Provisional text

JUDGMENT OF THE COURT (Eighth Chamber)

7 September 2023 (*)

(Reference for a preliminary ruling – Common system of value added tax (VAT) – Directive 2006/112/EC – Principle of VAT neutrality – Principle of effectiveness – VAT rate set too high on a purchase invoice – Reimbursement of the overpaid tax – Direct action against the tax authorities – Effect of the risk of a double reimbursement of the same VAT)

In Case C?453/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the Finanzgericht Münster (Finance Court, Münster, Germany), made by decision of 27 June 2022, received at the Court on 6 July 2022, in the proceedings

Michael Schütte

v

Finanzamt Brilon

THE COURT (Eighth Chamber),

composed of M. Safjan, President of the Chamber, K. Jürimäe (Rapporteur), President of the Third Chamber, and N. Piçarra, Judge,

Advocate General: M. Szpunar,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Michael Schütte, by H. Nieskens, Rechtsanwalt,

– the German Government, by J. Möller and N. Scheffel, acting as Agents,

– the Czech Government, by O. Serdula, M. Smolek and J. Vlá?il, acting as Agents,

– the European Commission, by J. Jokubauskait? and L. Mantl, 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) (‘the VAT Directive’), and of the principles of value added tax (VAT) neutrality and of effectiveness.

2 The request has been made in proceedings between the applicant in the main proceedings, Mr Michael Schütte, and the Finanzamt Brilon (Tax Office, Brilon, Germany) (‘the tax office’) relating to the equitable right to obtain discharge from additional VAT assessments by the German tax authorities and interest on that tax.

Legal context

European Union law

3 Article 168(a) of the VAT Directive provides:

‘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’.

4 Under Article 178(a) of that directive, for the purposes of deductions pursuant to Article 168(a) of the directive, the taxable person must, ‘in respect of the supply of goods or services, … hold an invoice drawn up in accordance with Sections 3 to 6 of Chapter 3 of Title XI’.

German law

5 Paragraph 163 of the Abgabenordnung (the Fiscal Code, BGBl. 2002 I, p. 3866) (‘the AO’) provides:

‘(1) Taxes may be set at a lower amount and individual bases of taxation which increase the tax may be ignored in assessing the tax where the levy of the tax would be inequitable in the circumstances of the individual case.

…’

6 Paragraph 227 of the AO provides:

‘The tax authorities may remit, in whole or in part, amounts arising from the tax debtor-creditor relationship where their collection would be unreasonable in the circumstances of the individual case; under the same conditions, amounts already paid may be refunded or credited.’

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

7 The applicant in the main proceedings is a farmer and forester. In the years 2011 to 2013, he purchased timber from various suppliers and subsequently resold and delivered it to his customers as firewood. Although the VAT stated in the invoices of his suppliers was the standard rate of 19%, the VAT stated on the invoices issued by the applicant in the main proceedings to his customers was the reduced rate of 7%.

8 The upstream suppliers declared VAT each time and paid the tax to the German tax authorities at the rate of 19%. By contrast, the applicant in the main proceedings declared his sales at the rate of only 7% and deducted input VAT in respect of the purchases at the rate of 19%. The applicant in the main proceedings paid the resulting tax debt to the German tax

authorities.

9 The Finanzgericht Münster (Finance Court, Münster, Germany), the referring court, specifies that there were no indications of the imminent insolvency of the applicant in the main proceedings at any time or suspicion of fraud on his part. However, following an audit, the tax office concluded that the output transactions of the applicant in the main proceedings should not have been subject to the reduced VAT rate, but rather to the standard rate.

10 Following that audit, an action was brought before the Finanzgericht Münster (Finance Court, Münster). That action resulted in a judgment, which has now become final, of 2 July 2019, by which that court held that the output transactions of the applicant in the main proceedings were indeed subject to the reduced VAT rate. It nevertheless took the view that the purchases made by the applicant in the main proceedings were also subject to the reduced rate of 7%. The deduction of input VAT by the applicant in the main proceedings was, as a result, reduced accordingly.

11 In order to implement that judgment, the tax office sought to recover the VAT due for the years 2011 to 2013, plus interest, by notices of 30 September 2019. The applicant in the main proceedings then contacted his suppliers for them to correct the invoices issued to him and pay him the difference.

12 All the suppliers invoked the defence of limitation provided for under German civil law against the applicant. Accordingly, the invoices in question were not corrected and the applicant in the main proceedings did not receive the repayments he had claimed from his suppliers.

13 In those circumstances, the applicant in the main proceedings, by a letter of 24 October 2019, applied to the tax office for discharge, on grounds of equity, from the additional VAT recovery of which had been sought and the interest in respect of that VAT amount, in accordance with Paragraphs 163 and 227 of the AO.

14 The tax office rejected that application by decisions of 3 and 16 December 2019 on the ground that the applicant in the main proceedings himself was responsible for the situation. The objections directed by the applicant against those rejection decisions were also considered unfounded in a decision issued on 24 July 2020.

15 The applicant in the main proceedings brought an action before the referring court against the rejection of his application for discharge of the VAT recovery of which had been sought. That court is uncertain as to the interpretation of the VAT Directive regarding the application of the principle of fiscal neutrality and of the principle of effectiveness to the right to claim reimbursement.

16 The referring court’s concerns also relate to the fact that the suppliers could adjust the invoices without a limitation period and, consequently, do so at a date subsequent to the purchaser’s reimbursement by the German tax authorities. Were those suppliers then to claim reimbursement of the overpaid amounts from those authorities, this would expose those authorities to the risk of having to reimburse the same amount of VAT twice, without necessarily having a right of recourse against the purchaser of the goods which were the subject of those invoices.

17 In those circumstances, the Finanzgericht Münster (Finance Court, Münster) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘In the circumstances of the main proceedings, do the provisions of [the VAT Directive] – in particular the principle of fiscal neutrality and the principle of effectiveness – require that the applicant has a right to claim reimbursement of the [VAT] overpaid by him or her to his or her

upstream suppliers, including interest, directly from the tax authorities, even though there is still a possibility that the upstream suppliers will at a later point in time take action against the tax authorities on the basis of a correction of the invoices, and the tax authorities may then – possibly – no longer have a right of recourse against the applicant, with the result that there is a risk that those authorities will have to reimburse the same value added tax twice?'

Consideration of the question referred

18 By its question, the referring court asks, in essence, whether the VAT Directive and the principle of VAT neutrality and the principle of effectiveness must be interpreted as requiring that a receiver of supplies of goods has a direct right to claim from the tax authorities the reimbursement of improperly invoiced VAT paid to his or her suppliers and paid by those suppliers to the public purse, together with related interest, in circumstances where, first, that receiver cannot be criticised for fraud, abuse or negligence but cannot claim that reimbursement from those suppliers due to the limitation period provided for by national law and, second, there is a procedural possibility of those suppliers subsequently claiming reimbursement of the overpaid tax from the tax authorities after having adjusted the invoices that were issued initially to the receiver of those supplies.

19 As a preliminary point, it must be borne in mind that the right of deduction is an integral part of the VAT scheme and in principle may not be limited. The deduction system is intended to relieve the taxable person entirely of the burden of the VAT payable or paid in the course of all of that person's economic activities. The common system of VAT consequently ensures neutrality of taxation of all economic activities, whatever their purpose or results, provided that those activities are themselves subject in principle to VAT (judgment of 6 February 2014, *Fatorie*, C?424/12, EU:C:2014:50, paragraphs 30 and 31 and the case-law cited).

20 The principle of neutrality of VAT, is, in that regard, a fundamental principle of the common system of VAT. In that context, the claim for repayment of improperly overpaid VAT concerns the right to recovery of sums paid but not due which, according to settled case-law, helps to offset the consequences of the tax's incompatibility with EU law by neutralising the economic burden which that tax has improperly imposed on the trader who has, in fact, ultimately borne it (see, to that effect, judgment of 2 July 2020, *Terracult*, C?835/18, EU:C:2020:520, paragraphs 24 and 25 and the case-law cited).

21 That being said, in the absence of EU rules on applications for the repayment of taxes, it is for the domestic legal system of each Member State to lay down the conditions under which such applications may be made; those conditions must observe the principles of equivalence and effectiveness, that is to say, they must not be less favourable than those relating to similar claims founded on provisions of domestic law or framed so as to render virtually impossible the exercise of rights conferred by the EU legal order (judgments of 15 March 2007, *Reemtsma Cigarettenfabriken*, C?35/05, EU:C:2007:167, paragraph 37, and of 26 April 2017, *Farkas*, C?564/15, EU:C:2017:302, paragraph 50).

22 Given that, in principle, it also falls to the Member States to determine the conditions under which improperly invoiced VAT may be adjusted, the Court has accepted that a system in which, first, the supplier of the property who has paid the VAT to the tax authority in error may seek to be reimbursed and, second, the purchaser of that property may bring a civil law action against that supplier for recovery of the sums paid but not due, observes the principles of VAT neutrality and effectiveness. Such a system enables that purchaser, which bore the tax invoiced in error, to obtain reimbursement of the sums improperly paid (see, to that effect, judgments of 15 March 2007, *Reemtsma Cigarettenfabriken*, C?35/05, EU:C:2007:167, paragraphs 38 and 39, and of 26 April 2017, *Farkas*, C?564/15, EU:C:2017:302, paragraph 51).

23 However, if reimbursement of the VAT becomes impossible or excessively difficult, in particular in the case of the insolvency of the supplier, the principle of effectiveness may require that the purchaser of the property concerned be able to address his application for reimbursement to the tax authorities directly. Thus, the Member States must provide for the instruments and the detailed procedural rules necessary to enable the purchaser to recover the improperly invoiced tax in order to respect the principle of effectiveness (see, to that effect, judgments of 15 March 2007, *Reemtsma Cigarettenfabriken*, C?35/05, EU:C:2007:167, paragraph 41, and of 26 April 2017, *Farkas*, C?564/15, EU:C:2017:302, paragraph 53).

24 Moreover, if it is shown, in the light of objective factors, that the right to reimbursement of improperly invoiced and paid VAT is being relied on fraudulently or abusively, that right must be refused (judgments of 2 July 2020, *Terracult*, C?835/18, EU:C:2020:520, paragraph 38, and of 13 October 2022, *HUMDA*, C?397/21, EU:C:2022:790, paragraph 28 and the case-law cited). However, in view of the position which the principle of VAT neutrality has in the common system of VAT, a penalty consisting of an absolute refusal of the right to a reimbursement of VAT that has been incorrectly invoiced and paid but not due, appears disproportionate where no evasion or detriment to the budget of the State is ascertained, even where negligence on the part of the taxable person has been established (see, to that effect, judgments of 12 July 2012, *EMS-Bulgaria Transport*, C?284/11, EU:C:2012:458, paragraph 70, and of 2 July 2020, *Terracult*, C?835/18, EU:C:2020:520, paragraph 37).

25 In the light of the case-law cited in paragraphs 19 to 24 of the present judgment, national rules or practices which result in refusing an input VAT reimbursement to a purchaser of goods in respect of which he or she was improperly invoiced and which he or she overpaid to his or her suppliers appears not only contrary to the principles of VAT neutrality and of effectiveness but also disproportionate, where it is impossible for him or her to claim reimbursement from those suppliers on the sole ground of the limitation period on which those suppliers rely against him or her, even though the purchaser cannot be criticised for any established fraud, abuse or negligence.

26 In those circumstances, if it is impossible or excessively difficult for the purchaser to obtain reimbursement from the suppliers of the improperly invoiced and paid VAT, that purchaser, failing any established fraud, abuse or negligence on his or her part, is fully entitled to address his or her application for reimbursement to the tax authorities directly.

27 Neither the judgment of 13 January 2022, *Zipvit* (C?156/20, EU:C:2022:2), nor the fact that the suppliers are not insolvent, nor the risk of double reimbursement raised by the referring court call that assessment into question.

28 First, regarding that judgment, it must be stated that, contrary to the hypothesis giving rise to the case in the main proceedings, the claim of the applicant in the case which resulted in that judgment concerned the supply of services which had incorrectly been exempted from VAT. However, in that case, the supplier had not attempted to recover from his client the mistakenly

unpaid VAT and the tax authorities had not issued a tax adjustment notice against the supplier. It is on account of those circumstances that the Court held that a taxable person cannot claim to deduct an amount of VAT where that person has not been charged for that amount and which it has therefore not passed on to the final consumer (judgment of 13 January 2022, *Zipvit*, C?156/20, EU:C:2022:2, paragraph 31).

29 Second, with regard to whether the fact that the suppliers are not insolvent may have a bearing on the right to reimbursement of VAT in the light of the case-law referred to in paragraph 23 of the present judgment, it is common ground that the systematic use of the adverb ‘in particular’ in that case-law shows that the hypothesis of supplier insolvency is only one of the circumstances in which it may be impossible or excessively difficult to obtain a reimbursement in respect of VAT which has been unduly invoiced and paid (judgments of 15 March 2007, *Reemtsma Cigarettenfabriken*, C?35/05, EU:C:2007:167, paragraph 41; of 26 April 2017, *Farkas*, C?564/15, EU:C:2017:302, paragraph 53; of 11 April 2019, *PORR Építési Kft.*, C?691/17, EU:C:2019:327, paragraphs 42 and 48; and of 13 October 2022, *HUMDA*, C?397/21, EU:C:2022:790, paragraph 22).

30 Third, regarding the risk of double reimbursement arising from the fact that the suppliers could adjust their invoices issued initially to the purchaser subsequent to the reimbursement thereof by the tax authorities and then request reimbursement of the overpaid VAT from those authorities, such a risk is, in principle, precluded in circumstances such as those in the main proceedings.

31 As noted in paragraph 24 of the present judgment, the right to reimbursement of improperly invoiced and paid VAT must be refused if it is established that that right is relied on fraudulently or abusively.

32 In that connection, the Court has held that, in the sphere of VAT, two conditions must be met in order to find that an abusive practice exists. First, the transactions concerned, notwithstanding formal application of the conditions laid down by the relevant provisions of the VAT Directive and the national legislation transposing it, result in the accrual of a tax advantage the grant of which would be contrary to the purpose of those provisions. Second, it must be apparent from a number of objective factors that the essential aim of the transactions concerned is solely to obtain that tax advantage (judgments of 21 February 2006, *Halifax and Others*, C?255/02, EU:C:2006:121, paragraphs 74 and 75, and of 15 September 2022, *HA.EN.*, C?227/21, EU:C:2022:687, paragraph 35).

33 However, in the present case, it is apparent, subject to checks which it is for the referring court to carry out, that the purchaser paid the suppliers the VAT amounts set out in the invoices and that those suppliers paid the VAT amounts to the tax authorities. As a result, were those suppliers to adjust those invoices and claim reimbursement of the overpaid VAT from those authorities after those authorities have reimbursed the overpaid tax to the purchaser of the invoiced goods, even though those same suppliers had first relied on the limitation period vis-à-vis that purchaser and thereby showed that they had no interest in rectifying the situation, those claims would have no other objective than obtaining an advantage contrary to the principle of fiscal neutrality. Such a practice would therefore be abusive within the meaning of the case-law cited above and could not result in reimbursement to that supplier, which precludes the risk of double reimbursement.

34 Regarding, last, the interest, the Court has repeatedly held that, where a Member State has levied taxes in breach of the rules of EU law, individuals are entitled to reimbursement not only of the tax unduly levied but also of the amounts paid to that State or retained by it which relate directly to that tax, which also includes losses constituted by the unavailability of sums of money

as a result of a tax being levied prematurely (see, to that effect, judgments of 12 December 2006, *Test Claimants in the FII Group Litigation*, C?446/04, EU:C:2006:774, paragraph 205, and of 13 October 2022, *HUMDA*, C?397/21, EU:C:2022:790, paragraph 32).

35 In the present case, only the implementation of the judgment of the referring court of 2 July 2019, which reduced the input tax from 19% to 7%, would be capable of resulting in an economic burden for the applicant in the main proceedings corresponding to the difference between the standard VAT rate and the reduced rate thereof.

36 Accordingly, in the event that the applicant in the main proceedings had in fact already paid the tax authorities the amount corresponding to the reduction of his initial deduction, he would suffer financial damage since that amount is not available to him. It follows that, failing reimbursement of the VAT improperly collected by the tax authorities within a reasonable time, that financial damage, in so far as it results from an infringement of EU law by the Member State according to paragraph 25 of the present judgment, must be compensated by the payment of default interest.

37 Having regard to the foregoing considerations, the answer to the question referred is that the VAT Directive and the principle of VAT neutrality and the principle of effectiveness must be interpreted as requiring that a receiver of supplies of goods has a direct right to claim from the tax authorities the reimbursement of improperly invoiced VAT paid to his or her suppliers and paid by those suppliers to the public purse, together with related interest, in circumstances where, first, that receiver cannot be criticised for fraud, abuse or negligence but cannot claim that reimbursement from those suppliers due to the limitation period provided for by national law and, second, there is a procedural possibility of those suppliers subsequently claiming reimbursement of the overpaid tax from the tax authorities after having adjusted the invoices that were issued initially to the receiver of those supplies. Failing reimbursement of the VAT improperly charged by the tax authorities within a reasonable time, the damage suffered on account of the unavailability of the amount equivalent to that improperly charged VAT must be compensated by the payment of default interest.

Costs

38 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 (Eighth 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, and the principle of value added tax (VAT) neutrality and the principle of effectiveness

must be interpreted as requiring that a receiver of supplies of goods has a direct right to claim from the tax authorities the reimbursement of improperly invoiced VAT paid to his or her suppliers and paid by those suppliers to the public purse, together with related interest, in circumstances where, first, that receiver cannot be criticised for fraud, abuse or negligence but cannot claim that reimbursement from those suppliers due to the limitation period provided for by national law and, second, there is a procedural possibility of those suppliers subsequently claiming reimbursement of the overpaid tax from the tax authorities after having adjusted the invoices that were issued initially to the receiver of those supplies. Failing reimbursement of the VAT improperly charged by the tax authorities within a reasonable time, the damage suffered on account of the unavailability of the amount equivalent to that improperly charged VAT must be compensated by the payment

of default interest.

[Signatures]

* Language of the case: German.