Vastuvõtmise kuupäev : 07/12/2022

Case C-676/22

Request for a preliminary ruling

Date lodged:

2 November 2022

Referring court:

Nejvyšší správní soud (Czech Republic)

Date of decision to refer:

26 October 2022

Applicant:

B2 Energy s.r.o.

Defendant:

Odvolací finanční ředitelství

[…]

O R D E R

The Nejvyšší správní soud (the Supreme Administrative Court, Czech Republic) has ruled […] in the case of the applicant: **B2 Energy s.r.o.**, […] v. the defendant: **Odvolací finanční ředitelství** (The Appellate Tax Directorate) […] with respect to an action challenging the defendant's decision of 21 November 2019, […] in proceedings concerning the applicant's administrative complaint on a point of law challenging a judgment of the Městský soud v Praze (Prague City Court, Czech Republic) of 18 August 2021, ref. no 14 Af 4/2020-48,

A s f o l l o w s :

I. The following question is hereby **s u b m i t t e d** to the Court of Justice of the European Union for a preliminary ruling:

Must Article 138(1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax be interpreted in accordance with the judgment of the Court of Justice of the European Union of 9 December 2021 in Case C-154/20, *Kemwater ProChemie*, EU:C:2021:989, such that the

making of a claim for exemption from value added tax (VAT) upon the supply of goods to another EU Member State must be denied, without the tax authorities needing to prove that the supplier of the goods was involved in VAT fraud, if the supplier has failed to prove supply of goods to a specific recipient in another EU Member State having the status of the taxable person specified in the tax documents, even though, with a view to the facts of the case and the information provided by the taxable person, there is data available to verify that the actual recipient in the other EU Member State did indeed have that status?

[…]

G r o u n d s :

I. Subject of the proceedings

[1] The applicant is a Czech trading company. On 15 July 2015, the tax authorities initiated a tax inspection of the applicant for the taxable periods of February, March, April, and May 2015. On the basis of that inspection, it concluded that the applicant had failed to document compliance with the conditions for a claim to a value added tax (‘VAT’) exemption upon the supply of goods to another European Union (‘EU’) Member State lodged on the basis of a tax document in which the following entities were listed as the recipients of the goods: the cooperative OOV-Družstvo Malinovo and the company BICOTEC LIMITED (‘the recipients of the goods’). The documents submitted pertained to deliveries of rapeseed oil to another EU Member State. The applicant presented to the tax authorities tax documents pertaining to the performance provided, inclusive of their annexes in the form of purchase orders, delivery documents, international consignment notes, weighbridge tickets, certificates of the measurement of the quality of the goods, as well as framework purchase agreements, a framework agreements for the carriage of goods, and bank account statements.

[2] The tax authorities did not question that the carriage of the goods to another Member State did actually take place; however, they maintained that the applicant had failed to document its claims, as it had failed to document that it had transferred the right to dispose of the goods to the persons specified as the recipients of the goods in the documents submitted (the cooperative OOV-Družstvo Malinovo and the company BICOTEC LIMITED), or that the goods were supplied to a person registered for tax in another Member State. Thus, it failed to comply with the conditions for claiming a right to tax exemption. The recipients of the goods from the applicant failed to report the acquisition of goods from the Czech Republic or the delivery of goods within the EU in the form of a trilateral transaction and failed to pay the tax on the acquisition of the goods purchased from another Member State. The supply of the goods was also not certified in relation to the companies DRAGSTAL and WRATISLAVIA-BIO, even though the applicant claimed that they were to be its actual end customers. In

some of the CMR documents and weighbridge tickets, the company WRATISLAVIA-BIO was stated as the owner of the goods, but the confirming signature and stamp belonged to a different entity, the company Wratislavia-Biodiesel, meaning that the complainant has failed to prove supply of the goods to the company WRATISLAVIA-BIO. The fact that the recipients paid for the rapeseed oil does not, in itself, document that they acquired the right to dispose of the goods as their owners. Some of the international consignment notes submitted with the invoices issued to the recipients of the goods were not confirmed, not even by the final recipients, or were confirmed by totally different entities. The actual hand-over of the goods to the declared recipients in another EU Member State has also not been confirmed by witnesses.

[3] The tax authorities thus increased the value added tax claimed in payment assessments dated 6 October 2017, assessing the applicant for VAT of CZK 66,323 in respect of the taxable period of February 2015, CZK 68,490 in respect of March 2015, CZK 74,359 in respect of April 2015, and CZK 8,486 in respect of May 2015.

[4] The defendant dismissed the appeal challenging the payment assessments in a decision dated 21 November 2019 […]. The decision of the defendant was challenged by the applicant before the Městský soud v Praze (Prague City Court) (‘City Court’). The City Court dismissed the application challenging the decision of the defendant, in its judgment dated 18 August 2021, ref. no 14 Af 4/2020-48. According to the City Court, it was not the production of tax documents (compliance with formal requirements) or the carriage of the goods to another Member State that were questionable, but both the tax authorities as well as the defendants questioned the supply of the goods to the declared recipients.

[5] The City Court inferred from case-law of the Court of Justice of the European Union, primarily from the judgment dated 27 September 2007, in Case C-409/04, *Teleos plc and Others*, EU:C:2007:548, that the applicant failed to prove supply of the goods to its final recipients through the declared recipients. It was not apparent from the documents produced who accepted the goods on behalf of the recipients or to which recipient the goods were delivered, which was moreover not even confirmed by the witnesses heard. Hence, it is not clear who was entitled to exercise ownership rights to the goods (rapeseed oil). The City Court emphasised that the defendant did not accuse the applicant of involvement in tax fraud but for its failure to substantiate its tax claims. Given the facts of the case, the applicant was thus not acting in good faith as concerns the de facto transfer of the right to dispose of the rapeseed oil, as the owner to the declared recipients of the goods.

[6] The applicant (complainant) lodged an administrative complaint on a point of law challenging the judgment of the City Court, asserting that it had proven compliance with conditions for claiming a tax exemption upon the supply of goods to another EU Member State. As concerns the assessment of the time when the right to dispose of the goods as the owner arose, the complainant first asserted

that, even if it failed to prove supply of the goods to the declared recipients, it had, nevertheless, met all three conditions for being entitled to claim a VAT exemption upon the supply of goods to another EU Member State. The identity of the actual recipient, to which the right to dispose of the goods as their owner has been transferred, can be ascertained from the evidence produced. That evidence has convincingly proven the de facto acceptance of the goods in the city of Wrocław, Poland, by its end recipients – companies other than those entities declared in the relevant tax documents.

II. Applicable European Union legislation and national legislation

[7] Article 131 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax stipulates that tax exemptions shall apply without prejudice to other Community provisions and in accordance with conditions which the Member States lay down for the purposes of ensuring the correct and straightforward application of those exemptions and of preventing any possible evasion, avoidance or abuse.

[8] According to Article 138(1) of Directive 2006/112/EC, Member States are to exempt the supply of goods dispatched or transported to a destination outside their respective territory but within the Community, by or on behalf of the vendor or the person acquiring the goods, for another taxable person, or for a non-taxable legal person acting as such in a Member State other than that in which dispatch or transport of the goods began.

[9] The directive itself (unlike in the procedure for claiming a VAT deduction, see Article 168(a) and Article 178(a) of the Directive) does not have a specific provision listing the evidence that must be produced by a taxable person in order to be able to claim a tax exemption.

[10] A taxable person is defined in Article 9(1) of Directive 2006/112/EC as any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity.

[11] Article 287 of Directive 2006/112/EC stipulates that Member States which acceded after 1 January 1978 may exempt taxable persons whose annual turnover is no higher than the equivalent in national currency of the following amounts at the conversion rate on the day of their accession […]. For the Czech Republic, point (7) sets that turnover at EUR 35,000. For other Member States, similar exemptions with different limits are provided in Articles 284 to 286 of Directive 2006/112/EC.

[12] With a view to the option specified in Article 287 of Directive 2006/112/EC, under the laws of the Czech Republic, a taxable person becomes a taxpayer pursuant to Paragraph 6(1) of zákon č. 235/2004 Sb., o dani z přidané hodnoty (Law 235/2004, on value added tax) (‘the VAT Law’) if its turnover in no more than the 12 immediately preceding consecutive calendar months exceeds

CZK 1,000,000, with the exception of a person effecting solely tax-exempt performances without a right to a tax deduction.

[13] The substantive condition for a claim to a tax exemption is the supply of the goods to another EU Member State. The right to the tax exemption arises subject to the conditions set out in Paragraph 64 of the VAT Law, in the version applicable to the case in question. The foundation is that tax exemption with a right to a deduction attaches to the supply of goods to another Member State by a taxpayer to a person registered for tax purposes in another Member State to whom the goods are dispatched or transported from the Czech Republic by the taxpayer or the person acquiring the goods or an authorised third party. An exception applies to the supply of goods to a person for whom the acquisition of the goods in another Member State is not subject to tax.

[14] Pursuant to Paragraph 4(1)(e) of the VAT Law, taxable performance is the delivery of goods or provision of a service for consideration by a taxable person acting as such. Pursuant to Paragraph 4(1)(f) of the VAT Law, a person registered for tax purposes is a person who has been granted a tax identification number for value added tax purposes in the scope of trading among Member States.

[15] The supply of goods is defined by Paragraph 13(1) of the VAT Law as a transfer of the right to dispose of the goods as their owner. Pursuant to Paragraph 13(2), the supply of goods to another Member State means, for the purpose of that Law, the supply of goods that are actually dispatched or transported to another Member State.

[16] Pursuant to Paragraph 92(3) of zákon č. 280/2009 Sb., daňový řád (Law 280/2009, the Tax Code), a taxable person shall document all facts that the entity is obliged to state in its regular tax return, supplementary tax return, and other submissions.

III. Analysis of the preliminary reference

[17] In the present case, the Supreme Administrative Court is faced with the question of whether a right to a value added tax deduction can be denied upon the supply of goods to another Member State where the actual recipient of the goods, in connection with which the supplier is claiming a tax exemption, is not known.

[18] […]

[19] In its case-law pertaining to Articles 131 and 138 of Directive 2006/112/EC, the Court of Justice emphasised repeatedly that, in assessing a right to a value added tax exemption or the requirements that a taxable person must meet, Member States' tax authorities are always obliged to apply the principle of legal certainty, the principle of protecting legitimate expectations, and the principle of proportionality. According to the laws of the Czech Republic, the burden of proof, as concerns proving compliance with the substantive conditions, is borne by the taxable person. The same conclusions, however, arise from the prevailing case-

law of the Court of Justice. The case-law of the Court of Justice modifies the burden of proof only to the extent that it prohibits the tax authorities and Member States from imposing on taxable persons additional conditions which are not compliant with the objectives pursued by Directive 2006/112/EC. In proving involvement in tax fraud, the burden of proof is reversed and involvement in fraud must be proven by the tax authorities.

[20] Even though the Directive itself does not contain any specific provisions pertaining to the evidence that must be produced by the taxable person in order to be able to claim a value added tax exemption, the Court of Justice stated in specific cases that, in order to obtain a value added tax exemption, an importer must prove that, at the time of import, the goods concerned were intended for dispatch or transport to another Member State and that they were thus dispatched or transported as part of its subsequent supply within the Community; dispatch to a specific address of the entity acquiring the goods need not be proven. Such evidence may include documents of transport from a tax warehouse in the export Member State to a tax warehouse in another Member State.

[21] In terms of proving the right to a VAT deduction under Article 168 and Article 178 of Directive 2006/112/EC, the Court of Justice answered a preliminary reference submitted by an extended chamber of the Supreme Administrative Court in its recent judgment of 9 December 2021 in Case C-154/20, *Kemwater ProChemie*, EU:C:2021:989, as follows*: 'Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning that the right to deduct input value added tax (VAT) must be refused, without the tax authorities having to prove that the taxable person committed VAT fraud or that he or she knew, or ought to have known, that the transaction relied on to establish the right of deduction was connected with such fraud, where, the true supplier of the goods or services concerned not having been identified, that taxable person fails to adduce proof that that supplier had the status of taxable person, provided that, taking into account the factual circumstances and the evidence produced by that taxable person, the information needed to verify that the true supplier had that status is lacking'*

[22] Hence, the Court of Justice confirmed that the status of the supplier of goods or provider of services as a taxable person (or, in the case of the Czech Republic, a VAT payer) is one of the substantive conditions for being entitled to claim a VAT deduction; nevertheless, it admitted that, under certain conditions, that supplier need not be clearly identified, as long as the facts of the case indicate with certainty that it had the status of a VAT payer. The burden of proof in this regard lies with the person claiming the right to a VAT deduction. An exception is a situation when the information required to verify whether the substantive condition of a right to a VAT deduction has been met is available to the tax authorities.

[23] According to the conclusions of the Court of Justice stated in the judgement cited above, it is therefore not necessary to prove in tax proceedings that taxable

performance was provided by a specific supplier who had the status of a VAT payer. The possibility was thus admitted that, despite the identity of the supplier not being ascertained, the substantive conditions for a claim to a VAT deduction will however be met if the tax authorities have, in view of the facts of the case, information required to verify that the actual supplier had the status of a VAT payer.

[24] The facts of the case ascertained in this case indicate that the complainant carried out transport of rapeseed oil to another Member State without proving that it indeed supplied it to the declared recipients (the cooperative OOV-Družstvo Malinovo and the company BICOTEC LIMITED). The goods were, however, delivered to specific addresses located in another EU Member State, where their receipt was confirmed by other entities. In CMR document no 1988977, the delivery of the goods for which the declared recipient was stated as 'the cooperative OOV-Družstvo Malinovo' was confirmed by the stamp and signature of the company RPA. In the applicable CMR documents and weighbridge tickets for the delivery of the goods for which the company BICOTEC LIMITED was listed as the declared recipient was confirmed by the stamp and signature by the entity 'Sklad Wroclaw, ul. Swojczycka 32, 51-501 Wroclaw' (also designated as 'Magazyn-Wroclaw') and by the company 'Wratislavia-Biodiesel'. The company WRATISLAVIA-BIO was listed as the owner of the goods in the weighbridge tickets presented for some of the supplies assessed, while they were also confirmed by the stamp and signature of the company Wratislavia-Biodiesel.

[25] Furthermore, it must be stressed that there was no dispute as concerns the transport of the rapeseed oil from the Czech Republic to Poland and its subsequent drainage from the transport company's tanks for other customers not identified by the complainant in its tax returns, and the tax authorities failed to grant the complainant its right to a tax exemption due only to the fact that the complainant had failed to document delivery of the goods to the declared recipients. Furthermore, rapeseed oil was being delivered to destinations in weights in excess of tens of metric tonnes, i.e., in the value of tens of thousands of euros. It is, therefore, hard to imagine that the actual recipients of the goods in question were not VAT payers.

[26] For these reasons, the question arose whether the conclusions formulated in the judgment in the case *Kemwater ProChemie* can also be applied in the present case and whether documenting compliance with the substantive conditions for claiming a VAT exemption upon the supply of goods to another EU Member State includes the obligation of the taxable person to document that the goods were received by a specific recipient (declared by the taxable person) who had the status of a taxable person or whether it will suffice that the facts of the case indicate that the goods were accepted in another EU Member State by another actual recipient and that it had (or it is evident from the facts of the case that it must have had) the status of a taxable person.

[27] The Supreme Administrative Court is aware of the conclusions formulated in the judgment of the Court of Justice of 17 October 2019 in Case C-653/18, *Unitel sp. z o.o.*, EU:C:2019:876, according to which the right to a VAT exemption cannot be granted if the absence of an identified actual recipient prevents the submission of evidence that the performance constitutes supply of goods outside of the European Union. That decision, however, first, pertains to a different situation – to the supply of goods outside of the EU, and secondly, it does not answer the question of whether it is also the case when the facts of the case convincingly indicate that, even though the goods were not accepted by the recipient declared in the tax documents, they were accepted at the destination by another actual recipient who had (or must have had) the status of a taxable person. In other words, it is in dispute whether, in this case, the existing case-law as expressed in the judgment in *Kemwater ProChemie* may be shifted somewhat. The Supreme Administrative Court holds that the question of the tax exemption of goods supplied to another Member State is, to a certain degree, comparable to the issue of a right to input tax deduction, in that, in both cases, the relevant substantive condition is a trading partner in the transaction concerned who has the status of a taxable person (in the case of a right to a deduction, it is the supplier of the taxable performance concerned, whereas in the case of a tax exemption upon the supply of goods to another Member State, it is the recipient of the goods in the other Member State).

[28] The need to apply the conclusions reached in the judgment in *Kemwater ProChemie* to an assessment of the right to a tax exemption in the event of the supply of goods to another Member State has been inferred by the Supreme Administrative Court in its judgment of 4 February 2022, ref no 4 Afs 115/2021-45, in which it stated that, in assessing a taxable person's right to a VAT exemption upon the supply of goods to another EU Member State, it is not possible to deny the taxable person that right if it was evident from the facts of the case that it indeed supplied the goods to another EU Member State, even though it has failed to document their supply to the declared recipients. According to […] [the referring court] it would run contrary to the principle of tax neutrality if a taxable person were denied the right to a VAT tax exemption upon the supply of goods to another EU Member State if it proved the supply of the goods concerned to another actual recipient. In that situation, however, it must be verified whether it is evident from the facts of the case and from the information available to the tax authorities, or provided by the taxable person, that the actual recipients of the goods from the taxable person had the status of VAT taxable persons.

[29] Conversely, in its judgment of 25 May 2022, ref no 10 Afs 374/2020-59, the Supreme Administrative Court subsequently concluded that the conclusions formulated by the Court of Justice in *Kemwater ProChemie* do not pertain to VAT exemptions upon the supply of goods to another EU Member State. In the judgment cited above, […] [the Supreme Administrative Court] noted that in such a case, the '*supplier must provide evidence that its customer abroad is a "taxable person acting as such" (judgment of the Court of Justice of 27 September 2012 in Case C-587/10,* [VSTR]). *This case-law of the Court of Justice is confirmed by*

recent judgments of the Supreme Administrative Court, of 10 February 2022, ref. no 9 Afs 274/2020 – 61, molton*, and of 24 February 2022, ref no 1 Afs 238/2020 – 59,* Steris*, according to which a Czech supplier must document that the entity abroad was the actual recipient of the goods'*

[30] This conflict in the case-law of the Supreme Administrative Court therefore documents the complexity of the legal issue at hand and the need for a ruling of the Court of Justice.

[…]