

Provisional text

JUDGMENT OF THE COURT (Sixth Chamber)

9 November 2017 (*)

(Reference for a preliminary ruling — Taxation — Value added tax (VAT) — Directive 2006/112/EC — Article 98 — Discretion of the Member States to apply a reduced rate to certain supplies of goods and services — Annexe III, point 1 — Foodstuffs — Pastry goods and cakes — Best-before date or use-by date — Principle of fiscal neutrality)

In Case C-499/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland), made by decision of 16 June 2016, received at the Court on 16 September 2016, in the proceedings

AZ

v

Minister Finansów,

THE COURT (Sixth Chamber),

composed of C.G. Fernlund (Rapporteur), President of the Chamber, S. Rodin and E. Regan, Judges,

Advocate General: Y. Bot,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- AZ, by M. Machciński, adwokat,
- the Polish Government, by B. Majczyna, acting as Agent,
- the Italian Government, by G. Palmieri, acting as Agent, and by E. De Bonis, avvocato dello Stato,
- the European Commission, by M. Owsiany-Hornung and K. Herrmann, 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 98 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') in the light of the principle of fiscal neutrality.

2 The request has been made in proceedings between AZ and the Minister Finansów (Minister for Finance, Poland) concerning two tax rulings by the latter in respect of the rate of value added tax (VAT) applicable to supplies of goods by that company.

Legal context

EU law

3 Recital 4 of the VAT Directive states as follows:

'The attainment of the objective of establishing an internal market presupposes the application in Member States of legislation on turnover taxes that does not distort conditions of competition or hinder the free movement of goods and services. It is therefore necessary to achieve such harmonisation of legislation on turnover taxes by means of a system of value added tax (VAT), such as will eliminate, as far as possible, factors which may distort conditions of competition, whether at national or Community level.'

4 According to recital 7 of that directive:

'The common system of VAT should, even if rates and exemptions are not fully harmonised, result in neutrality in competition, such that within the territory of each Member State similar goods and services bear the same tax burden, whatever the length of the production and distribution chain.'

5 Article 96 of the directive provides:

'Member States shall apply a standard rate of VAT, which shall be fixed by each Member State as a percentage of the taxable amount and which shall be the same for the supply of goods and for the supply of services.'

6 Article 98 of the directive provides:

'1. Member States may apply either one or two reduced rates.

2. The reduced rates shall apply only to supplies of goods or services in the categories set out in Annex III.

...

3. When applying the reduced rates provided for in paragraph 1 to categories of goods, Member States may use the Combined Nomenclature to establish the precise coverage of the category concerned.'

7 Point 1 of Annex III to the VAT Directive includes, inter alia, 'foodstuffs ... for human consumption'.

Polish law

8 It is apparent from Article 41(1) and Article 146a(1) of the Law of 11 March 2004 on tax on goods and services, in the version applicable at the material time (Dz. U. of 2011 No 177, Heading 1054) ('the VAT Law'), that the normal VAT rate was 23% for the period from 1 January 2011 to 31 December 2016.

9 For the same period, the rate applicable to the goods and services listed in Annex 3 to that law was 8%, in accordance with Article 41(2) and Article 146a(2) of that law.

10 Under Heading 32 of that annex the following goods are listed, namely, 'Pastry goods and cakes, fresh whose use-by date, fixed pursuant to separate provisions, does not exceed 45 days or, where those goods are marked pursuant to separate provisions solely by a best-before date, that date likewise does not exceed 45 days.'

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

11 AZ is a Polish company which produces pastry goods and cakes including croissants with various fillings and sweet rolls with various coatings with a use-by date exceeding 45 days.

12 During 2010, AZ's goods were classified as 'Rusks and biscuits; preserved pastry goods and cakes', within the meaning of the national legislation on statistical classification of goods for 2008. However, in 2013, those goods were classified by the Director of the Warsaw Customs Chamber (Poland) under subheading 1905 90 60 of the combined nomenclature in Annex 1 to Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ L 256, p. 1), as amended by Commission Regulation (EU) No 927/2012 of 9 October 2012 (OJ L 304, p. 1) ('the CN'), which corresponds to another classification under the national legislation, namely that of 'Pastry goods and cakes, fresh'.

13 On 14 November 2013, AZ asked the Minister for Finance for a tax ruling in order to determine whether it was entitled to apply the reduced VAT rate of 8% to deliveries of the goods concerned which, although coming under the CN code corresponding to the classification 'Pastry goods and cakes, fresh', have a use-by or best-before date exceeding 45 days. In its application, that company submits that Heading 32 of Annex 3 to the VAT Law inserts, contrary to EU law, a criterion for applying the reduced VAT rate which does not follow from either the VAT Directive or the CN. CN Subheading 1905 90 60 contains no distinction concerning the freshness of the goods, their best-before date or their use-by date.

14 In rulings on 3 December 2013 and 14 January 2014, the Minister for Finance did not uphold the view taken by AZ and held that the Polish legislature could legitimately adopt a criterion for applying the reduced VAT rate at issue.

15 AZ brought an action against those tax rulings before the Wojewódzki Sąd Administracyjny w Warszawie (Regional Administrative Court, Warsaw, Poland). That court dismissed that action, stating that additives in the composition of pastry goods and cakes, such as preservatives which extend shelf life, have an influence on the decision of the average consumer.

16 According to that court, in so far as the EU legislature and the national legislature regarded the use-by date as essential for consumer protection, goods with different use-by dates may reasonably be considered to be dissimilar.

17 That court also noted that AZ had not demonstrated the existence on the market of other specific goods which could be regarded as similar to its goods. Whilst recognising that the criterion of a 45-day shelf life was subjective, in its judgment the court held that the VAT directive did not preclude the application of such a criterion, provided that the principle of fiscal neutrality was not infringed.

18 AZ appealed against that judgment to the referring court.

19 That court states that the sole determining criterion, under the Polish legislation, for the

application of the reduced VAT rate to certain fresh pastries and cakes is their best-before date or their use-by date, namely the criterion related to the 45-day shelf life. After also noting that such a criterion does not stem from EU law, that court asks whether it is capable of distinguishing goods which are sufficiently different to justify the application of different VAT rates, particularly since the court of first instance stated that the EU legislature considers the use-by date of a product to be an essential element of consumer protection, which consequently suffices for differentiating between the goods as far as VAT rates are concerned.

20 In those circumstances, the Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Does the fact of making the rate of taxation for pastry goods and cakes depend solely on the criterion of the ‘use-by date’ and the ‘best-before date’, as in the case of those goods in Article 41(2) and Heading 32 of Annex 3 to the [VAT Law], infringe the principle of VAT neutrality and the prohibition of unequal treatment of goods within the meaning of Article 98(1) and (2) of the [VAT Directive]?’

Consideration of the question referred

21 By its question, the referring court asks the Court, in essence, whether Article 98 of the VAT Directive, read in the light of the principle of fiscal neutrality, must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which makes application of the reduced rate of VAT on fresh pastry goods and cakes depend solely on the criterion of their ‘best-before date’ or their ‘use-by date’.

22 As a preliminary point, it must be recalled that, according to Article 96 of the VAT Directive, the same rate of VAT, that is the standard rate fixed by each Member State, is applicable to supplies of goods and services. By derogation from that principle, the possibility to apply reduced rates of VAT is provided for by virtue of Article 98 thereof. Annex III to that directive lists the categories of supplies of goods and services to which the reduced rates mentioned in Article 98 may apply (judgment of 9 March 2017, *Oxycure Belgium*, C-573/15, EU:C:2017:189, paragraphs 20 and 21).

23 As regards the application of reduced rates of VAT, it is apparent from the Court’s case-law that it is for the Member States, subject to compliance with the principle of fiscal neutrality inherent in the common system of VAT, to determine more precisely the supplies of goods and services included in the categories in Annex III to the VAT Directive to which the reduced rate is to apply (judgment of 11 September 2014, *K*, C-219/13, EU:C:2014:2207, paragraph 23).

24 The possibility of applying the reduced rate of VAT selectively is justified, inter alia, by the fact that, since that rate is the exception, the restriction of its application to concrete and specific aspects of the category of supply in question is consistent with the principle that exemptions or derogations must be interpreted restrictively (judgment of 6 May 2010, *Commission v France*, C-94/09, EU:C:2010:253, paragraph 29).

25 In this regard, it should be noted that Article 98(3) of the VAT Directive provides that Member States may use the CN when applying the reduced rates to categories of goods to establish the precise coverage of the category concerned. However, it must be noted that use of the CN is just one of a number of ways to establish the precise coverage of the category concerned.

26 In the present case, the Polish legislature chose to apply a reduced VAT rate to fresh pastry

goods and cakes with an expiry date set in such a way that shelf life did not exceed 45 days.

27 It is not disputed that those pastries and cakes constitute a limited category of foodstuffs for human consumption, referred to in point 1 of Annex III to the VAT Directive.

28 Thus, in so far as the criterion relating to a certain number of days of shelf life precisely defines the category concerned, it must be found that that selective application of the reduced VAT rate to a concrete and specific aspect of the goods included in one of the categories of Annex III is, in principle, compatible with Article 98 of the VAT Directive.

29 However, in order to answer the question referred by the national court, it must be determined whether national legislation, such as that at issue in the main proceedings, infringes the principle of fiscal neutrality.

30 It follows from settled case-law that that principle precludes similar goods or services which are in competition with each other being treated differently for VAT purposes (judgment of 11 September 2014, *K*, C-219/13, EU:C:2014:2207, paragraph 24 and the case-law cited).

31 As regards the assessment of the similarity of the goods or services concerned, which is ultimately a matter for the national court to determine, it is clear from the Court's case-law that account must be taken primarily of the point of view of an average consumer. Goods or services are similar where they have similar characteristics and meet the same needs from the point of view of consumers, the test being whether their use is comparable, and where the differences between them do not have a significant influence on the decision of the average consumer to use one or other of those goods or services (judgment of 11 September 2014, *K*, C-219/13, EU:C:2014:2207, paragraph 25).

32 It is therefore for the referring court to make a specific assessment whether the fact that the expiry date is fixed in such a way that the shelf life does not exceed 45 days is determinative from the point of view of the average Polish consumer when choosing pastry goods and cakes (see, to that effect, judgment of 11 September 2014, *K*, C-219/13, EU:C:2014:2207, paragraph 33).

33 Thus, it is for the referring court to assess if, on the Polish market, there are pastry goods or cakes whose shelf life does not exceed 45 days but which nevertheless are similar in the eyes of that consumer to pastry goods and cakes which have a best-before date exceeding 45 days, such as those produced by AZ, and which are interchangeable with the latter.

34 If such goods are found to exist, a shelf life of less than 45 days would not be determinative for the average Polish consumer and that consumer's choice might be affected by the application of different VAT rates. In such a situation, the principle of fiscal neutrality would preclude the national provisions at issue in the main proceedings.

35 On the other hand, if the referring court, in the specific assessment which it is to undertake, finds that the reduced VAT rate for pastry goods and cakes with an expiry date fixed so that the shelf life does not exceed 45 days does not have the effect of favouring the sale of such goods over the sale of pastry goods and cakes with an expiry date fixed in such a way that the shelf life exceeds 45 days, it would follow from this that those two categories of pastry goods and cakes are not similar goods in competition with each other (see, to that effect, judgment of 3 May 2001, *Commission v France*, C-481/98, EU:C:2001:237, paragraph 27). In that situation, the principle of fiscal neutrality would not preclude the national provisions at issue in the main proceedings.

36 In the light of all of the foregoing, the answer to the question referred is that Article 98 of the VAT Directive must be interpreted as meaning that it does not preclude — provided that the

principle of fiscal neutrality is complied with, which is for the referring court to ascertain — national legislation, such as that at issue in the main proceedings, which makes the application of the reduced VAT rate to fresh pastry goods and cakes depend solely on the criterion of their ‘best-before date’ or their ‘use-by date.’

Costs

37 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 (Sixth Chamber) hereby rules:

Article 98 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning that it does not preclude — provided that the principle of fiscal neutrality is complied with, which is for the referring court to ascertain — national legislation, such as that at issue in the main proceedings, which makes the application of the reduced VAT rate to fresh pastry goods and cakes depend solely on the criterion of their ‘best-before date’ or their ‘use-by date’.

[Signatures]

* Language of the case: Polish.