JUDGMENT OF THE COURT (Seventh Chamber)

4 October 2012 (*)

(Taxation – VAT – Directive 2006/112/EC – Right to deduction – Adjustment – Theft of goods)

In Case C–550/11,

REFERENCE for a preliminary ruling pursuant to Article 267 TFEU from the Administrativen sad – Varna (Bulgaria), made by decision of 24 October 2011, received at the Court on 2 November 2011, in the proceedings

PIGI – Pavleta Dimova ET

v

Direktor na Direktsia 'Obzhalvane I upravlenie na izpalnenieto' – Varna pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite,

THE COURT (Seventh Chamber),

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

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Direktor na Direktsia 'Obzhalvane I upravlenie na izpalnenieto' – Varna pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite, by S. Zlateva, acting as Agent,

– the Bulgarian Government, by T. Ivanov and Y. Atanasov, acting as Agents,

– the European Commission, by L. Lozano Palacios and D. Roussanov, 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 Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1) ('the Directive').

2 The reference was made in the course of proceedings between PIGI – Pavleta Dimova ET ('PIGI') and the Direktor na Direktsia 'Obzhalvane I upravlenie na izpalnenieto' – Varna pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite (Director of the Appeals and

Enforcement Management Directorate, Varna, of the central administration of the national public revenue agency) ('the Direktor') concerning the adjustment of a value added tax ('VAT') deduction.

Legal context

European Union law

3 The second subparagraph of Article 1(2) of the Directive provides:

'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 Under Article 168 of the Directive:

'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;

...'

5 Article 184 of the Directive provides that the initial deduction is to be adjusted where it is higher or lower than that to which the taxable person was entitled.

6 Article 185 of the Directive reads as follows:

'1. Adjustment shall, in particular, be made where, after the VAT return is made, some change occurs in the factors used to determine the amount to be deducted, for example where purchases are cancelled or price reductions are obtained.

2. By way of derogation from paragraph 1, no adjustment shall be made in the case of transactions remaining totally or partially unpaid or in the case of destruction, loss or theft of property duly proved or confirmed, or in the case of goods reserved for the purpose of making gifts of small value or of giving samples …

However, in the case of transactions remaining totally or partially unpaid or in the case of theft, Member States may require adjustment to be made.

7 Article 186 of the Directive provides that Member States are to lay down the detailed rules for applying Articles 184 and 185 thereof.

Bulgarian law

8 The Republic of Bulgaria transposed the Directive by the Law on value added tax (Zakon za danak varhu dobavenata stoynost, DV No 63 of 4 August 2006, 'the ZDDS'), which has been in force since 1 January 2007.

9 Adjustments of entitlement to a VAT deduction for a given tax period are governed inter alia by Article 79 of the ZDDS, which provides:

'...

(3) A taxable person who has wholly or partly deducted input tax in respect of any goods produced, purchased, acquired or imported by him shall calculate and be liable for tax in the amount of the deduction made, where the goods have been destroyed, a shortfall has been established or the goods have been classified as wastage, or their intended use has been altered and the new intended use no longer gives entitlement to deduction.

(4) The adjustment … shall be made in the tax period during which the relevant circumstances have occurred …

...

(6) ... the taxable person shall be liable for a tax on all goods and services which are capital goods for the purposes of the Law on corporation tax ...'

10 Limitations on adjustments are provided as follows for in Article 80 of the ZDDS:

'...

(2) Adjustments under Article 79(3) shall not be made in the following circumstances:

1. destruction, shortfalls or wastage caused by *force majeure*, as well as in the case of the destruction of excisable goods under administrative control in accordance with the Law on excise duties and tax warehouses [Zakon za aktsizite i danachnite skladove];

2. destruction, shortfalls or wastage caused by accidents or disasters which the person can prove were not caused through his fault;

...

4. technological wastage within permissible limits, established by the technological documentation for the production or activity concerned;

5. wastage due to expiry of the service life, determined according to the requirements of a legislative provision;

6. write-off of capital goods within the meaning of the Law on accounting [Zakon za schetovodstvoto], where the balance sheet value is less than 10 per cent of the cost of acquisition.

...'

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

11 PIGI, a sole trader under Bulgarian law represented by Ms Dimova, operates in inter alia the manufacture, purchase and marketing of agricultural products, the manufacture and sale of alcoholic and non-alcoholic drinks and trade in foodstuffs.

12 Following an inspection pertaining to the period between 1 August 2005 and 30 September 2010, in October 2010 the revenue office, Varna, of the regional directorate of the central administration of the national public revenue agency, proposed an adjustment of the VAT owing for the month of January 2007. That adjustment was confirmed by a tax assessment of 14 January 2011, ordering PIGI to pay BGN 1 283.43 in VAT owing for that month and BGN 656.04 in interest.

13 The claimant in the main proceedings stated before that office that there was a shortfall in the goods (packaged products and cigarettes) to which the assessment in question related

following a theft at the company's premises on 3 January 2007. According to PIGI's accounting records, the value of the goods totalled BGN 6 417.16.

14 In order to have the theft recognised, a complaint against X was lodged before the Dobrich regional police. By order of 26 March 2007 of the Public Prosecutor, Dobrich, the proceedings were temporarily suspended because the perpetrator could not be identified. The documents were communicated to the police officer leading the investigation in order to allow the search for the perpetrator to be continued.

15 The revenue office, Varna, of the regional directorate of the central administration of the national public revenue agency took the view, however, that under Article 79(3) of the ZDDS PIGI was liable for VAT equal to the amount of the input tax deduction claimed for the period in which the goods were stolen. It then relied on Article 80 of the Law on VAT, which sets out the circumstances in which the taxable person is not required to make an adjustment to the input tax deduction claimed in respect of the shortfall, including *force majeure*. It went on to hold that a ground for an adjustment existed, since the claimant in the main proceedings should have paid VAT equal to the amount of the input tax deduction claimed on acquisition of the goods in which there was now a shortfall.

16 PIGI then lodged an objection to that decision before the Direktor, arguing that, since the shortfall in the goods was the result of theft, the shortfall had been caused by *force majeure* which she could not have foreseen, and therefore no adjustment had to be made.

17 By decision of 22 March 2011, the Direktor dismissed that objection, holding that an adjustment of an input VAT deduction is possible in cases of theft of goods.

18 PIGI brought an action against that rejection decision before the referring court, arguing inter alia that, since the shortfall was the result of theft, the Direktor ought not to have applied the provisions on adjustment of input VAT. PIGI argued that it was a case of *force majeure* which it could not have foreseen or prevented.

19 In those circumstances, the Administrativen sad – Varna decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) In which cases is it to be assumed that there is a theft of property duly proved or confirmed within the meaning of Article 185(2) of [the Directive], and is it necessary in that regard that the identity of the perpetrator has been established and that that person has already been finally convicted?

(2) Depending on the answer to the first question: does the expression "theft of property duly proved or confirmed" within the meaning of Article 185(2) of [the Directive] cover a situation such as that in the main proceedings, in which a pre-litigation procedure for theft was initiated against person or persons unknown, a fact that is not disputed by the revenue collection department and on the basis of which it has been assumed that there is a shortfall [of the goods stolen]?

(3) In the light of Article 185(2) of [the Directive], are national legal provisions such as those laid down in Articles 79(3) and 80(2) of the ZDDS and a tax practice such as that adopted in the main proceedings permissible, under which the input tax deduction made on the acquisition of goods which are subsequently stolen must be adjusted, if it is assumed that the State has not made use of the power afforded to it to provide expressly for adjustments to the input tax deducted in the case of theft?'

The questions referred for a preliminary ruling

20 By its questions, which it is appropriate to consider together, the referring court asks, in essence, whether Article 185(2) of the Directive must be interpreted as precluding national tax provisions, such as Articles 79 and 80 of the ZDDS, which require, where a shortfall of goods subject to VAT has been established, that an adjustment be made to the input tax deduction made at the time of acquisition of those goods where the taxable person has been the victim of theft of those goods and the perpetrator has not been identified.

21 In order to answer those questions it should be recalled at the outset that the deduction system established by the Directive is meant to relieve the operator entirely of the burden of the VAT paid or payable in the course of all his economic activities. The common system of VAT seeks to ensure complete neutrality of taxation of all economic activities, whatever their purpose or results, provided that they are themselves subject, in principle, to VAT (see Case C-153/11 *Klub* [2012] ECR, paragraph 35 and the case-law cited).

22 It follows from Article 168 of the Directive that, in so far as the taxable person, acting as such at the time when he acquires goods, uses the goods for the purposes of his taxable transactions, he is entitled to deduct the VAT paid or payable in respect of the goods. The right to deduct arises at the time when the deductible tax becomes chargeable, namely when the goods are delivered (see *Klub*, paragraph 36 and the case-law cited).

23 It follows that the decisive criterion for the deduction of input VAT is the actual or intended use of the goods and services concerned. That use determines the extent of the initial deduction to which the taxable person is entitled and the extent of any adjustments, which must be made under the conditions laid down in Articles 185 to 187 of the Directive (see Case C-63/04 *Centralan Property* [2005] ECR I-11087, paragraph 54 and the case-law cited).

24 The adjustment provided for in those articles of the Directive is an integral part of the VAT deduction scheme established by that legislation.

25 It should be noted that the rules laid down by the Sixth Directive in respect of adjustment are intended to enhance the precision of deductions so as to ensure the neutrality of VAT, with the result that transactions effected at an earlier stage continue to give rise to the right to deduct only to the extent that they are used to make supplies subject to VAT. By those rules, the Directive is thus intended to establish a close and direct relationship between the right to deduct input VAT and the use of the goods and services concerned for taxable transactions (see *Centralan Property*, paragraph 57).

26 As regards the coming into existence of an obligation to make an adjustment of an input VAT deduction, Article 185(1) of the Directive establishes the principle that such an adjustment must be made inter alia when changes to factors which were taken into consideration for the determination of the amount of such a deduction occurred subsequently to the VAT return.

27 It should be noted that, since property which was stolen can no longer be used by the taxable person for taxable output transactions, theft is such a change which should, in principle, give rise to an adjustment of the input VAT deduction.

28 However, by way of derogation from the principle laid down in Article 185(1) of the Directive, the first subparagraph of Article 185(2) provides that no adjustment is to be made, inter alia, in the event of ‘theft of property duly proved’. Under the second subparagraph of the latter provision, that derogation is made optional.

29 It follows that the Member States may provide for adjustments of input VAT deductions in any cases of theft of property giving rise to entitlement to VAT deduction, irrespective of whether or not the circumstances surrounding the theft have been fully elucidated.

30 In those circumstances, since the Republic of Bulgaria availed itself of the power granted to it under the second subparagraph of Article 185(2) of the Directive, the competent tax authority in the main proceedings was not required to determine whether the theft in question, committed by an unidentified and unconvicted perpetrator, was ‘duly proved’. In accordance with the aforementioned provision, the national tax legislation provides for an adjustment of the input VAT deduction in the event of theft, irrespective of the particular circumstance surrounding the theft.

31 In the written observations submitted to the Court, reliance was placed on the fact that the concept of ‘theft’ is not referred to explicitly in the wording of the national tax legislation at issue in the main proceedings, which refers merely to a ‘shortfall [being] established’ as a ground for adjusting the input VAT deduction.

32 Suffice it to observe in that regard that the Member States, in exercising the power provided for in the second subparagraph of Article 185(2) of the Directive, are free to employ, in their domestic tax legislation, terms which are not identical to the enabling provision of the Directive, provided that those terms reflect the objective pursued by the latter.

33 The Court has held that the Member States, in exercising a power conferred under that directive, may choose the legislative technique which they regard as the most appropriate. Thus they may, inter alia, merely incorporate into national tax legislation the approach adopted in the Directive or an equivalent expression (see, to that effect, Case C-102/08 *SALIX Grundstücks-Vermietungsgesellschaft* [2009] ECR I-4629, paragraph 56).

34 Since the concept of ‘theft’ generally comes within the scope of criminal law, the Member States may employ the terms they consider most appropriate in establishing the fiscal legislative framework intended to implement a European Union law provision governing VAT adjustments.

35 Therefore, and in so far as theft entails a ‘shortfall’ in the property concerned, with the result that it is not possible to use it for taxable output transactions, the national tax legislation and its application by the competent authority must be regarded as a suitable implementation of the second subparagraph of Article 185(2) of the Directive.

36 The written observations lodged before the Court state that, under other provisions of the tax legislation at issue in the main proceedings as well, an adjustment of the input VAT deduction is not made, inter alia, where there is a ‘shortfall’ due to ‘*force majeure*’. In the light of the findings of fact made by the referring court in the main proceedings, it may therefore be stated that that scenario is not at issue here.

37 In those circumstances, the answer to the questions referred is that Article 185(2) of the Directive must be interpreted as not precluding national tax provisions, such as those contained in Articles 79 and 80 of the ZDDS, which require, where a shortfall in the goods subject to VAT has been established, that an adjustment be made to the deduction of that input tax at the time of acquisition of those goods, where the taxable person was the victim of a theft of those goods and

the perpetrator has not been identified.

Costs

38 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 (Seventh Chamber) hereby rules:

Article 185(2) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as not precluding national tax provisions, such as those contained in Articles 79 and 80 of the Law on value added tax (Zakon za danak varhu dobavenata stoynost), which require, where a shortfall in the goods subject to value added tax has been established, that an adjustment be made to the deduction of that input tax at the time of acquisition of those goods, where the taxable person was the victim of a theft of those goods and the perpetrator has not been identified.

[Signatures]

* Language of the case: Bulgarian.