Provisional text

JUDGMENT OF THE COURT (Ninth Chamber)

17 May 2023 (*)

(Reference for a preliminary ruling – Directive 2006/112/EC – Value added tax (VAT) – Obligations to declare and pay VAT – Article 273 – Penalties laid down for the failure of a taxable person to comply with the obligations – Principles of proportionality and neutrality of VAT – Right to deduct VAT – Compatibility of penalties)

In Case C?418/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the tribunal de première instance du Luxembourg (Court of First Instance of Luxembourg, Belgium), made by decision of 8 June 2022, received at the Court on 21 June 2022, in the proceedings

SA CEZAM

v

État belge,

THE COURT (Ninth Chamber),

composed of L.S. Rossi, President of the Chamber, J.-C. Bonichot (Rapporteur) and S. Rodin, Judges,

Advocate General: A. Rantos,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Belgian Government, by P. Cottin, J.-C. Halleux and C. Pochet, acting as Agents,

– the European Commission, by S. Delaude and J. Jokubauskait?, 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 62(2) and Articles 63, 167, 206, 250 and 273 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1) and of the principles of proportionality and fiscal neutrality.

2 The request has been made in proceedings between SA CEZAM and État belge (Belgian

State) concerning a number of decisions adopted by the Belgian tax authorities imposing fines on that company for infringements of the rules governing value added tax (VAT).

Legal context

European Union law

3 Article 62(2) of Directive 2006/112 provides:

‘For the purposes of this Directive:

…

(2) VAT shall become “chargeable” when the tax authority becomes entitled under the law, at a given moment, to claim the tax from the person liable to pay, even though the time of payment may be deferred.’

4 Article 63 of that directive provides:

‘The chargeable event shall occur and VAT shall become chargeable when the goods or the services are supplied.’

5 Article 167 of Directive 2006/112 is worded as follows:

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

6 Article 203 of that directive provides:

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

7 Article 206 of Directive 2006/112 provides:

‘Any taxable person liable for payment of VAT must pay the net amount of the VAT when submitting the VAT return provided for in Article 250. Member States may, however, set a different date for payment of that amount or may require interim payments to be made.’

8 Article 250(1) of that directive is worded as follows:

‘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.’

9 The first paragraph of Article 273 of Directive 2006/112 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.’

Belgian law

10 Article 53(1) of the loi du 3 juillet 1969, créant le code de la taxe sur la valeur ajoutée (Law of 3 July 1969 establishing the Value Added Tax Code) (*Moniteur belge* of 17 July 1969, p. 7046),

in the version applicable to the dispute in the main proceedings ('the VAT Code'), provides:

'A taxable person, with the exception of a person who has no right of deduction, shall be bound by the following obligations:

…

(2) to submit, each month, a return in which he or she shall indicate:

(a) the value of the transactions referred to in this Code that were carried out by or supplied to him or her during the preceding month in the course of his or her economic activity;

(b) the amount of the tax that has become chargeable and of the deductions and adjustments to be made;

…

(3) to pay, within the time limit set for submitting the return provided for in point 2, the tax that is due. …'.

11 Under Article 70(1) of that code:

'In respect of any infringement of the obligation to pay the tax, a fine equal to twice the unpaid tax or twice the tax paid late shall be incurred.

…'

12 Article 1 of the arrêté royal no 41, du 30 janvier 1987, fixant le montant des amendes fiscales proportionnelles en matière de TVA (Royal Decree No 41 of 30 January 1987 setting the amounts of the proportionate tax fines in relation to VAT) (*Moniteur belge* of 7 February 1987, p. 1709; 'Royal Decree No 41') provides:

'The scale for the reduction of the proportionate tax fines in relation to value added tax shall be set as follows:

(1) In respect of the infringements referred to in Article 70(1) of the [VAT Code], … in the case of infringements committed after 31 October 1993, according to Table G set out in the annex to the present decree;

…'

13 The second paragraph of Article 1 of that decree provides that 'the scale of reductions set out in Tables A to J of the annex to the present decree shall not apply in respect of infringements committed with the intention of evading or facilitating evasion of the tax'.

14 The annex to Royal Decree No 41 contains a 'Table G', entitled 'Fines applicable in respect of the infringements referred to in Article 70(1) of the [VAT] Code'. Part V of that table, entitled 'Errors as to content discovered on inspection of accounts', provides, in respect of 'taxable transactions which have not been entered, in whole or in part, or which have been entered late in the relevant return', for the imposition of a flat-rate fine of 10% of the tax due where 'the amount of tax due in respect of a period subject to inspection of one year' is 'less than or equal to EUR 1 250.00' and for the imposition of a flat-rate fine of 20% of the tax due where that amount is 'greater than EUR 1 250.00'.

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

15 By application of 15 May 2018, CEZAM, a company whose registered office is in Belgium and which is active in the carpentry and glazing sectors, brought an action before the tribunal de première instance du Luxembourg (Court of First Instance of Luxembourg, Belgium), which is the referring court, against three decisions of the Belgian tax authorities served, respectively, in January and March 2018 and by which, inter alia, tax fines were imposed on that company.

16 In that regard, it is common ground that, since June 2013, CEZAM has failed to submit periodic VAT returns and that the Belgian tax authorities first of all drew up a formal record of assessment in respect of the year 2013, which it sent to CEZAM. Next, in August 2016, an inspection of CEZAM's accounts was carried out. In the absence of periodic VAT returns for the years 2014 and 2015, the Belgian tax authorities made, of their own motion, an assessment in respect of those years. Lastly, having found, in 2017, that CEZAM had not submitted all of the required periodic returns and had not paid the VAT due, the Belgian tax authorities adopted, in 2018, the three decisions referred to in paragraph 15 above.

17 CEZAM justifies its failure to submit returns by the fact that the Belgian tax authorities had refused it an arrangement to clear the VAT debts. It disputes, in particular, the amount of the fines, which correspond to 20% of the amount of VAT which would have been due before subtracting deductible VAT. For the purpose of calculating the fines, it argues, the Belgian tax authorities should have taken account of the amount of VAT which had actually to be paid to them, that is to say, the amount after the subtraction of deductible VAT. The approach adopted in this case by those authorities infringes, in its view, the right to deduct input VAT and the principle of fiscal neutrality.

18 In that regard, CEZAM relies on the judgments of 9 July 2015, *Salomie and Oltean* (C?183/14, EU:C:2015:454), and of 8 May 2019, *EN.SA.* (C?712/17, EU:C:2019:374), and submits, inter alia, that the principle of proportionality requires the Member States not to impose a penalty of an amount equal to the deductible VAT, in that such a penalty would render the right of deduction meaningless.

19 The Belgian State contends that the solution adopted in the judgment of 8 May 2019, *EN.SA.* (C?712/17, EU:C:2019:374), cannot be transposed to the dispute pending before the referring court. That judgment, it argues, concerns a situation in which, despite the absence of taxable transactions, invoices indicating VAT were issued. The issuer of those invoices paid the VAT and eliminated any risk of loss of tax revenue. In such a situation, the principle of proportionality and Article 203 of Directive 2006/112, according to which VAT entered on an invoice is payable, preclude the imposition of a fine corresponding to the full amount of the VAT improperly deducted.

20 In the present case, the Belgian State maintains that CEZAM has been penalised for an infringement of the obligation to declare and pay VAT. That obligation is essential for the proper functioning of the VAT system, in which the taxable person holds the role of tax collector. By not paying the VAT collected from its customers, CEZAM has obtained an advantage to the detriment of the Treasury. Furthermore, the fines amount to only 20% of the amount of VAT which ought to have been paid. In that latter regard, the right of deduction is a right which the taxable person may exercise by entering the VAT to be deducted in his or her periodic returns.

21 In the light of those arguments, the referring court observes that it follows from the Court's case-law that, in the field of VAT, the Member States are, in principle, empowered to choose the sanctions which seem to them to be appropriate, provided that they do not go beyond what is necessary to attain the objectives of ensuring the correct levying and collection of the tax and of

preventing fraud (judgment of 26 April 2017, *Farkas*, C?564/15, EU:C:2017:302, paragraphs 59 and 60). It also observes that the measures taken to attain those objectives must not undermine the neutrality of VAT (judgment of 11 April 2013, *Rusedespred*, C?138/12, EU:C:2013:233, paragraph 29). In that regard, the referring court also refers to the Opinion of Advocate General Kokott in *EN.SA.* (C?712/17, EU:C:2019:35, point 62).

22 That court takes the view, however, that the principle of fiscal neutrality does not apply directly for the purpose of determining the penalties applicable in the event of infringement of VAT rules. Nonetheless, it is unsure whether that principle must be taken into consideration in order to determine whether the penalties imposed in this case on CEZAM comply with the principle of proportionality.

23 Furthermore, the referring court observes that those penalties were determined in accordance with the Belgian legislation intended to penalise infringements committed without any intention to evade VAT.

24 In those circumstances, the tribunal de première instance du Luxembourg (Court of First Instance of Luxembourg) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Do Articles 62(2), 63, 167, 206, 250 and 273 of [Directive 2006/112] and the principle of proportionality, as interpreted, in particular, in the judgment of the Court of Justice of 8 May 2019, *EN.SA* [(C?712/17, EU:C:2019:374)], taken together with the principle of neutrality, preclude provisions of national legislation such as Article 70(1) of the VAT Code, Article 1 of and Part V of Table G in the annex to Royal Decree No 41 setting the amounts of the proportionate tax penalties in relation to value added tax, pursuant to which:

– in the event of errors as to content discovered on the inspection of accounts,

– and in order to sanction the failure, in whole or in part, to enter taxable transactions in relation to which the amount of tax due is greater than EUR 1 250,

that infringement is penalised by a flat-rate fine at a reduced rate of 20% of the tax due, without it being possible, for the purposes of calculating the fine, to deduct therefrom any input tax paid, on account of the fact that it has not been deducted because no return was submitted, where, pursuant to the second paragraph of Article 1 of Royal Decree No 41, the scale of reductions set out in Tables A to J of the annex to that decree applies only where the infringements sanctioned have been committed without any intention to evade or to facilitate evasion of the tax?

(2) Is the answer to that question different if the taxable person has, voluntarily or otherwise, paid the amount of tax that has become chargeable following the inspection, so as to make good the shortfall in payment of the tax and thereby to allow the attainment of the objective of ensuring the correct collection of the tax?’

Consideration of the questions referred

25 By its questions, which it is appropriate to examine together, the referring court seeks, in essence, to ascertain whether Article 62(2) and Articles 63, 167, 206, 250 and 273 of Directive 2006/112 and the principles of proportionality and fiscal neutrality must be interpreted as precluding national legislation pursuant to which the failure to comply with the obligation to declare and pay VAT to the Treasury is penalised by a flat-rate fine amounting to 20% of the amount of VAT which would have been due before subtracting deductible VAT.

26 In that regard, it must be borne in mind that it follows from Articles 2 and 273 of Directive 2006/112, read in conjunction with Article 4(3) TEU, that Member States are required to take all legislative and administrative measures appropriate for ensuring collection of all the VAT due on their territory and for preventing fraud (judgment of 2 May 2018, *Scialdone*, C?574/15, EU:C:2018:295, paragraph 26).

27 In the absence of harmonisation of EU legislation in the field of the penalties applicable in cases of non-compliance with the conditions laid down by arrangements established under such legislation, Member States have the power to choose the penalties which seem to them to be appropriate. They must, however, exercise that power in accordance with EU law and its general principles, and, consequently, in accordance with the principles of proportionality and fiscal neutrality (see, to that effect, judgments of 29 July 2010, *Profaktor Kulesza, Frankowski, Jó?wiak, Or?owski*, C?188/09, EU:C:2010:454, paragraph 29, and of 9 July 2015, *Salomie and Oltean*, C?183/14, EU:C:2015:454, paragraph 62).

28 It should also be borne in mind that, when choosing the penalties, Member States are required to comply with the principle of effectiveness, which requires effective and dissuasive penalties to be established to counter infringements of harmonised VAT rules and to protect the financial interests of the European Union (see, to that effect, judgment of 2 May 2018, *Scialdone*, C?574/15, EU:C:2018:295, paragraphs 28 and 33).

29 Furthermore, in addition to Article 273 of Directive 2006/112, the referring court refers, in its first question, to several other provisions of that directive. However, those other provisions do not appear to be relevant for the purpose of answering the questions referred, which concern the criteria which make it possible to determine whether a VAT penalty complies with the principles of proportionality and fiscal neutrality. Accordingly, it is necessary to answer the question as reformulated only in so far as it refers to Article 273 of Directive 2006/112, interpreted in the light of those principles.

30 As regards, first, the principle of proportionality, the penalties provided for by national law pursuant to Article 273 of Directive 2006/112 must not go beyond what is necessary to attain the objectives of ensuring the correct levying and collection of the tax and preventing fraud. In order to assess whether a penalty is consistent with the principle of proportionality, account must be taken of, inter alia, the nature and the degree of seriousness of the infringement which that penalty seeks to penalise, and of the means of establishing the amount of that penalty (see, to that effect, judgment of 26 April 2017, *Farkas*, C?564/15, EU:C:2017:302, paragraph 60 and the case-law cited).

31 Although it falls to the referring court to assess whether the amount of the fines imposed on CEZAM is consistent with the principle of proportionality, it is, however, appropriate to point out to that court certain aspects which may enable it to carry out that assessment.

32 As regards the nature and seriousness of the infringements that the fines at issue seek to penalise, it is apparent from the order for reference that the infringements that CEZAM is alleged to have committed are not the result of an error relating to the application of the VAT mechanism. Over the course of a prolonged period and despite several interventions by the Belgian tax authorities, that company neither declared nor paid the VAT due.

33 Furthermore, the fact that, following a tax inspection, the taxable person has, voluntarily or otherwise, made good the shortfall in payment found by the competent authorities may be relevant for the purpose of assessing the proportionality of a penalty in the light of the objective of ensuring the correct levying and collection of the tax. However, it is apparent from the file before the Court

that, in this case, the shortfall in payment has not been made good voluntarily.

34 As regards the means of establishing the penalties to be applied, it is apparent from the order for reference that Belgian law provides for a scale of fines. Pursuant to Article 70(1) of the VAT Code, infringement of the obligation to pay the tax is punishable by a penalty equal to twice the VAT which would have been due before subtracting deductible VAT. However, if there is no fraudulent intent, Royal Decree No 41 provides that the amount of the penalty is to be reduced to 20% or 10%, respectively, of the VAT which would have been due before subtracting deductible VAT, depending on whether or not the amount of tax due in respect of a period subject to inspection of one year exceeds EUR 1 250.00.

35 In any event, and subject to the checks to be carried out by the referring court, it does not appear that, in view of the nature and seriousness of the infringements that CEZAM is alleged to have committed and having regard to the requirements relating to the effective and dissuasive nature of penalties in the field of VAT, the imposition of penalties amounting to 20% of the VAT which would have been due before subtracting deductible VAT goes beyond what is necessary to ensure the correct levying and collection of the tax and to prevent fraud.

36 As regards, second, the principle of fiscal neutrality, that principle requires that deduction of input VAT be allowed if the substantive requirements are satisfied, even if the taxable person has failed to comply with some of the formal requirements. Consequently, where the tax authorities have the information necessary to establish that the substantive requirements have been satisfied, they cannot impose additional conditions which may have the effect of rendering the right of deduction ineffective for practical purposes (see, to that effect, judgment of 9 July 2015, *Salomie and Oltean*, C?183/14, EU:C:2015:454, paragraphs 58 and 59 and the case-law cited).

37 However, in the present case, there is nothing in the file before the Court to demonstrate that the fines imposed on CEZAM or the Belgian legislation applied in order to determine their amount, namely Article 70(1) of the VAT Code, read in conjunction with Royal Decree No 41, would be liable to undermine the right to deduct input VAT. In particular, those provisions do not appear to preclude the taxable person from being able to exercise such a right of deduction. It is apparent in this regard from the observations of the Belgian Government that, when establishing CEZAM’s tax liability, the Belgian tax authorities deducted the input VAT of their own motion.

38 Furthermore, it should be noted that the case in the main proceedings is not comparable to that which gave rise to the judgment of 9 July 2015, *Salomie and Oltean* (C?183/14, EU:C:2015:454, paragraphs 60 to 64), relied on by CEZAM before the referring court, since the case giving rise to that judgment concerned a national administrative practice under which the failure to comply with certain formal requirements for the purposes of control, such as the obligation of the taxable person to be identified for VAT purposes, provided for in Article 214 of Directive 2006/112, or the obligation to state when his or her activity as a taxable person commences, changes or ceases, provided for in Article 213 of that directive, was penalised not by the imposition of a fine proportionate to the seriousness of the offence, but by denial of the right to deduct VAT, which was liable to undermine the neutrality of VAT.

39 The present case is also not comparable to that which gave rise to the judgment of 8 May 2019, *EN.SA.* (C?712/17, EU:C:2019:374), also relied on by CEZAM before the referring court.

40 In that regard, it must be borne in mind that, in paragraphs 43 and 44 of that judgment, the Court held that the principle of fiscal neutrality precluded the imposition of a fine equal to the full amount of the input tax improperly deducted, where the output VAT had been duly paid and the Treasury had not, as a result, lost any tax revenue, since compliance with that principle was ensured by the possibility for the Member States to provide for the correction of any tax improperly

invoiced in the case where the issuer of the invoice showed that he or she had acted in good faith or where he or she had, in sufficient time, wholly eliminated the risk of any loss of tax revenue. The imposition of that fine therefore led to the possibility of adjustment in respect of the tax liability under Article 203 of Directive 2006/112 being redundant.

41 However, that is not the case here since, first, the fines imposed on CEZAM seek to penalise the deliberate failure, over a prolonged period, to declare and pay the output VAT, thus creating a risk of loss of tax revenue for the Treasury, and, second, as stated in paragraph 37 of the present judgment, it does not follow either from the national provisions at issue in the main proceedings or from other information in the file before the Court that those fines, the amount of which does not exceed 20% of the VAT which would have been due before subtracting deductible VAT, would undermine the right to deduct input VAT.

42 In the light of the foregoing considerations, the answer to the questions referred is that Article 273 of Directive 2006/112 and the principles of proportionality and fiscal neutrality must be interpreted as not precluding national legislation pursuant to which the failure to comply with the obligation to declare and pay VAT to the Treasury is penalised by a flat-rate fine amounting to 20% of the amount of VAT which would have been due before subtracting deductible VAT, subject to the checks to be carried out by the referring court as regards the proportionate nature of the fine imposed in the case in the main proceedings.

Costs

43 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 273 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax and the principles of proportionality and fiscal neutrality

must be interpreted as not precluding national legislation pursuant to which the failure to comply with the obligation to declare and pay value added tax (VAT) to the Treasury is penalised by a flat-rate fine amounting to 20% of the amount of VAT which would have been due before subtracting deductible VAT, subject to the checks to be carried out by the referring court as regards the proportionate nature of the fine imposed in the case in the main proceedings.

[Signatures]

* Language of the case: French.