JUDGMENT OF THE COURT (Eighth Chamber)

20 June 2013 (*)

(Taxation – VAT –Directive 2006/112/EC– Principles of fiscal neutrality and proportionality – Belated recording in the accounts and declaration of the cancellation of an invoice – Remedying of the omission – Payment of the tax – State budget – No harm suffered – Administrative penalty)

In Case C-259/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Administrativen sad Plovdiv (Bulgaria), made by decision of 15 May 2012, received at the Court on 24 May 2012, in the proceedings

Teritorialna direktsia na Natsionalnata agentsia za prihodite – Plovdiv

v

Rodopi-M 91 OOD,

THE COURT (Eighth Chamber),

composed of E. Jaraši?nas, President of the Chamber, A. Ó Caoimh and C.G. Fernlund (Rapporteur), Judges,

Advocate General: M. Wathelet,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Teritorialna direktsia na Natsionalnata agentsia za prihodite – Plovdiv, by S. Marinov, direktor,

– Rodopi-M 91 OOD, by M. Ekimdzhiev, K. Boncheva, G. Chernicherska and S. Hadzhieva, advokati,

– the European Commission, by C. Soulay 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; ‘the VAT Directive’).

2 The request has been made in proceedings between the Teritorialna direktsia na

Natsionalnata agentsia za prihodite – Plovdiv (Regional Office, Plovdiv, of the National Revenue Agency; ‘the Teritorialna direktsia’) and Rodopi-M 91 OOD (‘Rodopi’) relating to a fine imposed upon that company for the belated recording in the accounts and declaration of the cancellation of an invoice.

Legal context

European Union law

3 Article 184 of the VAT Directive provides:

‘The initial deduction shall be adjusted where it is higher or lower than that to which the taxable person was entitled.’

4 Article 186 of the VAT Directive states:

‘Member States shall lay down the detailed rules for applying Articles 184 and 185.’

5 Article 242 of the VAT Directive is worded as follows:

‘Every taxable person shall keep accounts in sufficient detail for [valued added tax (‘VAT’)] to be applied and its application checked by the tax authorities.’

6 Article 273 of the VAT Directive provides:

‘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.’

Bulgarian law

7 Article 72(1) of the Law on value added tax (Zakon za danak varhu dobavenata stoynost; ‘the ZDDS’) provides:

‘A person registered under this law may exercise his right to deduct input tax in the tax period during which that right has arisen or in one of the 12 subsequent tax periods.’

8 Article 78 of the ZDDS is worded as follows:

‘(1) The person registered shall be obliged to adjust the amount of input tax whose deduction is claimed in the event of a change in the taxable amount, cancellation of a transaction or a change in the type of transaction.

(2) The adjustment shall be effected during the tax period in which the circumstances referred to in paragraph 1 have occurred, by recording the document referred to in Article 115, or the new document referred to in Article 116 by which the correction is made, in the purchase ledger and in the tax return for the corresponding tax period.’

9 Article 112(1) of the ZDDS provides:

‘A tax document for the purpose of this law shall mean:

1. an invoice;

2. a note relating to the invoice;

3. a memorandum.’

10 Article 115 of the ZDDS is worded as follows:

‘(1) In the event of a change in the taxable amount or cancellation of a transaction for which an invoice has been issued, the supplier shall be obliged to draw up a note relating to the invoice.

(2) The note shall be issued within five days following the occurrence of the circumstances referred to in paragraph 1.

(3) In the event of an increase in the taxable amount, a debit note shall be raised; in the event of a reduction in the taxable amount or cancellation of a transaction, a credit note shall be issued.

...’

11 Article 116(1) of the ZDDS provides:

‘Corrections and additions in invoices and notes relating thereto shall not be permitted. Documents containing errors or corrections shall be cancelled and new documents shall be issued.’

12 Article 124(4) of the ZDDS provides:

‘The person registered shall be obliged to show the tax documents received by him in the purchase ledger by no later than the 12th tax period following the period during which they were issued, but without going beyond the last tax period referred to in Article 72(1).’

13 Article 182 of the ZDDS is worded as follows:

‘(1) Where a taxable person does not issue a tax document or fails to show the tax document issued or received in the accounting ledgers for the tax period concerned, thereby resulting in a lower amount of tax being assessed, a fine (in the case of natural persons who are not engaged in trade) or a pecuniary penalty (in the case of legal persons or sole traders) shall be imposed upon him, of an amount equal to the amount of tax not paid and in any event not less than BGN 1 000.

(2) In the event of a breach under paragraph 1, if the taxable person has issued or shown the tax document during the period following the tax period in which that document should have been issued or shown, the fine or pecuniary penalty shall be 25% of the amount of tax not paid, but not less than BGN 250.’

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

14 Rodopi is a Bulgarian company liable to VAT.

15 In the tax period corresponding to the month of December 2009, Rodopi entered in its purchase ledger, and in the return which it submitted, an invoice issued by Moda Shport EOOD dated 30 December 2009. The VAT indicated on the invoice amounts to BGN 161 571.12 (roughly EUR 82 800).

16 That invoice should not have been issued. In accordance with the national legislation, a memorandum dated 15 October 2010 cancelled it.

17 Rodopi did not take account of the memorandum in its accounts or its return for October 2010. It did so for December 2010, rectifying the deduction made in respect of that invoice by payment in full of the amount of VAT initially deducted for the cancelled invoice and of the interest thereon.

18 On 22 February 2011 a notice establishing an administrative offence was issued, in which it is stated, in essence, that the infringement was established by the Teritorialna direktsia in November 2010. On 17 June 2011 the Teritorialna direktsia imposed upon Rodopi a fine equivalent to the amount of VAT stated on the invoice at issue.

19 That penalty was challenged at first instance in the Rayonen sad (district court).

20 Before that court, Rodopi contended that Annex 12 to the Regulation implementing the ZDDS, which requires in the case in point that cancellation of the invoice at issue be entered in the accounts in October 2010, contradicts Article 124(4) of the ZDDS, which provides that the taxable person must enter tax documents received in his purchase ledger no later than during the 12th tax period following the period during which those documents were issued, but in any event before the end of the last tax period in which he may exercise his right of deduction, that is to say 12 months after the period in which that right arose.

21 The Rayonen sad held that the cancellation of the invoice should have been entered by Rodopi in the accounts in October 2010, whereas it was not entered until December 2010. It considered, however, that the decision taken by the Teritorialna direktsia imposing a penalty was vitiated by an infringement of material procedural rules, because it did not comply with the period prescribed by the Zakon za administrativnite narushenia i nakazania (Law on administrative offences and penalties) for drawing up the notice establishing the offence.

22 The Teritorialna direktsia brought an appeal on a point of law before the Administrativen sad Plovdiv (Administrative Court, Plovdiv).

23 Rodopi contends before that court that the fine imposed upon it is contrary to European Union law, and more specifically to the principles of fiscal neutrality and proportionality.

24 According to the Administrativen sad Plovdiv, it is necessary in the case before it to determine whether the penalty imposed upon Rodopi on the ground that it declared the cancellation of the invoice at issue belatedly is consistent with the principles of neutrality and proportionality, given that Rodopi paid the tax together with the interest thereon.

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

‘(1) Does the principle of fiscal neutrality permit a Member State to impose a penalty for failure to show cancellation of an invoice on time even though that cancellation is later shown in the accounts and the person concerned has paid the tax resulting from cancellation plus the interest thereon?

Are the following circumstances of significance in connection with the first question:

– the period within which cancellation of the invoice should supposedly have been shown is 14 days from the end of the calendar month in which the cancellation took place;

– cancellation of the invoice was in fact shown one month after the end of the period within which cancellation should supposedly have taken place;

– the VAT owed plus the interest thereon was remitted to the State budget?

(2) Do Articles 242 and 273 of [the VAT Directive] permit the Member States to impose a fine upon taxable persons who have allegedly failed to fulfil on time their duty to show circumstances in their accounts that are of significance to the calculation of VAT where that fine amounts to the VAT not paid on time if that omission is later remedied and the tax owed is paid in full plus the interest thereon?

(3) Is significance to be attributed to the fact that the State budget has not been harmed as the person concerned later showed cancellation of the invoice and paid all of the tax plus the interest thereon?

(4) Does the imposition of a fine in the full amount of the tax already paid with interest thereon contravene the principle of proportionality?'

Consideration of the questions referred

Admissibility

26 The Teritorialna direktsia submits that the request for a preliminary ruling is inadmissible, on the ground that it is irrelevant to the outcome of the main proceedings as only answers to questions relating to the facts are of interest for the outcome of those proceedings.

27 In accordance with settled case-law, the Court can, however, decline to rule on a request for a preliminary ruling from a national court only where it is quite obvious that the interpretation of European Union law that is sought bears no relation to the facts of the main action or to its subject-matter, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (Case C-11/07 *Eckelkamp and Others* [2008] ECR I-6845, paragraph 28 and the case-law cited).

28 It is clear that that is not the case here. The interpretation of the principles of fiscal neutrality and proportionality and of Articles 242 and 273 of the VAT Directive that is sought is directly connected with the subject-matter of the main proceedings, the genuineness of which appears incontestable. Furthermore, the order for reference contains sufficient factual and legal material for the Court to be able to give a useful answer to the questions submitted to it. The request for a preliminary ruling must therefore be declared admissible.

Substance

29 By its questions, which it is appropriate to consider together, the referring court asks in essence whether the principles of fiscal neutrality and proportionality and Articles 242 and 273 of the VAT Directive must be interpreted as precluding the tax authorities of a Member State from imposing upon a taxable person who has not fulfilled within the period prescribed by national legislation his obligation to record in the accounts and to declare matters affecting the calculation of the VAT for which he is liable a fine equal to the amount of the VAT not paid within that period where the taxable person has subsequently remedied the omission and paid all the tax due, together with interest.

30 In accordance with Article 242 of the VAT Directive, every taxable person is required to keep accounts in sufficient detail, in order for VAT to be applied and its application to be checked by the tax authorities. Also, under the first paragraph of Article 273 of the VAT Directive, the Member States may impose obligations other than those prescribed by the directive if they consider them necessary to ensure the correct collection of VAT and to prevent evasion.

31 The VAT Directive does not lay down expressly a system of penalties in the event of infringement of the obligations referred to in that directive which are owed by taxable persons. However, it is settled case-law that, in the absence of harmonisation of European Union legislation in the field of the penalties applicable in cases where conditions laid down by arrangements under such legislation are not complied with, Member States retain the power to choose the penalties which seem to them to be appropriate. They must, however, exercise that power in accordance with European Union law and its general principles (see, to this effect, Case C-263/11 *R?dlihs* [2012] ECR, paragraph 44 and the case-law cited).

32 Thus, the penalties which the Member States may adopt in order to ensure the correct collection of VAT and to prevent evasion, and in particular in order to ensure that taxable persons comply with their obligations regarding rectification of their accounts following cancellation of an invoice on the basis of which they have made a deduction, cannot, in the first place, undermine the neutrality of VAT, which is a fundamental principle of the common system of VAT and prevents economic operators carrying out the same transactions from being treated differently in relation to the levying of VAT (see, to this effect, Case C-188/09 *Profaktor Kulesza, Frankowski, Jó?wiak, Or?owski* [2010] ECR I-7639, paragraph 26 and the case-law cited, and Case C-500/10 *Belvedere Costruzioni* [2012] ECR, paragraph 22).

33 The system of adjustment of deductions is an essential element of the system established by the VAT Directive in that its purpose is to ensure the accuracy of deductions and hence the neutrality of the tax burden (Case C-184/04 *Uudenkaupungin kaupunki* [2006] ECR I-3039, paragraph 26).

34 In the present instance, it is apparent from the documents submitted to the Court that, by encouraging taxable persons to rectify the amount of tax payable as soon as possible where a transaction which formed the basis for a deduction has been cancelled, the penalty at issue in the main proceedings is designed to ensure the correct collection of tax, in particular the correctness of deductions, and to prevent evasion, without in any way undermining the principle of the right of deduction.

35 Furthermore, as the Commission has observed, first, a taxable person committing an irregularity such as that at issue in the main proceedings is, with regard to the objective of ensuring the correct collection of VAT and preventing evasion, in a different situation from that of a taxable person who has complied with his accounting obligations.

36 Second, the fine at issue in the main proceedings is not imposed on account of any

transaction, but as a result of belated rectification by the taxable person of a deduction which he has made and which has ceased to have a basis. A charge resulting in double taxation contrary to the principle of fiscal neutrality cannot therefore be considered to be involved (see, to this effect and by analogy, Case C-155/01 *Cookies World* [2003] ECR I-8785, paragraph 60, and Case C-502/07 *K-1* [2009] ECR I-161, paragraphs 17 to 19).

37 It follows from the foregoing that the principle of fiscal neutrality does not preclude a fine such as that at issue in the main proceedings from being imposed in circumstances such as those set out in paragraph 29 of the present judgment.

38 In the second place, the penalties referred to in paragraph 32 of the present judgment must not go beyond what is necessary to attain the objectives of ensuring the correct collection of tax and preventing evasion. In order to assess whether a penalty is consistent with the principle of proportionality, account must be taken inter alia of the nature and the degree of seriousness of the infringement which the penalty seeks to sanction and of the means of establishing the amount of the penalty (see *R?dlihs*, paragraphs 46 and 47 and the case-law cited).

39 It is, however, for the national court to determine whether the amount of the penalty goes beyond what is necessary to attain the objectives stated in the previous paragraph.

40 As regards the means of establishing the penalty at issue, it is to be noted that the penalty as prescribed in Article 182(1) and (2) of the ZDDS is graduated in amount. If the rectification occurs with just one month’s delay, the fine is only 25% of the amount of VAT payable. It is only if the delay exceeds the period of one month that the fine is increased to 100% of the amount of VAT payable. Such a penalty is therefore liable to encourage taxable persons to adjust as rapidly as possible deductions which have been made but no longer have a basis and thus to achieve the objective of ensuring the correct collection of tax.

41 Furthermore, it is for the national court to verify whether the belated declaration of the cancellation of the invoice at issue is tainted by the evasion of VAT. It is settled case-law that European Union law cannot be relied on for abusive or fraudulent ends. Similarly, the application of European Union legislation cannot be extended to cover transactions carried out for the purpose of wrongfully obtaining advantages provided for by European Union law (see Case C-146/05 *Collée* [2007] ECR I-7861, paragraph 38 and the case-law cited).

42 However, late payment of VAT cannot, per se, be equated with evasion (see Case C-284/11 *EMS-Bulgaria Transport* [2012] ECR, paragraph 74 and the case-law cited.

43 In the light of all the foregoing considerations, the answer to the questions referred is that the principle of fiscal neutrality does not preclude the tax authorities of a Member State from imposing upon a taxable person who has not fulfilled within the period prescribed by national legislation his obligation to record in the accounts and to declare matters affecting the calculation of the VAT for which he is liable a fine equal to the amount of the VAT not paid within that period where the taxable person has subsequently remedied the omission and paid all the tax due, together with interest. It is for the national court to determine, in view of Articles 242 and 273 of the VAT Directive, whether in the light of the circumstances of the main proceedings – in particular the period within which the irregularity was rectified, the seriousness of that irregularity, and the presence of any evasion or any circumvention of the applicable legislation that is attributable to the taxable person – the amount of the penalty imposed goes beyond what is necessary to attain the objectives of ensuring the correct collection of tax and preventing evasion.

Costs

44 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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 (Eighth Chamber) hereby rules:

The principle of fiscal neutrality does not preclude the tax authorities of a Member State from imposing upon a taxable person who has not fulfilled within the period prescribed by national legislation his obligation to record in the accounts and to declare matters affecting the calculation of the value added tax for which he is liable a fine equal to the amount of the value added tax not paid within that period where the taxable person has subsequently remedied the omission and paid all the tax due, together with interest. It is for the national court to determine, in view of Articles 242 and 273 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, whether in the light of the circumstances of the main proceedings – in particular the period within which the irregularity was rectified, the seriousness of that irregularity, and the presence of any evasion or any circumvention of the applicable legislation that is attributable to the taxable person – the amount of the penalty imposed goes beyond what is necessary to attain the objectives of ensuring the correct collection of tax and preventing evasion.

[Signatures]

* Language of the case: Bulgarian.