Provisional text

JUDGMENT OF THE COURT (Seventh Chamber)

12 September 2018 (*)

(Reference for a preliminary ruling — Taxation — Value added tax (VAT) — Right of deduction — Acquisitions made by a taxpayer declared ‘inactive’ by the tax authorities — Refusal of the right of deduction — Principles of proportionality and neutrality of VAT)

In Case C?69/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Curtea de Apel Bucure?ti (Bucharest Court of Appeal, Romania), made by decision of 16 November 2016, received at the Court on 8 February 2017, in the proceedings

Siemens Gamesa Renewable Energy România SRL, formerly Gamesa Wind România SRL,

v

Agen?ia Na?ional? de Administrare Fiscal? — Direc?ia General? de Solu?ionare a Contesta?iilor,

Agen?ia Na?ional? de Administrare Fiscal? — Direc?ia General? de Administrare a Marilor Contribuabili,

THE COURT (Seventh Chamber),

composed of A. Rosas (Rapporteur), President of the Chamber, C. Toader and A. Prechal, Judges,

Advocate General: P. Mengozzi,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Siemens Gamesa Renewable Energy România SRL, by A. St?noiu and O. Marian, avoca?i,

– the Romanian Government, by H.R. Radu initially, and subsequently by C.-R. Can??r, R.I. Ha?ieganu and L. Li?u, acting as Agents,

– the European Commission, by G.-D. Balan and R. Lyal, 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), as amended by Council Directive 2010/45/EU of 13 July 2010 (OJ 2010 L 189, p. 1) (‘Directive 2006/112’).

2 The request has been made in proceedings between Siemens Gamesa Renewable Energy România SRL, formerly Gamesa Wind România SRL (‘Gamesa’), and the Agen?ia Na?ional? de Administrare Fiscal? — Direc?ia General? de Solu?ionare a Contesta?iilor (National Tax Administration Office — Directorate-General for the settlement of complaints, Romania) and the Agen?ia Na?ional? de Administrare Fiscal? — Direc?ia General? de Administrare a Marilor Contribuabili (National Tax Administration Office — Directorate-General for the Administration of Large-scale Taxpayers, Romania), concerning Gamesa’s right to deduct value added tax (VAT) paid on acquisitions made during a period in which its VAT identification number was inoperative.

Legal context

European Union law

3 The second subparagraph of Article 1(2) of Directive 2006/112, which is included under Title I thereof, entitled ‘Subject matter and scope’, provides as follows:

‘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 Article 9(1) of that directive provides as follows:

‘“Taxable person” shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity.

Any activity of producers, traders or persons supplying services … shall be regarded as “economic activity”. The exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as an economic activity.’

5 Article 167 of that directive provides as follows:

‘A right of deduction shall arise at the time the deductible tax becomes chargeable.’

6 Article 168 of Directive 2006/112, which is set out under Title X thereof, entitled ‘Deductions’, is worded as follows:

‘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;

…’

7 Pursuant to Article 178 of Directive 2006/112:

‘In order to exercise the right of deduction, a taxable person must meet the following conditions:

(a) for the purposes of deductions pursuant to Article 168(a), in respect of the supply of goods or services, he must hold an invoice drawn up in accordance with Sections 3 to 6 of Chapter 3 of

Title XI;

…’

8 Under the first paragraph of Article 179 of that directive:

‘The taxable person shall make the deduction by subtracting from the total amount of VAT due for a given tax period the total amount of VAT in respect of which, during the same period, the right of deduction has arisen and is exercised in accordance with Article 178.’

9 The first subparagraph of Article 213(1) of that directive provides as follows:

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

10 Under Article 214(1) of that directive:

‘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;

…’

11 Under Article 250(1) of Directive 2006/112:

‘Every taxable person shall submit a VAT return setting out all the information needed to calculate the tax that has become chargeable and the deductions to be made including, in so far as is necessary for the establishment of the basis of assessment, the total value of the transactions relating to such tax and deductions and the value of any exempt transactions.’

12 Article 252 of that directive states as follows:

‘1. The VAT return shall be submitted by a deadline to be determined by Member States. That deadline may not be more than two months after the end of each tax period.

2. The tax period shall be set by each Member State at one month, two months or three months.

Member States may, however, set different tax periods provided that those periods do not exceed one year.’

13 Under the first paragraph of Article 273 of that directive:

‘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.’

Romanian Law

14 Article 11(111) of the Legea nr. 571/2003 privind Codul fiscal (Law No 571/2003 establishing the Tax Code), dated 22 December 2003 (*Monitorul Oficial al României*, Part I, No 927 of 23 December 2003), in the version in force at the material time ('the Tax Code'), provides as follows:

'The tax authorities shall not take into account a transaction carried out by a taxpayer who has been declared inactive by decision of the President of the National Tax Administration Office, with the exception of goods supplied in the context of enforcement proceedings'.

15 Article 1471(2) of that Code provides as follows:

'Where the conditions and formal requirements for exercising the right of deduction during the relevant tax period for the purposes of the tax return are not met, or where the supporting documents referred to in Article 146 have not been received, the taxable person may exercise the right of deduction by filing the tax return for the tax period in which those conditions and formal requirements are met, or by means of a subsequent return, which may not, however, be filed more than five consecutive years after 1 January of the year following that in which the right of deduction arose'.

16 Article 153(9) of that Code provides as follows:

'The competent tax bodies may revoke the registration of a taxable person for VAT purposes, in accordance with the present article, where, on the basis of the provisions of the present title, the taxable person was not required to apply for registration or was not entitled to apply for registration for VAT purposes, in accordance with the present article. Similarly, the competent tax authorities may revoke of their own volition the registration of a taxable person for VAT purposes in accordance with the present article in the case of taxable persons on the list of taxpayers who have been declared inactive for the purposes of Article 11, and taxable persons who are temporarily inactive and registered in the commercial register, as required by law. The procedure for removal from the register shall be established on the basis of the procedural measures in force. After revocation of registration for VAT purposes, the persons concerned shall be required to submit an application for registration for VAT purposes to the competent tax bodies when the situation which led to removal from the register no longer pertains; for the calendar year in question, the provisions concerning the exemption threshold for small undertakings referred to in Article 152 shall not apply.'

17 Article 158^2 of that Code provides as follows:

'1. As of 1 August 2010, within the National Tax Administration Office, a register of intra-Community operators shall be established and organised which shall identify all the taxable persons and the non-taxable legal persons carrying out intra-Community transactions, namely:

(a) intra-Community supplies of goods carried out in Romania in accordance with Article 132(1)(a) and exempt from tax in accordance with Article 143(2)(a) and (d);

(b) subsequent supplies of goods carried out in connection with triangular transactions referred to in Article 1321(5), carried out in the Member State in which dispatch or transport of the goods ends and declared as intra-Community supplies classified under Code T in Romania;

(c) intra-Community supplies of services — namely services falling under Article 133(2) — carried out by taxable persons established in Romania for the benefit of taxable persons not established in Romania but established in the Community, with the exception of supplies which, in

the Member State in which the latter are taxable persons, are exempt from VAT;

(d) taxed intra-Community acquisitions of goods carried out in Romania in accordance with Article 1321;

(e) intra-Community acquisitions of services — namely services falling under Article 133(2) — carried out for the benefit of taxable persons established in Romania, including non-taxable legal persons registered for VAT purposes in accordance with Article 153 or Article 1531, by taxable persons not established in Romania but established in the Community, the beneficiary of which is liable for the tax in accordance with Article 150(2).

…

3. The persons registered for VAT purposes in accordance with Article 153 and Article 1531 must apply for their inclusion on the register of intra-Community operators if they intend to carry out one or more of the intra-Community transactions covered under paragraph 1, prior to carrying out those transactions.

…

10. The competent tax authority shall automatically remove from the register of intra-Community operators:

(a) taxable persons and non-taxable legal persons included on the list of taxpayers who have been declared inactive in accordance with the law;

…’

18 Article 78(5) of the ordonan?a Guvernului nr. 92/2003 privind Codul de procedur? fiscal? (Government Decree No 92/2003 establishing the Tax Procedure Code), in the version in force at the material time, provides as follows:

‘Tax payers who are legal persons or any other entity without legal personality shall be declared inactive and shall be subject to the provisions laid down in Article 11(11) and (12) of Law No 571/2003 establishing the Tax Code, as subsequently amended and supplemented, if they satisfy one of the following requirements:

(a) they do not file, for half a calendar year, any of the returns required by law;

(b) they avoid tax inspections by declaring information regarding their registered office which does not allow the tax authority to identify that office;

(c) the tax authorities have established that they do not exercise an activity at their registered office or registered tax residence.’

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

19 Gamesa is a company governed by Romanian law and established in Bucharest (Romania), engaged in the business of the assembly, installation and maintenance of wind farms.

20 For the purpose of carrying out its economic activity, Gamesa acquired various goods and services from suppliers established and registered for VAT purposes in Romania and in other Member States of the European Union. It exercised its right to deduct VAT in respect of the goods and services acquired by submitting a VAT return.

21 From 7 October 2010 to 24 May 2011, Gamesa was declared an ‘inactive taxpayer’ for the purposes of Article 11(11) of the Tax Code on the ground that, for half a calendar year, it had not filed any of the returns required by law.

22 From 26 November 2014 to 29 July 2015, Gamesa was subject to a tax inspection to verify its position as regards VAT and corporation tax in respect of transactions carried out in the period from 15 May 2009 to 31 December 2013. On the basis of the report drawn up following that inspection, Gamesa received an assessment notice refusing it the right to deduct VAT in the sum of 3 875 717 Romanian lei (RON) (approximately EUR 890 000) and imposing on it an obligation to pay penalties in the sum of RON 2 845 308 (approximately EUR 654 000), on the ground, inter alia, that it was not entitled to a right of deduction in respect of the acquisitions made in the period during which it had been declared inactive.

23 The complaint filed by Gamesa against the tax adjustment was dismissed by a decision of the National Tax Administration Office — Directorate-General for the settlement of complaints.

24 By application lodged on 10 June 2016, Gamesa brought an action before the Curtea de Apel Bucure?ti (Bucharest Appeal Court, Romania) against the National Tax Administration Office — Directorate-General for the settlement of complaints and the National Tax Administration Office — Directorate-General for the Administration of Large-scale Taxpayers. It seeks, first, the partial annulment of the tax assessment inasmuch as in that assessment the tax authorities refused it the right to deduct VAT in the sum of RON 3 875 717 (approximately EUR 890 000) in respect of the period from 15 May 2009 to 31 December 2013 and imposed on it an obligation to pay penalties in the sum of RON 2 845 308 (approximately EUR 654 000), and, secondly, annulment in its entirety of the decision dated 15 December 2015 of the National Tax Administration Office — Directorate-General for the settlement of complaints.

25 In its application, Gamesa primarily alleges that the tax authorities infringed the principle of proportionality and the principle of the neutrality of VAT, in circumstances in which it had met all the necessary obligations for the purposes of the reactivation of its VAT identification number. Those authorities rely, in their defence, on the need to accurately collect VAT and to prevent tax evasion.

26 In those circumstances, the Curtea de Apel Bucure?ti (Bucharest Appeal Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Does [Directive 2006/112] (in particular, Articles 213, 214 and 273) preclude, in circumstances such as those of the main proceedings, national legislation or a tax practice under which a taxpayer does not have the right to deduct VAT claimed in several returns after the reactivation of the taxpayer’s VAT identification number, on the basis that the VAT in question relates to purchases made during a period in which the taxpayer’s VAT identification number was inoperative?

(2) Does [Directive 2006/112] (in particular, Articles 213, 214 and 273) preclude, in circumstances such as those of the main proceedings, national legislation or a tax practice under which a taxpayer does not have the right to deduct VAT claimed in several returns after the

reactivation of the taxpayer's VAT identification number, on the basis that, although the VAT in question relates to invoices issued after the reactivation of the taxpayer's VAT identification number, it concerns purchases made during a period in which the VAT identification number was inoperative?'

Consideration of the questions referred

27 By the questions referred, which must be examined together, the referring court asks whether Directive 2006/112, in particular Articles 213, 214 and 273 thereof, must be interpreted as precluding national legislation, such as that at issue in the main proceedings, under which it is permissible for the tax authorities to refuse, on account of a failure to submit tax returns, a taxable person which has made acquisitions during the period in which its VAT identification number was revoked the right to deduct VAT on those acquisitions using VAT returns filed — or invoices issued — after the reactivation of its identification number.

28 It must be recalled at the outset that the right of taxable persons to deduct the VAT due or already paid on goods purchased and services received as inputs from the VAT which they are liable to pay is a fundamental principle of the common system of VAT established by EU legislation (judgment of 19 October 2017, *Paper Consult*, C?101/16, EU:C:2017:775, paragraph 35 and the case-law cited).

29 As the Court has repeatedly pointed out, the right of deduction provided for in Article 167 et seq. of Directive 2006/112 is an integral part of the VAT scheme and in principle may not be limited. In particular, the right of deduction is exercisable immediately in respect of all the taxes charged on transactions relating to inputs (judgment of 19 October 2017, *Paper Consult*, C?101/16, EU:C:2017:775, paragraph 36 and the case-law cited).

30 The deduction system is intended to relieve the trader entirely of the burden of the VAT payable or paid in the course of all his economic activities. The common system of VAT consequently ensures the neutrality of taxation of all economic activities, whatever the purpose or results of those activities, provided that they are themselves subject in principle to VAT (judgment of 19 October 2017, *Paper Consult*, C?101/16, EU:C:2017:775, paragraph 37 and the case-law cited).

31 The right to deduct VAT is, however, subject to compliance with both substantive requirements or conditions and formal requirements or conditions.

32 With regard to the substantive requirements or conditions, it is apparent from the wording of Article 168(a) of Directive 2006/112 that, in order to have a right to deduct, it is necessary, first, that the interested party be a 'taxable person' within the meaning of that directive and, second, that the goods or services relied on to confer entitlement to that right be used by the taxable person for the purposes of his own taxed output transactions, and that, as inputs, those goods or services must be supplied by another taxable person (judgment of 19 October 2017, *Paper Consult*, C?101/16, EU:C:2017:775, paragraph 39).

33 As to the detailed rules governing the exercise of the right of deduction, which may be considered formal requirements or conditions, Article 178(a) of Directive 2006/112 provides that the taxable person must hold an invoice drawn up in accordance with Articles 220 to 236 and Articles 238 to 240 of that directive (judgment of 19 October 2017, *Paper Consult*, C?101/16, EU:C:2017:775, paragraph 40).

34 According to settled case-law, the fundamental principle of VAT neutrality requires deduction of input tax to be allowed if the substantive requirements are satisfied, even if the

taxable person has failed to comply with some of the formal requirements (judgments of 28 July 2016, *Astone*, C?332/15, EU:C:2016:614, paragraph 45; 19 October 2017, *Paper Consult*, C?101/16, EU:C:2017:775, paragraph 41, and 26 April 2018, *Zabrus Siret*, C?81/17, EU:C:2018:283, paragraph 44).

35 In particular, identification for VAT purposes, provided for in Article 214 of Directive 2006/112, and the obligation of the taxable person to state when his activity as a taxable person commences, changes or ceases, provided for in Article 213 of that directive, are only formal requirements for the purposes of control, and they cannot compromise, inter alia, the right to deduct VAT, in so far as the substantive conditions which give rise to that right have been satisfied (judgments of 9 July 2015, *Salomie and Oltean*, C?183/14, EU:C:2015:454, paragraph 60, and 7 March 2018, *Dobre*, C?159/17, EU:C:2018:161, paragraph 32).

36 Accordingly, a person taxable for VAT purposes may not be prevented from exercising his right of deduction on the ground that he had not been identified as a taxable person for those purposes before using the goods purchased in the context of his taxed activity (judgments of 21 October 2010, *Nidera Handelscompagnie*, C?385/09, EU:C:2010:627, paragraph 51, and 7 March 2018, *Dobre*, C?159/17, EU:C:2018:161, paragraph 33).

37 Furthermore, the Court has held that penalising the failure on the part of the taxable person to comply with the obligations relating to accounts and tax returns by denial of the right of deduction clearly goes further than is necessary to attain the objective of ensuring the correct application of those obligations, since EU law does not prevent Member States from imposing, where necessary, a fine or a financial penalty proportionate to the seriousness of the offence (judgments of 9 July 2015, *Salomie and Oltean*, C?183/14, EU:C:2015:454, paragraph 63, and 7 March 2018, *Dobre*, C-159/17, EU:C:2018:161, paragraph 34).

38 The position could be different if the effect of breach of failure to satisfy formal requirements is to prevent the production of conclusive evidence that the substantive requirements have been satisfied (judgments of 28 July 2016, *Astone*, C?332/15, EU:C:2016:614, paragraph 46 and the case-law cited, and 7 March 2018, *Dobre*, C?159/17, EU:C:2018:161, paragraph 35).

39 Similarly, the right of deduction may be refused, if it has been established, in the light of objective evidence, that that right is being invoked fraudulently or abusively (judgments of 19 October 2017, *Paper Consult*, C?101/16, EU:C:2017:775, paragraph 43, and 7 March 2018, *Dobre* , C-159/17, EU:C:2018:161, paragraph 36).

40 In the present case, it is apparent from the order for reference that, in the period from 7 October 2010 to 24 May 2011, Gamesa was declared an inactive taxpayer on the ground that it had not filed any of the returns required by law. However, its VAT identification number was reactivated and it was re-registered for VAT purposes as of 25 May 2011. Following that reactivation, it exercised its right of deduction using VAT returns filed or invoices issued after that reactivation.

41 It must be observed that the date at which the VAT return is filed or the invoice issued does not necessarily have an effect on the substantive requirements which confer the right of deduction.

42 Accordingly, in so far as the substantive requirements conferring a right to deduct input VAT have been satisfied and that right of deduction is not being invoked fraudulently or abusively, a company in a situation such as Gamesa would be entitled to assert its right of deduction by means of VAT returns filed or invoices issued after the reactivation of its VAT identification number.

43 It is for the referring court to ascertain inter alia if the tax authorities had the necessary data

to establish that the substantive requirements conferring a right to deduct VAT paid as input tax by Gamesa were satisfied, irrespective of the date of the VAT return or invoice.

44 Having regard to those considerations, Directive 2006/112, in particular Articles 213, 214 and 273 thereof, must be interpreted as precluding national legislation, such as that at issue in the main proceedings, under which it is permissible for the tax authorities to refuse, on account of a failure to submit tax returns, a taxable person which has made acquisitions during the period in which its VAT identification number was revoked the right to deduct VAT on those acquisitions using VAT returns filed — or invoices issued — after the reactivation of its identification number, on the sole ground that those acquisitions took place in the period during which its VAT identification number was de-activated and where the substantive requirements have been satisfied and the right of deduction is not being invoked fraudulently or abusively.

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 (Seventh Chamber) hereby rules:

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, as amended by Council Directive 2010/45/EU of 13 July 2010, in particular Articles 213, 214 and 273 thereof, must be interpreted as precluding national legislation, such as that at issue in the main proceedings, under which it is permissible for the tax authorities to refuse, on account of a failure to submit tax returns, a taxable person which has made acquisitions in the period during which its value added tax identification number was revoked the right to deduct value added tax on those acquisitions using value added tax returns filed — or invoices issued — after the reactivation of its identification number, on the sole ground that those acquisitions took place in the period during which its value added tax identification number was de-activated and where the substantive requirements have been satisfied and the right of deduction is not being invoked fraudulently or abusively.

[Signatures]

* Language of the case: Romanian.