Polish Government, the Commission and the Advocate General, in point 30 of his Opinion, have pointed out, the situations in which the margin scheme is applied, the list of which includes the exemption provided for in Article 136(b) of that directive, have in common that the person supplying the goods concerned to the taxable dealer could not deduct any of the input tax paid on the purchase of those goods and therefore bore that tax in its entirety.

38 In the case in the main proceedings, Article 86(3) of the Law on VAT provides not that VAT is not deductible, within the meaning of Article 136(b) of Directive 2006/112, but that the amount of the tax deductible is limited. Far from being wholly deprived of the right to deduct the input VAT paid, the taxable person having acquired the goods subsequently supplied to the taxable dealer is entitled to deduct that tax within the limits set by that national provision, that is, 60% of the input tax paid or PLN 6 000, as the case may be.

39 Consequently, and without there being a need to assess whether Article 86(3) of the Law on VAT is covered by the 'standstill' clause in the second paragraph of Article 176 of Directive 2006/112, the exemption from VAT granted by Paragraph 13(1)(5) of the Decree on VAT on supplies of motor vehicles to a taxable dealer carried out by taxable persons which had the right to deduct in part the input tax paid, under Article 86(3) of the Law on VAT, does not correspond, on any view, to the situation narrowly defined in Article 136(b) of that directive. It follows that the subsequent supply of those vehicles by the taxable dealer is not eligible for the application of the margin scheme.

40 Bawaria Motors submits that such an interpretation, upheld by the Minister Finansów, results in it being subjected to partial double taxation. It explains that, in accordance with that interpretation, it is required under the normal VAT arrangements to apply VAT on the entire resale price of the second-hand motor vehicle at issue, although, as that vehicle was previously supplied to it exempt from VAT by another taxable person under Paragraph 13(1)(5) of the Decree on VAT, it cannot deduct the part of the VAT which that other taxable person was unable, pursuant to the restriction set out in Article 86(3) of the Law on VAT, to deduct as input tax and which has therefore been incorporated into the price of that supply.

41 However, in the light of the considerations set out in paragraphs 34 and 35 above, Article 136(b) of Directive 2006/112 is not capable of any interpretation other than that contained in paragraph 39 above, which would allow a taxable dealer which, like Bawaria Motors, cannot rely on the fact that on the initial acquisition, by another taxable person, of the goods which were subsequently supplied to it as second-hand goods VAT was not deductible within the meaning of that provision, to avoid partial double taxation (see, to that effect, *Jyske Finans*, paragraph 24). That situation has no effect on the determination of the conditions under which the margin scheme provided for in Article 314 of that directive is applied.

42 As the Commission submitted, both in its written pleadings and at the hearing, it falls to the

Polish legislature to end such a situation. However, the elimination of that situation should not be at the cost of an interpretation of Directive 2006/112 which is irreconcilable with the actual wording of that directive and its general scheme.

43 It must also be stated that, in contrast to the position defended by Bawaria Motors, refusing the application of the margin scheme to a taxable dealer in a situation such as that at issue in the main proceedings, although that scheme is applicable, under the combined provisions of Article 136(b) and Article 314(b) of Directive 2006/112, where the taxable dealer has previously acquired the goods at issue exempt from VAT from another taxable person which was not able to deduct any of the input tax, does not run counter to the principle of fiscal neutrality.

44 As the Minister Finansów pointed out at the hearing, in that latter situation the price of the supply of the goods to the taxable dealer includes all the VAT paid as input tax by that other taxable person, which was not able to deduct it, even in part, on the acquisition of those goods. On the other hand, in the situation at issue in the main proceedings that price includes only part of the VAT paid as input tax, namely that which, on account of the restriction provided for in Article 86(3) of the Law on VAT, the taxable person having supplied the goods at issue to the taxable dealer was not able to deduct on the acquisition of those goods.

45 As the Polish Government submitted, authorising the application of the margin scheme in a situation such as that at issue in the main proceedings would result in the VAT not being proportional to the price of the second-hand goods resold by the taxable dealer, even though it was possible for a significant part of the input tax paid to be deducted by another taxable person at a prior stage of marketing. Such an outcome would be contrary to the principle that VAT should be of general application, expressed in Article 1(2) of Directive 2006/112.

46 Having regard to the foregoing considerations, the answer to the question referred is that Articles 313(1) and 314 of Directive 2006/112, read in conjunction with Articles 136 and 315 of that directive, must be interpreted as meaning that a taxable dealer is not eligible for the application of the margin scheme where it supplies motor vehicles considered to be second-hand goods, within the meaning of Article 311(1)(1) of that directive, which it has previously acquired exempt from VAT from another taxable person which had only a right of partial deduction of input VAT paid on the purchase price of those vehicles.

Costs

47 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 313(1) and 314 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, read in conjunction with Articles 136 and 315 of that directive must be interpreted as meaning that a taxable dealer is not eligible for the application of the margin scheme where it supplies motor vehicles considered to be second-hand goods, within the meaning of Article 311(1)(1) of that directive, which it has previously acquired exempt from VAT from another taxable person which had only a right of partial deduction of input VAT paid on the purchase price of those vehicles.

[Signatures]

* Language of the case: Polish.