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OPINION OF ADVOCATE GENERAL

BOT

delivered on 7 September 2017 (1)

Case C?307/16

Stanis?aw Pie?kowski

v

Dyrektor Izby Skarbowej w Lublinie

(Request for a preliminary ruling from the Naczelny S?d Administracyjny (Supreme Administrative Court, Poland))

(Reference for a preliminary ruling — Taxation — Value added tax (VAT) — Export exemptions — Legislation of a Member State making the benefit of the exemption subject to the attainment of a certain turnover or the conclusion of an agreement with a person authorised to make VAT refunds to travellers — Principles of fiscal neutrality and proportionality)

I. Introduction

1.

In this case, the Court is asked to interpret Articles 146(1)(b), 147, 131 and 273 of Directive 2006/112/EC, (2) in the context of proceedings between Mr Stanis?aw Pie?kowski, a vendor of telecommunications equipment, and the Urz?du Skarbowego w Bia?ej Podlaskiej (tax authority for Bia?a Podlaska, Poland), in relation to the exemption from value added tax (VAT) on the supply of goods dispatched outside the European Community in the personal luggage of travellers.

2.

This case gives the Court the opportunity to rule on the question of whether the VAT Directive precludes national legislation which provides that, in the context of a supply of goods for export, a taxable person must have attained a minimum turnover during the preceding tax year, or have concluded an agreement with a person authorised to make VAT refunds to travellers, in order for the exemption to apply. It is also an opportunity for the Court to interpret, for the first time, the provisions of Article 147 of the VAT Directive and to provide guidance on the application of the principle of proportionality in an unprecedented specific situation, even though existing case-law does assist significantly, as is rightly noted by the Naczelny S?d Administracyjny (Supreme Administrative Court, Poland) in its order for reference.

3.

At the end of my analysis, I will propose that the Court should rule that the provisions of Articles 146(1)(b), 147, 131 and 273 of the VAT Directive, together with the principle of fiscal neutrality, preclude national legislation such as that at issue in the main proceedings.

II. Legal context

A. EU law

4.

Recitals 5, 35 and 49 in the preamble to the VAT Directive are worded as follows:

‘(5)

A VAT system achieves the highest degree of simplicity and of neutrality when the tax is levied in as general a manner as possible and when its scope covers all stages of production and distribution, as well as the supply of services. It is therefore in the interests of the internal market and of Member States to adopt a common system which also applies to the retail trade.

…

(35)

A common list of exemptions should be drawn up so that the Communities’ own resources may be collected in a uniform manner in all the Member States.

…

(49)

Member States should be allowed to continue to apply their special schemes for small enterprises, in accordance with common provisions, and with a view to closer harmonisation.’

5.

Article 131 of the VAT Directive provides:

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

6.

Article 146(1) of the same directive reads as follows:

‘1. Member States shall exempt the following transactions:

…

(b)

the supply of goods dispatched or transported to a destination outside the Community by or on behalf of a customer not established within their respective territory, with the exception of goods transported by the customer himself for the equipping, fuelling and provisioning of pleasure boats and private aircraft or any other means of transport for private use …’.

7.

Article 147 of the VAT Directive provides:

‘1. Where the supply of goods referred to in point (b) of Article 146(1) relates to goods to be carried in the personal luggage of travellers, the exemption shall apply only if the following conditions are met:

(a)

the traveller is not established within the Community;

(b)

the goods are transported out of the Community before the end of the third month following that in which the supply takes place;

(c)

the total value of the supply, including VAT, is more than EUR 175 or the equivalent in national currency, fixed annually by applying the conversion rate obtaining on the first working day of October with effect from 1 January of the following year.

However, Member States may exempt a supply with a total value of less than the amount specified in point (c) of the first subparagraph.

2. For the purposes of paragraph 1, “a traveller who is not established within the Community” shall mean a traveller whose permanent address or habitual residence is not located within the Community. In that case “permanent address or habitual residence” means the place entered as such in a passport, identity card or other document recognised as an identity document by the Member State within whose territory the supply takes place.’

8.

Article 273 of that directive is worded as follows:

‘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.

The option under the first paragraph may not be relied upon in order to impose additional invoicing obligations over and above those laid down in Chapter 3.’

B. Polish law

9.

Article 126(1) of the Ustawa o podatku od towarów i us?ug (Law on tax on goods and services, consolidated text, as amended), of 11 March 2004, (3) provides:

‘Natural persons not permanently resident in the territory of the European Union, hereinafter referred to as “travellers”, shall be entitled to a refund of the tax paid on the acquisition of goods in

the territory of Poland which they have exported intact from the European Union in their personal luggage, subject to paragraph 3 and Articles 127 and 128.'

10.

Article 127 of the Law on VAT provides:

'1. There shall be a right to a tax refund as referred to in Article 126(1) in the case of the purchase of goods from taxable persons, hereinafter referred to as "vendors", who:

(1)

are registered as taxable persons, and

(2)

keep records of turnover and amounts of input tax using cash registers, and

(3)

have concluded tax refund agreements with at least one of the persons referred to in paragraph 8.

…

5. The tax refund to travellers shall be made in zlotys [Polish zloty, ('PLN')] by the vendor or at VAT refund points by persons whose object is to make refunds as referred to in Article 126(1).

6. Vendors as referred to in paragraph 5 may make a tax refund as referred to in Article 126(1), provided that their turnover for the previous tax year was greater than PLN 400000 [approximately EUR 94531] and they refund the tax solely in relation to goods acquired by a traveller from the relevant vendor.'

III. Facts leading to the dispute and the question submitted for a preliminary ruling

11.

Mr Pie?kowski, a trader subject to VAT, is engaged in the business of selling telecommunications equipment to travellers resident outside the territory of EU Member States. The goods therefore leave EU territory once they are in the customers' possession.

12.

In 2006 the Polish tax authorities notified Mr Pie?kowski that he qualified as a 'vendor' for the purposes of Article 127(1) of the Law on VAT. The same authorities also found Mr Pie?kowski's VAT returns to show his turnover as PLN 283695 (approximately EUR 67045) for the tax year 2009 and PLN 238429 (approximately EUR 56347) for the tax year 2010. Furthermore, the tax authorities found that Mr Pie?kowski had not supplied any information to show that he had concluded a VAT refund agreement with an authorised person but that he had made tax refunds to travellers personally, or through an employee.

13.

In those circumstances, the tax authorities found that the level of Mr Pie?kowski's turnover meant that he was not permitted to make VAT refunds to travellers personally or to apply a 0% rate to them for the tax years 2010 and 2011.

14.

Mr Pie?kowski challenged that decision before the Wojewódzki S?d Administracyjny w Lublinie (Regional Administrative Court, Lublin, Poland). Relying on the provisions relating to VAT refunds to travellers contained in Articles 126 to 129 of the Law on VAT, and on Articles 146(1)(b), 147, 131 and 273 of the VAT Directive, that court held that the provisions of the Law on VAT were compatible with the provisions of the VAT Directive in so far as they made the option to refund VAT to travellers conditional on the taxable person attaining a turnover greater than PLN 400000 (approximately EUR 94531) in the preceding tax year. According to the Wojewódzki S?d Administracyjny w Lublinie (Regional Administrative Court, Lublin), the threshold fixed for the turnover was not merely a formality but was a substantive condition on which the option for the vendor to refund the tax directly depended in principle.

15.

Mr Pie?kowski, who considered that threshold to be an 'administrative barrier' to the application of the preferential 0% VAT rate, appealed on a point of law to the Naczelny S?d Administracyjny (Supreme Administrative Court), again submitting that the provisions of the Law on VAT were incompatible with the provisions of the VAT Directive and with the principles of proportionality and fiscal neutrality.

16.

The referring court points out that, unlike Article 127(6) of the Law on VAT, the provisions of the VAT Directive do not require a taxable person to have attained a certain turnover during the preceding tax year in order to apply the VAT exemption to goods carried in the personal luggage of travellers.

17.

The referring court notes that the conditions for applying the exemption laid down in Articles 146 and 147 of the VAT Directive relate to consumers and not to vendors, as is the case with Article 127(6) of the Law on VAT.

18.

In addition, the referring court, in contrast to the Wojewódzki S?d Administracyjny w Lublinie (Regional Administrative Court, Lublin), considered that the condition that a specified turnover be attained in the preceding tax year cannot be regarded as a substantive condition, in the light of the provisions of the VAT Directive since there is no legal basis for it.

19.

Moreover, the referring court also states that the conditions laid down in the VAT Directive do not appear to permit the national legislature to make the application of the said exemption conditional on the attainment of a minimum turnover during the preceding tax year.

20.

The referring court recalls, in addition, that, pursuant to Article 273 of the VAT Directive, Member States may impose other obligations which they deem necessary to ensure the correct collection of VAT and to prevent evasion. However, the referring court questions whether the establishment by a Member State of a minimum threshold requirement fulfils the objectives of that provision.

21.

In those circumstances, the Naczelny S?d Administracyjny (Supreme Administrative Court) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

‘Must Articles 146(1)(b), 147, 131 and 273 of the VAT Directive be interpreted as precluding national legislation which excludes application of the exemption to a taxable person who does not satisfy the condition relating to attainment of the relevant turnover threshold for the previous tax year and who also has not concluded an agreement with a person authorised to refund tax to travellers?’

IV. My analysis

22.

The referring court is asking the Court of Justice to rule, in essence, on the question of whether the provisions of Articles 146(1)(b), 147, 131 and 273 of the VAT Directive preclude national legislation which provides that a taxable person may apply a VAT exemption to the export of goods by travellers only if his turnover reached a certain threshold during the preceding tax year, or if he has concluded a tax refund agreement with an authorised person.

23.

It is not disputed, in the present case, that the goods supplied by Mr Pie?kowski physically left EU territory by being carried in travellers’ personal luggage. Therefore, the provisions of Article 146(1)(b) of the VAT Directive apply to supplies of the goods concerned, which effectively meet the definition in Article 14(1) of that directive. (4)

24.

Article 146(1)(b) of the same directive provides that Member States shall exempt from VAT supplies of goods dispatched or transported by, or on behalf of, the customer, outside the EU. However, given that, in the present case, the goods are carried outside the EU in travellers’ personal luggage, that exemption may apply only if certain conditions, set out in Article 147 of the VAT Directive, are met, which is not disputed either in the present case. (5)

25.

It is clear from the terms of Articles 146(1)(b) and 147 of the VAT Directive that there is no obligation imposed by that directive on the taxable person to have attained a certain turnover during the preceding financial year, or to have concluded an agreement with a person authorised to refund VAT, in order for the export exemption to apply.

26.

Taking those provisions literally would therefore suggest that the national legislation at issue in the main proceedings should be regarded as incompatible with that directive since the exemption

requirements are set out exhaustively in the directive, leaving Member States with only limited leeway in relation to the matter.

27.

However, a reading of Articles 131 and 273 of the VAT Directive qualifies that interpretation by providing that the exemptions in question apply in accordance with conditions which the Member States shall lay down for the purposes of ensuring the correct and straightforward application of those exemptions and of preventing any possible evasion, avoidance or abuse. (6)

28.

Even though the purpose of the conditions laid down by the Polish legislation does not, a priori, appear to be ensuring straightforwardness, Member States do, under the provisions, have some discretion in determining the VAT exemption conditions. Indeed, in order to prevent tax evasion and ensure compliance with the objectives laid down by the EU legislature, Member States may provide that taxable persons must fulfil conditions in addition to those laid down in the VAT Directive, as they shall deem necessary.

29.

Nevertheless, Member States must exercise this discretion in compliance with the general principles of EU law. (7)

30.

The Court has already held that, when exercising their discretion, Member States must employ means which, whilst enabling them effectively to attain the objectives pursued by their domestic laws, cause the least possible detriment to the objectives and principles laid down by the relevant EU legislation. (8) In the present case, there is reason to question the compatibility of the domestic laws at issue in the main proceedings with the principles of fiscal neutrality and of proportionality, which are enshrined in EU law.

31.

In relation to the principle of fiscal neutrality, the Court has held that a national measure goes further than is necessary to ensure the correct collection of the tax if, in essence, it makes the right of exemption from VAT subject to compliance with formal obligations, without any account being taken of the substantive requirements and, in particular, without any consideration being given as to whether those requirements have been satisfied. Indeed, the Court has held that transactions should be taxed taking into account their objective characteristics. Accordingly, the principle of fiscal neutrality requires that an exemption from VAT be allowed if the substantive conditions are satisfied, even if the taxable person has failed to comply with some of the formal requirements. (9)

32.

The distinction between formal and substantive requirements has been the subject of debate in the observations submitted to the Court. However, the Court has already had to categorise certain additional requirements in national legislation as either ‘formal requirements’ or ‘substantive requirements’. I will cite certain examples here, in order to compare the present case with the existing case-law.

33.

In the judgment of 9 February 2017, Euro Tyre, (10) the Court categorised a requirement for the purchaser to either be registered in the VAT Information Exchange System or come under a system of taxation on intra-Community acquisitions of goods as a ‘formal requirement’. In the judgment of 20 October 2016, Plöckl, (11) the same decision was reached in the case of an obligation for the customer to provide a VAT identification number issued by the Member State of destination. In the judgments of 27 September 2007, Collée, (12) and of 12 July 2012, EMS-Bulgaria Transport, (13) the Court held that a requirement to prove the supply within a certain limitation period was a formal one. In judgments of 21 October 2010, Nidera Handelscompagnie; (14) of 27 September 2012, VSTR; (15) and of 14 March 2013, Ablessio, (16)the Court found a requirement for the prior identification of the taxable person in a VAT register to be a formal requirement.

34.

Taking into account this helpful case-law, together with the information submitted to the Court by the referring court, it seems fairly clear that the two alternative requirements laid down by Polish law are also formal in nature. It should be recalled, in this context, that it is not disputed that the substantive requirements under the VAT Directive have been satisfied in the present case.

35.

Therefore, the fact that the additional formal requirements under national law have not been satisfied should not affect the vendor’s right to the VAT exemption. (17)

36.

The only exception would be if non-compliance with such formal requirements would effectively prevent the production of conclusive evidence that the substantive requirements had been satisfied or if the taxable person had intentionally participated in tax evasion. (18)

37.

Consequently, once the administration has the information necessary to establish that the substantive requirements have been satisfied and that the tax authority does not suspect any intentional fraud on the part of the taxable person, the tax authority cannot, in relation to the taxable person’s right to a VAT exemption, impose additional conditions which may have the effect of rendering that right ineffective for practical purposes. (19) Thus, the refusal to grant the taxable person the benefit of the exemption cannot be justified on the sole ground that additional formal requirements laid down by domestic law, adopted pursuant to Articles 131 and 273 of the VAT Directive, have not been fulfilled. (20)

38.

As a result of the foregoing, it must be held that the principle of fiscal neutrality precludes national legislation such as that at issue in the main proceedings.

39.

Incidentally, even if the Court takes a different view from that which I have taken above, the Court should still rule on the principle of proportionality. In this respect, it is settled case-law that such national measures must not go further than is necessary to protect the interests of the Treasury and may not be used in such a way that they would have the effect of undermining the principles behind the common system of VAT. (21)

40.

In its observations, the Republic of Poland submits that the aim of the national legislation at issue in the main proceedings is to reduce the risk of disruption to the functioning of the system for refunding VAT to travellers. According to the Polish government, that disruption could result, in particular, from an increased risk of cashflow imbalance for small operators and liquidation of their economic activity, or deliberate non-compliance with the obligation to refund VAT, particularly in relation to tax evasion.

41.

It should be recalled that the prevention of tax evasion, avoidance or abuse are the main objectives of the VAT Directive. The Court has already had occasion to hold that the pursuit of those objectives can justify requirements on suppliers. (22)

42.

As to the practical application of the principle of proportionality in the present case, that will come down to the referring court. (23) It should nonetheless be noted here that the national legislation cannot be considered as proportional if it renders the VAT exemption impossible on the pretext that the formal requirements have not been satisfied, even though, according to the referring court and the Republic of Poland, the requirement to attain a certain turnover is not absolute in nature since the taxable person has the ability to benefit from the exemption by concluding an agreement with a person authorised to make VAT refunds to travellers.

43.

In addition, it must be held that such national legislation cannot have the effect of limiting the number of taxable persons able to directly apply the exemption, without this being a breach of the principle of equal treatment, laid down in Article 273 of the VAT Directive. The effect of that mechanism is to favour the largest undertakings, whereas the risk of tax evasion is necessarily proportional to the volume of business and therefore to the turnover. The Republic of Poland’s argument that the risk of error and fraud is inversely proportional to the level of turnover does not seem to me to be in the least convincing. Moreover, the Court has held that, in circumstances where the conditions for export exemption laid down in Article 146(1)(b) of the VAT Directive, in particular, the requirement that the goods concerned leave the customs territory of the European Union, are satisfied, no liability to pay VAT arises in respect of such a supply and there no longer exists, in principle, a risk of tax evasion or loss of tax which could justify the transaction concerned being taxed. (24)

44.

In view of all of the foregoing, it is proposed that the Court should hold that the provisions of Articles 146(1)(b), 147, 131 and 273 of the VAT Directive, together with the principle of neutrality, should be interpreted as precluding national legislation such as that at issue in the main proceedings that prevents taxable persons from personally applying the travellers’ VAT exemption

unless they have attained a certain turnover during the preceding tax year or have concluded a VAT refund agreement with an authorised person.

V. Conclusion

45.

In the light of the foregoing, I propose that the Court should respond to the question referred by the Naczelny S?d Administracyjny (Supreme Administrative Court, Poland) for a preliminary ruling in the following way:

The provisions of Articles 146(1)(b), 147, 131 and 273 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, together with the principle of fiscal neutrality, should be interpreted as precluding national legislation which excludes application of the exemption to a taxable person who does not satisfy the condition relating to attainment of a minimum turnover during the preceding tax year and who has not concluded an agreement with a person authorised to refund tax to travellers.

(1) Original language: French.

(2) Council Directive of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1, ‘the VAT Directive’).

(3) Dz. U. of 2011, No 177, item 1054, ‘the Law on VAT’.

(4) See, by analogy, judgments of 6 September 2012, Mecsek-Gabona (C?273/11, EU:C:2012:547, paragraph 31), and of 19 December 2013, BDV Hungary Trading (C?563/12, EU:C:2013:854, paragraph 24).

(5) For that reason, no comment will be made on the Republic of Poland’s observations about the conditions in Article 147 of the VAT Directive relating exclusively to customers and affecting the vendor’s ability to apply the exemption.

(6) See, by analogy, judgment of 26 March 2015, Macikowski (C?499/13, EU:C:2015:201, paragraphs 36 and 37).

(7) Judgments of 21 February 2008, Netto Supermarkt (C?271/06, EU:C:2008:105, paragraph 18 et seq.), and of 19 December 2013, BDV Hungary Trading (C?563/12, EU:C:2013:854, paragraph 29 et seq.).

(8) See, to that effect, in relation to the principle of proportionality, judgment of 19 December 2013, BDV Hungary Trading (C?563/12, EU:C:2013:854, paragraph 31), together with, by analogy, judgments of 18 December 1997, Molenheide and Others (C?286/94, C?340/95, C?401/95 and C?47/96, EU:C:1997:623, paragraphs 45 to 48), or of 11 May 2006, Federation of Technological Industries and Others (C?384/04, EU:C:2006:309, paragraph 30), and, in relation to the principle of neutrality, judgments of 19 September 2000, Schmeink & Cofreth and Strobel (C?454/98, EU:C:2000:469, paragraph 59), or of 21 February 2006, Halifax and Others (C?255/02, EU:C:2006:121, paragraph 92); of 26 January 2012, Kraft Foods Polska (C?588/10, EU:C:2012:40, paragraph 28); and of 14 March 2013, Ablessio (C?527/11, EU:C:2013:168, paragraph 30).

(9) See, in particular, judgment of 20 October 2016, Plöckl (C?24/15, EU:C:2016:791, paragraphs 36 to 39).

(10) C?21/16, EU:C:2017:106, paragraph 32.

(11) C?24/15, EU:C:2016:791, paragraphs 40 and 41.

(12) C?146/05, EU:C:2007:549, paragraph 29.

(13) C?284/11, EU:C:2012:458, paragraph 60.

(14) C?385/09, EU:C:2010:627, paragraph 50.

(15) C?587/10, EU:C:2012:592, paragraph 51.

(16) C?527/11, EU:C:2013:168, paragraph 32.

(17) See, by analogy, judgments of 6 September 2012, Mecsek-Gabona (C?273/11, EU:C:2012:547, paragraph 60); of 27 September 2012, VSTR (C?587/10, EU:C:2012:592, paragraph 51); of 20 October 2016, Plöckl (C?24/15, EU:C:2016:791, paragraph 40); and of 9 February 2017, Euro Tyre (C?21/16, EU:C:2017:106, paragraph 32).

(18) See, by analogy, judgments of 27 September 2007, Collée (C?146/05, EU:C:2007:549, paragraph 31); of 12 July 2012, EMS-Bulgaria Transport (C?284/11, EU:C:2012:458, paragraph 71); of 27 September 2012, VSTR (C?587/10, EU:C:2012:592, paragraph 46); of 14 March 2013, Ablessio (C?527/11, EU:C:2013:168, paragraph 32); of 11 December 2014, Idexx Laboratories Italia (C?590/13, EU:C:2014:2429, paragraphs 39 and 40); and of 20 October 2016, Plöckl (C?24/15, EU:C:2016:791, paragraphs 44 and 46).

(19) See, to that effect, judgment of 20 October 2016, Plöckl (C?24/15, EU:C:2016:791, paragraph 47 and the case-law cited).

(20) See, by analogy, judgment of 11 December 2014, Idexx Laboratories Italia (C?590/13, EU:C:2014:2429, paragraph 40).

(21) See, by analogy, judgments of 7 December 2010, R. (C?285/09, EU:C:2010:742, paragraphs 44 and 45), and of 22 December 2010, Dankowski (C?438/09, EU:C:2010:818, paragraph 37).

(22) See by analogy, judgments of 7 December 2010, R. (C?285/09, EU:C:2010:742, paragraph 36), and of 19 December 2013, BDV Hungary Trading (C?563/12, EU:C:2013:854, paragraph 33).

(23) See, to that effect, judgments of 12 July 2012, EMS-Bulgaria Transport (C?284/11, EU:C:2012:458, paragraph 77); of 14 March 2013, Ablessio (C?527/11, EU:C:2013:168, paragraph 35); and of 26 March 2015, Macikowski (C?499/13, EU:C:2015:201, paragraph 53).

(24) See, to that effect, judgment of 19 December 2013, BDV Hungary Trading (C?563/12, EU:C:2013:854, paragraph 40).