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Provisional text

JUDGMENT OF THE COURT (Ninth Chamber)

9 February 2017 (*)

(Reference for a preliminary ruling — VAT — Directive 2006/112/EC — Articles 131 and 138 — Preconditions for the exemption of an intra-Community supply — VAT Information Exchange System (VIES) — Purchaser's failure to register — Refusal to grant the exemption — Whether permissible)

In Case C?21/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunal Arbitral Tributário (Centro de Arbitragem Administrativa) (Tax Arbitration Tribunal (Centre for Administrative Arbitration), Portugal), made by decision of 30 November 2015, received at the Court on 15 January 2016, in the proceedings

Euro Tyre BV — Sucursal em Portugal

v

Autoridade Tributária e Aduaneira,

THE COURT (Ninth Chamber),

composed of E. Juhász, President of the Chamber, K. Jürimäe (Rapporteur) and C. Lycourgos, Judges,

Advocate General: P. Mengozzi,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Portuguese Government, by L. Inez Fernandes, R. Campos Laires and M. Figueiredo, acting as Agents,

– the Polish Government, by B. Majczyna, acting as Agent,

– the European Commission, by L. Lozano Palacios and G. Braga da Cruz, 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 Article 131 and Article 138(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 also of the principle of proportionality.

2 The request was made in the course of proceedings between Euro Tyre BV — Sucursal em Portugal (‘Euro Tyre’) and the Autoridade Tributária e Aduaneira (Tax and Customs Authority, Portugal) in relation of that authority’s refusal to exempt from value added tax (VAT) several transactions which Euro Tyre has classified as intra-Community supplies of goods.

Legal context

European Union law

The VAT Directive

3 Under Article 9(1) of the VAT Directive, ‘taxable person’ means ‘any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity’. ‘Economic activity’ is defined, in that provision, as all activities of producers, traders and persons supplying services including mining and agricultural activities and activities of the professions. That provision states that, in particular, the exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis is also to be considered an economic activity.

4 According to Article 131 of that directive:

‘The exemptions provided for in Chapters 2 to 9 shall apply without prejudice to other Community provisions and in accordance with conditions which the Member States shall lay down for the purposes of ensuring the correct and straightforward application of those exemptions and of preventing any possible evasion, avoidance or abuse.’

5 Article 138(1) of that directive provides as follows:

‘Member States shall exempt the supply of goods dispatched or transported to a destination outside their respective territory but within the Community, by or on behalf of the vendor or the person acquiring the goods, for another taxable person, or for a non-taxable legal person acting as such in a Member State other than that in which dispatch or transport of the goods began.’

6 Article 213(1) of the same directive provides:

‘Every taxable person shall state when his activity as a taxable person commences, changes or ceases.

Member States shall allow, and may require, the statement to be made by electronic means, in accordance with conditions which they lay down.’

7 Article 214(1) of the VAT Directive provides:

‘Member States shall take the measures necessary to ensure that the following persons are identified by means of an individual number:

(a) every taxable person, with the exception of those referred to in Article 9(2), who within their respective territory carries out supplies of goods or services in respect of which VAT is deductible, other than supplies of goods or services in respect of which VAT is payable solely by the customer or the person for whom the goods or services are intended, in accordance with Articles 194 to 197 and Article 199;

(b) every taxable person, or non-taxable legal person, who makes intra-Community acquisitions of goods subject to VAT pursuant to Article 2(1)(b) and every taxable person, or non-taxable legal person, who exercises the option under Article 3(3) of making their intra-Community acquisitions subject to VAT;

…’

Regulations (EC) No 1798/2003 and (EU) No 904/2010

8 Article 27(1) of Council Regulation (EC) No 1798/2003 of 7 October 2003 on administrative cooperation in the field of value-added tax and repealing Regulation (EEC) No 218/92 (OJ 2003 L 264, p. 1) provides:

‘Each Member State shall maintain an electronic database containing a register of persons to whom VAT identification numbers have been issued in that Member State.’

9 Regulation No 1798/2003 was repealed with effect from 1 January 2012 by Council Regulation (EU) No 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax (OJ 2010 L 268, p. 1).

10 Article 17(1) of Regulation No 904/2010 provides:

‘Each Member State shall store in an electronic system the following information:

(a) information which it collects pursuant to Chapter 6 of Title XI of [the VAT Directive];

(b) data on the identity, activity, legal form and address of persons to whom it has issued a VAT identification number, collected pursuant to Article 213 of [the VAT Directive], as well as the date on which that number was issued;

…’

Portuguese Law

11 The Regime do IVA das Transações Intracomunitárias (Intra-Community Trade VAT Rules; ‘RITI’) transposes the rules on intra-Community transactions arising from the VAT Directive into Portuguese law.

12 According to Article 14(a) of the RITI, the following are exempt from VAT:

‘Supplies of goods by a taxable person referred to in Article 2(1)(a), dispatched or transported by or on behalf of the vendor or the person acquiring the goods, from the national territory to another Member State, to the person acquiring the goods, where the latter is a natural or legal person registered for value added tax in another Member State, who has used the respective tax identification number to make the purchase and who comes under a system of taxation on intra-Community acquisitions of goods.’

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

13 Euro Tyre is a Portuguese branch of a company incorporated under Netherlands law, Euro Tyre BV. It is engaged in the import, export and marketing of tyres of various brands for retailers based in Portugal and Spain. In the Spanish market, it sells, in part, directly and, in part, through a distributor, namely Euro Tyre Distribución de Neumáticos SL.

14 The dispute in the main proceedings concerns several sales made during the period between 2010 and 2012 to Euro Tyre Distribución de Neumáticos. At the time of those sales, the latter was registered as a taxable person for the purposes of VAT in Spain. However, it was not yet subject, in that Member State, to the system of taxation on intra-Community acquisitions or registered in the VAT Information Exchange System (the 'VIES system'). It was not until 19 March 2013 that the Spanish tax authorities granted it the status of intra-Community operator and registered it in that system with effect from 1 July 2012.

15 Euro Tyre declared those sales to be intra-Community supplies and thus exempt under Article 14(a) of the RITI.

16 Following a tax inspection covering the years 2010 to 2012, however, the Inspeção Tributária (Tax Inspectorate, Portugal) considered that the conditions for the exemption provided for in Article 14(a) of the RITI were not met, since, at the time of the sales in question, Euro Tyre Distribución de Neumáticos, was neither registered for intra-Community transactions in Spain nor registered in the VIES system.

17 Consequently, the Tax and Customs Authority made adjustments to the VAT due from Euro Tyre for the years 2010 to 2012 together with interest for late payment.

18 Euro Tyre contested those adjustments. After its administrative action and appeal were dismissed, that company brought an action before the referring court. Before that court, it claims that the condition laid down in Article 14(a) of the RITI, namely that the purchaser must come under a system of taxation on intra-Community acquisitions of goods and be registered in the VIES system, is the result of an incorrect transposition of the VAT Directive. Such a condition does not appear in Article 138 of that directive and is, at most, a formal requirement imposed only by the Portuguese Republic.

19 The referring court asks whether the exemption for intra-Community supplies provided for in Article 138(1) of the VAT Directive may be subject to the condition that the purchaser whose seat is in a Member State other than that in which dispatch or transport of the goods began is registered in that first State for intra-Community transactions and appears in the VIES system.

20 In that regard, the referring court notes that since June 2010 Euro Tyre Distribución de Neumáticos has been registered for VAT in Spain for domestic transactions under an identification number which appeared on all invoices relating to sales in question and in the accompanying summary statements. By contrast, at the time of those sales, that company, which was subject to VAT, did not come under a system of taxation on intra-Community acquisitions and was not registered in the VIES system. Euro Tyre was aware of this fact, but expected the Spanish tax authorities to grant, with retroactive effect, Euro Tyre Distribución de Neumáticos the status of intra-Community operator. Furthermore, the Portuguese tax authorities considered that there was neither tax evasion nor avoidance on the part of Euro Tyre.

21 It is in those circumstances that the Tribunal Arbitral Tributário (Centro de Arbitragem Administrativa) (Tax Arbitration Tribunal (Centre for Administrative Arbitration), Portugal) decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must Article 131 and Article 138(1) of Directive 2006/112 be interpreted, in respect of an intra-Community supply of goods, as precluding the tax authority of a Member State from refusing to grant VAT exemption to a vendor domiciled in that Member State on the ground that the purchaser, domiciled in another Member State, is not registered in the VIES database nor is

subject in that country to a system of taxation on intra-Community acquisitions of goods, although he has, at the time of the transactions, a valid identification number for the purposes of VAT in that other Member State, which has been used in the transaction invoices, and the cumulative material conditions for an intra-Community supply have been fulfilled, namely, that the right to dispose of the goods as owner has been transferred to the purchaser and the vendor has established that these goods were dispatched or transported to another Member State and that, after that dispatch or transport, those goods physically left the Member State of departure and were delivered to a taxable purchaser or legal person acting as such in a Member State other than that in which dispatch or transport of the goods began?

(2) Does the principle of proportionality preclude an interpretation of Article 138(1) of Directive No 2006/112/EC to the effect that the benefit of the right to VAT exemption is to be denied in a situation where a vendor, domiciled in a Member State, was aware that the purchaser, domiciled in another Member State, although holding a valid identification number for the purposes of VAT in that other Member State, was not registered in the VIES database nor came under a system of taxation on intra-Community acquisitions of goods, but was convinced that that purchaser would be retroactively registered as an intra-Community operator?'

Consideration of the questions referred

22 By its questions, which should be considered together, the referring court asks, in essence, whether Article 131 and Article 138(1) of the VAT Directive must be interpreted as precluding the tax authority of a Member State refusing to exempt intra-Community supplies from VAT on the ground that, at the time of that supply, the purchaser, domiciled in the territory of the Member State of destination and who was in possession of a valid identification number for the purposes of VAT in that Member State, is neither registered in the VIES system nor comes under a system of taxation on intra-Community acquisitions of goods. The referring court also asks whether Article 138(1) of the VAT Directive, interpreted in the light of the principle of proportionality, precludes such refusal where the vendor was aware of the circumstances of the situation of the purchaser with regard to the application of VAT and was convinced that subsequently the purchaser would be registered as an intra-Community operator with retroactive effect.

23 It must be borne in mind at the outset that Article 138(1) of the VAT Directive requires Member States to exempt from VAT supplies of goods which satisfy the conditions listed in that article (judgment of 9 October 2014, *Traum*, C?492/13, EU:C:2014:2267, paragraph 46).

24 Under Article 138(1) of the VAT Directive, Member States are to exempt supplies of goods dispatched or transported to a destination outside their respective territories but within the European Union, by or on behalf of the vendor or the person acquiring the goods, for another taxable person, or for a non-taxable legal person acting as such in a Member State other than that in which dispatch or transport of the goods began.

25 It is settled case-law that the VAT exemption in respect of the intra-Community supply of goods becomes applicable only when the right to dispose of the goods as owner has been transferred to the purchaser, the vendor establishes that those goods have been dispatched or transported to another Member State and, as a result of that dispatch or that transport, they have physically left the territory of the Member State of supply (judgment of 6 September 2012, *Mecsek-Gabona*, C?273/11, EU:C:2012:547, paragraph 31 and the case-law cited).

26 In the present case, it follows from the information contained in the order for reference that the questions referred are based on the premiss that the material conditions for an intra-Community supply within the meaning of Article 138(1) of the VAT Directive, as set out in paragraphs 24 and 25 above, were fulfilled. The exemption from VAT was refused on the sole

ground that the purchaser was neither registered at the time of the sales at issue in the main proceedings for intra-Community transactions in Spain nor entered in the VIES system. The purchaser possessed, in that Member State, only a VAT identification number valid for transactions within that Member State and not for intra-Community transactions.

27 In that regard, it should be noted that, it is true that, under the transitional arrangements for tax applicable to trade within the European Union, the identification of taxable persons subject to VAT by means of an individual number also facilitates the determination of the Member State in which the final consumption of the goods delivered takes place (judgments of 6 September 2012, *Mecsek-Gabona*, C?273/11, EU:C:2012:547, paragraph 57, and 14 March 2013, *Ablessio*, C?527/11, EU:C:2013:168, paragraph 19). Article 214(1)(b) of the VAT Directive requires Member States to take all measures necessary to identify by means of an individual number, in particular, every taxable person or non-taxable legal person who makes intra-Community acquisitions.

28 The registration of taxable persons carrying out intra-Community transactions in the VIES system is also of particular importance in that context. The purpose of that system is to enable operators to obtain confirmation of the VAT identification number of their trading partners and the national tax administrations to monitor intra-Community transactions and to detect any irregularities. That system thus complies with the requirement, laid down in Article 27 of Regulation No 1798/2003 and, as from 1 January 2012, Article 17 of Regulation No 904/2010, that the Member States maintain an electronic database containing a register of persons to whom they have issued VAT identification numbers.

29 Neither Article 138(1) of the VAT Directive nor the Court's case-law, however, mentions — as one of the substantive conditions, listed exhaustively, for an intra-Community supply — the obligation for the purchaser to have a VAT identification number (see, to that effect, judgment of 6 September 2012, *Mecsek-Gabona*, C?273/11, EU:C:2012:547, paragraph 59) nor, *a fortiori*, the obligation for the purchaser to be registered for the purpose of carrying out intra-Community transactions and to be registered in the VIES system.

30 Contrary to what the Portuguese and Polish Governments argued, in essence, before the Court, such obligations cannot be deduced from the condition that the purchaser must be a taxable person acting as such in a Member State other than that in which dispatch or transport of the goods began (see, by analogy, judgment of 27 September 2012, *VSTR*, C?587/10, EU:C:2012:592, paragraph 40).

31 The definition of 'taxable person' set out in Article 9(1) of the VAT Directive simply covers a person who independently carries out in any place an economic activity, whatever the purpose or results of that activity, and does not make the capacity of taxable person either subject to that person is possessing a VAT identification number (see, to that effect, judgment of 27 September 2012, *VSTR*, C?587/10, EU:C:2012:592, paragraph 49 and the case-law cited), specific for carrying out intra-Community transactions, or subject to that person is being registered in the VIES system. It follows, moreover, from the Court's case-law that a taxable person is acting in that capacity when performing transactions in the course of his taxable activity (see, to that effect, judgment of 27 September 2012, *VSTR*, C?587/10, EU:C:2012:592, paragraph 49 and the case-law cited).

32 Accordingly, neither the acquisition by the purchaser of a VAT identification number valid for the purpose of carrying out intra-Community transactions nor the inclusion of that number in the VIES system constitute substantive conditions for exemption from VAT of an intra-Community supply. Those are merely formal requirements which cannot undermine the vendor's entitlement to exemption from VAT where the substantive conditions for an intra-Community supply are satisfied (see, by analogy, judgments of 6 September 2012, *Mecsek-Gabona*, C?273/11, EU:C:2012:547,

paragraph 60; of 27 September 2012, *VSTR*, C?587/10, EU:C:2012:592, paragraph 51, and of 20 October 2016, *Plöckl*, C?24/15, EU:C:2016:791, paragraph 40).

33 In that connection, it must be recalled that, in the absence of any specific provision in the VAT Directive as to the evidence that taxable persons are required to provide in order to be granted an exemption from VAT, it is for the Member States to lay down, in accordance with Article 131 of that directive, the conditions in which intra-Community supplies of goods will be exempt, with a view to ensuring the correct and straightforward application of those exemptions and of preventing any possible evasion, avoidance or abuse. However, when they exercise their powers, Member States must observe the general principles of law which form part of the European Union legal order (see judgments of 6 September 2012, *Mecsek-Gabona*, C?273/11, EU:C:2012:547, paragraph 36 and the case-law cited, and of 9 October 2014, *Traum*, C?492/13, EU:C:2014:2267, paragraph 27).

34 According to the Court's case-law, such a national measure goes further than is necessary to ensure the correct collection of the tax if, in essence, it makes the right of exemption from VAT subject to compliance with formal obligations, without any account being taken of the substantive requirements and, in particular, without any consideration being given as to whether those requirements have been satisfied. Transactions should be taxed taking into account their objective characteristics (judgment of 20 October 2016, *Plöckl*, C?24/15, EU:C:2016:791, paragraph 37 and the case-law cited).

35 As regards the objective characteristics of an intra-Community supply, it follows from paragraphs 23 to 25 above that, if a supply of goods satisfies the conditions laid down in Article 138(1) of the VAT Directive, that supply is exempt from VAT (see, to that effect, judgment of 20 October 2016, *Plöckl*, C?24/15, EU:C:2016:791, paragraph 37 and the case-law cited).

36 Accordingly, the principle of fiscal neutrality requires that an exemption from VAT be allowed if the substantive conditions are satisfied, even if the taxable person has failed to comply with some of the formal requirements (judgment of 20 October 2016, *Plöckl*, C?24/15, EU:C:2016:791, paragraph 39).

37 Accordingly, the authorities of a Member State cannot in principle refuse to grant an exemption from VAT for an intra-Community supply merely on the ground that the recipient is neither registered in the VIES system nor comes under a system of taxation on intra-Community acquisitions.

38 It must be noted that, according to Court's case-law, however, there are only two situations in which the failure to meet a formal requirement may result in the loss of entitlement to an exemption from VAT (see, to that effect, judgment of 20 October 2016, *Plöckl*, C?24/15, EU:C:2016:791, paragraph 43).

39 In the first place, the principle of fiscal neutrality cannot be invoked for the purposes of an exemption from VAT by a taxable person who has intentionally participated in tax evasion which has jeopardised the operation of the common system of VAT (see judgment of 20 October 2016, *Plöckl*, C?24/15, EU:C:2016:791, paragraph 44 and the case-law cited).

40 It must be note pointed out that, according to the Court's case-law, it is not contrary to EU law to require an operator to act in good faith and to take every step which could reasonably be asked of it to satisfy itself that the transaction which it is carrying out does not result in its participation in tax evasion (judgment of 6 September 2012, Mecsek-Gabona, C?273/11, EU:C:2012:547, paragraph 48 and the case-law cited). If the taxable person concerned knew or should have known that the transaction which it had carried out was part of a fraud committed by

the purchaser and that the taxable person had not taken every step which could reasonably be asked of it to prevent that fraud from being committed, that person would have to be refused a VAT exemption (judgment of 6 September 2012, Mecsek-Gabona, C?273/11, EU:C:2012:547, paragraph 54).

41 In the present case, the sole fact, referred to by the referring court, that the vendor, on the one hand, was aware of the fact that at the time of the transactions the purchaser was neither registered in the VIES system nor comes under a system of taxation on intra-Community acquisitions and, on the other hand, believed that the purchaser would subsequently be registered as an intra-Community operator with retroactive effect, cannot be grounds for the national tax authority to refuse to grant an exemption from VAT. It is clear from the documents submitted by the referring court and noted in paragraph 20 above that there was neither tax evasion nor tax avoidance on the part of Euro Tyre.

42 In the second place, non-compliance with a formal requirement may lead to the refusal of an exemption from VAT if that non-compliance would effectively prevent the production of conclusive evidence that the substantive requirements have been satisfied (see judgment of 20 October 2016, *Plöckl*, C?24/15, EU:C:2016:791, paragraph 46 and cited case-law).

43 In the present case, as is apparent in essence from paragraph 26 above, the questions referred are based on the premiss that the material conditions for an intra-Community supply within the meaning of Article 138(1) of the VAT Directive have been fulfilled. Moreover, nothing in the file submitted to the Court indicates that the infringement of the formal requirement at issue in the main proceedings prevented the conclusion being reached that those conditions were indeed fulfilled. It is, however, for the referring court to carry out the necessary verifications in that regard.

44 In the light of the foregoing considerations, the answer to the questions referred must be that Article 131 and Article 138(1) of the VAT Directive must be interpreted as precluding the tax authority of a Member State from refusing to exempt an intra-Community supply from value added tax on the sole ground that, at the time of that supply, the purchaser domiciled in the territory of the Member State of destination and who was in possession of a valid identification number for the purposes of VAT in that Member State is neither registered in the VIES system nor comes under a system of taxation on intra-Community acquisitions of goods, where there is no sound evidence pointing to the existence of fraud and it is established that the basic conditions of the exemption are fulfilled. In that case, Article 138(1) of the VAT Directive, interpreted in the light of the principle of proportionality, also precludes such refusal where the vendor was aware of the circumstances of the situation of the purchaser with regard to the application of VAT and was convinced that subsequently the purchaser would be registered as an intra-Community operator with retroactive effect.

Costs

45 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 (Ninth Chamber) hereby rules:

Article 131 and Article 138(1) of the Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, must be interpreted as precluding the tax authority of a Member State from refusing to exempt an intra-Community supply from value added tax on the sole ground that, at the time of that supply, the purchaser domiciled in the territory of the Member State of destination and who was in possession of a valid identification number for the purposes of value added tax in that Member State is neither registered in the Value Added Tax Information Exchange System nor comes under a

system of taxation on intra-Community acquisitions of goods, where there is no sound evidence pointing to the existence of fraud and it is established that the basic conditions of the exemption are fulfilled. In that case, Article 138(1) of that directive, interpreted in the light of the principle of proportionality, also precludes such refusal where the vendor was aware of the circumstances of the situation of the purchaser with regard to the application of VAT and was convinced that subsequently the purchaser would be registered as an intra-Community operator with retroactive effect.

[Signatures]

* Language of the case: Portuguese.