JUDGMENT OF THE COURT (Fifth Chamber)

11 April 2013 (*)

(Taxation – VAT – Directive 2006/112/EC – Article 203 – Principle of fiscal neutrality – Refund to the supplier of tax paid where the recipient under an exempt transaction is refused a right of deduction)

In Case C-138/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Administrativen sad Varna (Bulgaria), made by decision of 6 March 2012, received at the Court on 15 March 2012, in the proceedings

Rusedespred OOD

v

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

THE COURT (Fifth Chamber),

composed of T. von Danwitz (Rapporteur), President of the Chamber, A. Rosas, E. Juhász, D. Šváby and C. Vajda, Judges,

Advocate General: P. Cruz Villalón,

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 D. Drambozova, 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 request 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).

2 The request has been made in proceedings between Rusedespred OOD ('Rusedespred')

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, at the Central Administration of the National Revenue Agency, ‘the Direktor’), concerning the latter’s refusal to refund to Rusedespred value added tax (‘VAT’) invoiced by Rusedespred to its customer, after the tax authority had refused the customer the right to deduct that VAT on the ground that the supply at issue was not taxable.

Legal context

European Union law

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

‘The following transactions shall be subject to VAT:

(a) the supply of goods for consideration within the territory of a Member State by a taxable person acting as such;

…

(c) the supply of services for consideration within the territory of a Member State by a taxable person acting as such;

…’

4 Article 203 of that directive states:

‘VAT shall be payable by any person who enters the VAT on an invoice.’

Bulgarian law

5 Article 12(1) of the Law on value added tax (Zakon za danak varhu dobavenata stoynost, ‘the ZDDS’) provides:

‘Any supply of goods or services within the meaning of Articles 6 and 9, where it is effected by a taxable person under the present law and where the place of performance is on national territory, and any transaction to which a zero rate applies effected by a taxable person, unless the present law provides otherwise, is a taxable transaction.’

6 Under Article 45(3) of the ZDDS:

‘Exempt transactions include the supply of buildings or parts of a building which are not new, the supply of the land on which the building stands, and the creation and transfer of other rights *in rem* therein.’

7 Pursuant to Article 70(5) of the ZDDS, no right to deduct input VAT paid arises if that input VAT was invoiced improperly.

8 Under Article 85 of that law, the tax is payable by any person who enters it on an invoice and/or note, as referred to in Article 112 of that law.

9 Article 116 of the same law provides:

‘(1) Corrections and additions in invoices and notes relating thereto are not permitted. Documents containing errors or corrections must be cancelled and new documents must be

issued.

…

(3) Invoices issued and notes relating thereto on which tax has been entered, although it should not have been, shall also be considered to be documents containing an error.

(4) If documents containing errors or corrections are included in the accounts of the supplier or the recipient of supplies, a statement regarding its cancellation must also be drawn up for each of the parties, which includes the following:

1. the reason for the cancellation;

2. the number and date of the cancelled document;

3. the number and date of the new document issued;

4. the signatures of the persons who have drawn up the statement for each of the parties.

(5) The issuer shall retain all of the copies of cancelled documents and they shall be accounted for by the supplier and the customer in accordance with the detailed rules laid down in the implementing provisions of this law.'

10 The refund of amounts wrongly paid by way of tax is governed by Articles 128 and 129 of the Code of tax and social security procedures (danachno osiguritelen protsesualen kodeks).

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

11 On 15 August 2009, Rusedespred submitted an invoice to Esi Trade EOOD ('Esi Trade') relating to the sale and renovation of a building. The invoice set out the prices of the building and its renovation, the amounts of purchase tax and stamp duty, together with the amount of VAT.

12 Since the sale of the building was considered to be exempt from VAT, the tax was calculated on the basis of the other three items on the invoice, namely the cost of the renovation, purchase tax and stamp duty.

13 Subsequently, Rusedespred included the invoice in question in its tax return for the relevant period, while Esi Trade exercised its right to deduct the VAT entered on the invoice.

14 In 2010 Esi Trade was the subject of an audit by the tax authority; by a tax adjustment notice of 18 June 2010, the tax authority refused that company the right to deduct the VAT entered on the invoice at issue. According to the tax authority, all of the transactions entered on the invoice were exempt; therefore, there was no justification for the VAT entry on that invoice. That tax adjustment notice became final on 4 April 2011.

15 On 9 May 2011, Rusedespred submitted an application for a refund of the amount improperly invoiced to the tax authority; the tax authority ordered that an audit of Rusedespred be carried out and, by a tax adjustment notice of 2 June 2011, refused the refund sought on the ground that payments of VAT had not been wrongly made. In accordance with Article 85 of the ZDDS, the VAT entered on the invoice issued on 15 August 2009 was payable by Rusedespred as the person who entered that tax on the invoice.

16 Following confirmation by the Direktor of the tax adjustment notice of 2 June 2011 by a decision of 25 August 2011, Rusedespred brought proceedings before the Administrativen sad

Varna (Administrative Court, Varna) claiming that in view of the fact that the tax authority had, by a final tax adjustment notice, earlier refused the recipient of the invoice the right to deduct the VAT paid though not due in respect of the exempt supply, the tax authority had wrongly refused to refund that tax.

17 In the main proceedings, the Direktor contended that the tax entered on the invoice at issue was payable pursuant to Article 85 of the ZDDS. According to the Direktor, where a taxable person takes the view that it has made an error when issuing an invoice, it is open to that person to correct that error in accordance with Article 116 of the ZDDS.

18 The referring court observes that in the present case Esi Trade was refused the right to deduct the invoiced VAT by a final tax adjustment notice. The referring court takes the view that the risk of loss of VAT resulting from the right of deduction should be regarded as having been 'wholly and indisputably' eliminated. It would, therefore, be contrary to the principle of fiscal neutrality to require the supplier concerned to pay that tax under Article 85 of the ZDDS.

19 So far as the possibility for Rusedespred to correct the incorrect invoice is concerned, the referring court states that, contrary to what the tax authority contends, that possibility was not available in the present case. The procedure for correction of incorrectly drawn up documents, governed by Article 116 of the ZDDS, requires the cancellation of the tax document so drawn up. Since the supply had already been the subject of a tax audit and the customer under the supply had been refused deduction of the VAT entered on the invoice by a final tax adjustment notice, such an invoice cancellation would not have been permitted.

20 In those circumstances, the referring court asks whether a taxable person may base his right to a refund of VAT invoiced in error on the principles of European Union law governing the common system of VAT. Taking the view that resolution of the dispute before it depended on the interpretation of European Union law, the Administrativen sad Varna decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Is a taxable person entitled, in accordance with the principle of the neutrality of VAT, within the limitation period laid down, to claim a refund of VAT wrongly invoiced and not due, where, under national law, the supply in respect of which the tax has been invoiced is exempt, the risk of loss of tax revenue has been removed and the system for the correction of invoices provided for under national law is inapplicable?

2. Do the common system of VAT and the principles of neutrality, effectiveness and equal treatment preclude the refusal by a revenue authority, on the basis of a provision of national law transposing Article 203 of Directive 2006/112, to refund to a taxable person the VAT which that person has entered on an invoice where that tax is not due because the supply is exempt but was invoiced, accounted for and paid wrongly, and where the customer under the supply has already been refused, by a final tax adjustment notice, the right to deduct the input VAT in respect of the same supply on the ground that the VAT was invoiced improperly by the supplier?

3. Can a taxable person rely directly on the principles governing the common system of VAT and, more specifically, the principles of the neutrality of VAT and effectiveness, in order to contest a rule of national law or its application by the tax authorities and the courts, or the absence of such a rule, in breach of those principles?'

Consideration of the questions referred

The first and second questions

21 By its first and second questions, which it is appropriate to consider together, the referring court asks, in essence, whether the principle of the neutrality of VAT, as given specific definition by the case-law relating to Article 203 of Directive 2006/112, must be interpreted as precluding a tax authority from refusing, on the basis of a provision of national law intended to transpose that article, the supplier of an exempt supply the refund of VAT invoiced in error to a customer, on the ground that the supplier had not corrected the incorrect invoice, in circumstances where that authority had definitively refused the customer the right to deduct that VAT and such definitive refusal results in the system for correction provided for under national law no longer being applicable.

22 In order to answer those questions, it should first be noted that Article 203 of Directive 2006/112 provides that any person who enters VAT on an invoice is liable to pay the tax entered on the invoice.

23 According to the case-law of the Court of Justice, those persons are liable to pay the VAT entered on an invoice independently of any obligation to pay it on account there being a transaction subject to VAT (see Case C-566/07 *Stadeco* [2009] ECR I-5295, paragraph 26 and the case-law cited, and Case C-642/11 *Stroy trans* [2013] ECR, paragraph 29).

24 In providing that the VAT entered on an invoice is payable, Article 203 of Directive 2006/112 seeks to eliminate the risk of loss of tax revenue which the right of deduction provided for in Article 167 et seq. of that directive might entail (see, to that effect, *Stadeco*, paragraph 28, and *Stroy trans* , paragraph 32). It is apparent from the order for reference that, since the tax authority had definitively refused the recipient of the invoice at issue the right of deduction, such a risk does not exist in the case in the main proceedings.

25 Secondly, as regards the refund of VAT invoiced in error, it should be noted that Directive 2006/112 does not contain any provisions relating to the adjustment, by the issuer of the invoice, of VAT that has been invoiced improperly and that, in those circumstances, it is in principle for the Member States to lay down the conditions in which improperly invoiced VAT may be adjusted (see, to that effect, Case C-454/98 *Schmeink & Cofreth and Strobel* [2000] ECR I-6973, paragraphs 48 and 49, and *Stadeco*, paragraph 35).

26 The Court has held that, in order to ensure the neutrality of VAT, it is for the Member States to provide, in their domestic legal systems, for the possibility of adjusting any tax improperly invoiced where the person who issued the invoice shows that he acted in good faith (see Case C-342/87 *Genius* [1989] ECR 4227, paragraph 18, and *Stadeco*, paragraph 36).

27 However, where the issuer of the invoice has, in sufficient time, wholly eliminated the risk of any loss of tax revenue, the principle of the neutrality of VAT requires that VAT which has been improperly invoiced can be corrected without such adjustment being made conditional by the Member States upon the good faith of the issuer of the relevant invoice. The adjustment cannot be dependent upon the discretion of the tax authority (see *Schmeink & Cofreth and Strobel*, paragraphs 58 and 68, and *Stadeco*, paragraphs 37 and 38).

28 Thirdly, it should be borne in mind that the Member States may indeed adopt measures in order to ensure the correct levying and collection of the tax and for the prevention of fraud (see *Stadeco*, paragraph 39). In particular, the condition that an incorrect invoice must be corrected before a refund of the VAT invoiced in error can be obtained can, in principle, ensure the elimination of the risk of loss of tax revenue (see *Stadeco*, paragraph 42).

29 None the less, the measures must not go further than is necessary to attain the objectives

thereby pursued and may not, therefore, be used in such a way that they would have the effect of undermining the neutrality of VAT, which is a fundamental principle of the common system of VAT established by the relevant European Union law (see *Stadeco*, paragraph 39, and the case-law cited).

30 Consequently, if the refund of the VAT becomes impossible or excessively difficult as a result of the conditions under which applications for tax refunds may be made, the principle of neutrality and the principle of effectiveness may require that the Member States provide for the instruments and the detailed procedural rules necessary to enable the taxable person to recover the improperly invoiced tax (see *Stadeco*, paragraph 40, and the case-law cited).

31 With regard to the case in the main proceedings, it is apparent from the order for reference that Bulgarian law provides, in principle, for the possibility of obtaining a refund of VAT invoiced in error, but makes the exercise of that right conditional on the prior correction of the incorrect invoice. As pointed out in paragraph 28 of this judgment, such a requirement can ensure the elimination of the risk of loss of tax revenue.

32 However, it is also apparent from the order for reference that, pursuant to applicable national law, once the tax authority had definitively refused the recipient of the invoice the right to deduct the amount of VAT entered on it, the possibility of correcting the invoice at issue was no longer available to Rusedespred.

33 Furthermore, as the referring court observes, since the tax authority had definitively refused the recipient of the invoice at issue the right of deduction, the risk of loss of tax linked to the exercise of the right was completely eliminated.

34 In such circumstances, it must be held that making the adjustment of the VAT entered in error on an invoice subject to the condition that that invoice be corrected, a condition that is impossible to satisfy, goes further than is necessary to achieve the objective pursued by Article 203 of Directive 2006/112 of eliminating the risk of loss of tax revenue.

35 In the light of all of the foregoing, the answer to the first and second questions is that the principle of the neutrality of VAT, as given specific definition by the case-law relating to Article 203 of Directive 2006/112, must be interpreted as precluding a tax authority from refusing, on the basis of a provision of national law intended to transpose that article, the supplier of an exempt supply the refund of VAT invoiced in error to a customer, on the ground that the supplier had not corrected the incorrect invoice, in circumstances where that authority had definitively refused the customer the right to deduct that VAT and such definitive refusal results in the system for correction provided for under national law no longer being applicable.

The third question

36 By its third question, the referring court asks, in essence, whether the principle of the neutrality of VAT, as given specific definition by the case-law relating to Article 203 of Directive 2006/112, may be relied on by a taxable person in order to contest a provision of national law that makes the refund of VAT invoiced in error conditional on the correction of the incorrect invoice, in circumstances where the right to deduct that VAT has definitively been refused and such definitive refusal results in the system for correction provided for under national law no longer being applicable.

37 A preliminary point to note is that the Court has consistently held that when national courts apply domestic law they are bound to interpret that law, so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the

directive and, consequently, comply with the third paragraph of Article 288 TFEU. This obligation to interpret national law in conformity with European Union law is inherent in the system of the Treaty on the Functioning of the European Union, since it permits national courts, for the matters within their jurisdiction, to ensure the full effectiveness of European Union law when they determine the disputes before them (see, inter alia, Case C-282/10 *Dominguez* [2012] ECR, paragraph 24, and the case-law cited).

38 So far as concerns the possibility of relying on the principle of the neutrality of VAT against a Member State, it must be noted, first of all, that that principle is a fundamental principle of the common system of VAT as governed, inter alia, by Directive 2006/112 (see to that effect, inter alia, *Stadeco*, paragraph 39, and the case-law cited).

39 Secondly, as is apparent from paragraph 35 of this judgment, the principle of the neutrality of VAT, as given specific definition by the case-law relating to Article 203 of Directive 2006/112, must be interpreted as precluding a tax authority from refusing the supplier of an exempt supply the refund of VAT invoiced in error to a customer, on the ground that the supplier had not corrected the incorrect invoice, in circumstances where that authority had definitively refused the customer the right to deduct that VAT and such definitive refusal results in the system for correction provided for under national law no longer being applicable.

40 According to case-law, the principle of the neutrality of VAT may, if necessary, be relied on by a taxable person against a provision of national law, or the application thereof, which fails to have regard to that principle (see, to that effect, Case C-306/06 *Marks & Spencer* [2008] ECR I-2283, paragraph 34). In circumstances such as those set out in paragraph 35 of this judgment, since the principle of the neutrality of VAT, as given specific definition by the case-law relating to Article 203 of Directive 2006/112, places an unconditional and sufficiently precise obligation on the Member State concerned, it may be relied on against a provision of national law that fails to have regard to that principle.

41 In the light of the foregoing, the answer to the third question is that the principle of the neutrality of VAT, as given specific definition by the case-law relating to Article 203 of Directive 2006/112, may be relied on by a taxable person in order to contest a provision of national law that makes the refund of VAT invoiced in error conditional on the correction of the incorrect invoice, in circumstances where the right to deduct that VAT has definitively been refused and such definitive refusal results in the system for correction provided for under national law no longer being applicable.

Costs

42 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 (Fifth Chamber) hereby rules:

1. **The principle of the neutrality of value added tax, as given specific definition by the case-law relating to Article 203 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, must be interpreted as precluding a tax authority from refusing, on the basis of a provision of national law intended to transpose that article, the supplier of an exempt supply the refund of value added tax invoiced in error to a customer on the ground that the supplier had not corrected the erroneous invoice, in circumstances where that authority had definitively refused the customer the right to deduct that value added tax and such definitive refusal results in the system for correction provided for under national law no longer being applicable.**

2. **The principle of the neutrality of value added tax, as given specific definition by the case-law relating to Article 203 of Directive 2006/112, may be relied on by a taxable person in order to contest a provision of national law that makes the refund of value added tax invoiced in error conditional on the correction of the incorrect invoice, in circumstances where the right to deduct that value added tax has definitively been refused and such definitive refusal results in the system for correction provided for under national law no longer being applicable.**

[Signatures]

* Language of the case: Bulgarian.