

Provisional text

JUDGMENT OF THE COURT (Fifth Chamber)

28 February 2018 (\*)

(Reference for a preliminary ruling — Directive 2006/112/EC — Value added tax (VAT) — Article 131 — Article 146(1)(b) — Article 147 — Exemptions on exportation — Article 273 — Legislation of a Member State making the benefit of the exemption subject to the attainment of a minimum level of turnover or the conclusion of an agreement with a person authorised to make VAT refunds to travellers)

In Case C-307/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland), made by decision of 27 January 2016, received at the Court on 30 May 2016, in the proceedings

**Stanisław Piekowski**

v

**Dyrektor Izby Skarbowej w Lublinie,**

THE COURT (Fifth Chamber),

composed of J.L. da Cruz Vilaça, President of the Chamber, E. Levits, A. Borg Barthet (Rapporteur), M. Berger and F. Biltgen, Judges,

Advocate General: Y. Bot

Registrar: A. Calot Escobar

having regard to the written procedure,

after considering the observations submitted on behalf of:

- the Polish Government, by B. Majczyna, acting as Agent,
- the European Commission, by K. Herrmann and M. Owsiany-Hornung, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 7 September 2017,

gives the following

### **Judgment**

1 This request for a preliminary ruling concerns the interpretation of Article 131, Article 146(1)(b) and Articles 147 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) ('the VAT Directive').

2 The request has been made in proceedings between Mr Stanisław Piekowski and the

Dyrektor Izby Skarbowej w Lublinie (Director of the Tax Chamber, Lublin, Poland), concerning the exemption from value added tax (VAT) of the supply of goods dispatched outside the European Union in the personal luggage of travellers.

## Legal context

### EU law

3 Under Article 14(1) of the VAT Directive:

“Supply of goods” shall mean the transfer of the right to dispose of tangible property as owner.’

4 Article 131 of the VAT Directive provides:

‘The exemptions provided for in Chapters 2 to 9 [of Title IX of the VAT Directive] 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.’

5 Article 146(1)(b), which is in Chapter 6 (entitled ‘Exemptions on exportation’) of Title IX of that directive, provides:

‘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.’

6 Article 147 of the 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.

Proof of exportation shall be furnished by means of the invoice or other document in lieu thereof, endorsed by the customs office of exit from the Community.

Each Member State shall send to the Commission specimens of the stamps it uses for the endorsement referred to in the second subparagraph. The Commission shall transmit that information to the tax authorities of the other Member States.'

7 Article 273 of the VAT Directive 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.'

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.'

### **Polish law**

8 The ustawa o podatku od towarów i usług (Law on the tax on goods and services) of 11 March 2004 (Dz. U. of 2011, No 177, heading 1054), in the version applicable at the material time ('the Law on VAT'), provides in Article 126(1):

'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.'

9 Article 127 of the Law on VAT states:

'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 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 400 000 and that they refund the tax solely in relation to goods acquired by a traveller from the relevant vendor.

...

8. Persons referred to in paragraph 5 who are not vendors may make a refund as referred to in Article 126(1), provided that they have:

- (1) been registered taxable persons for at least 12 months prior to the submission of an application for a certificate as referred to in paragraph 6;
- (2) notified in writing the head of a tax office of their intention to commence activity relating to the refunding of tax to travellers;
- (3) not had tax arrears constituting State budget revenue or arrears by virtue of contributions to the Social Security Institution for at least 12 months prior to submission of an application for a certificate as referred to in paragraph 6;
- (4) concluded tax refund agreements with the vendors as referred to in paragraph 1;
- (5) deposited with the tax office a guarantee security deposit in the amount of PLN 5 000 000 in the form of:
  - (a) a cash deposit;
  - (b) bank guarantees;
  - (c) State Treasury bonds maturing in at least three years;
- (6) obtained, from the minister competent for public finances, a certificate confirming that all the conditions laid down in paragraphs 1 to 5 have been satisfied cumulatively. ’

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

10 Mr Pie?kowski, a trader subject to VAT, is engaged in the business of selling, inter alia, telecommunications equipment and uses a cash register to register turnover and the amount of tax payable. In the course of his economic activity, Mr Pie?kowski sells goods to, amongst others, travellers resident outside the territory of the European Union.

11 The Urz?du Skarbowego w Bia?ej Podlaskiej (Tax Authorities of Bia?a Podlaska, Poland) 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 283 695 (approximately EUR 68 288) for the tax year 2009 and PLN 238 429 (approximately EUR 57 392) 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.

12 In those circumstances, the tax authorities of Bia?a Podlaska found that the level of Mr Pie?kowski’s turnover meant that he was not permitted to make VAT refunds to travellers personally or through an employee, or to apply a zero VAT rate to them for the tax years 2010 and 2011.

13 Mr Pie?kowski challenged that decision before the Wojew?dzki S?d Administracyjny w Lublinie (Regional Administrative Court, Lublin, Poland).

14 Relying on the provisions governing the procedure for refunding tax to travellers, contained in Articles 126 to 129 of the Law on VAT and in Article 131, Article 146(1) and Articles 147 and

273 of the VAT Directive, the Wojewódzki Sąd Administracyjny w Lublinie (Regional Administrative Court, Lublin) found that, in the light of those provisions, Mr Piekrowski was wrong to claim that the provisions of the Law on VAT were incompatible with the VAT Directive in so far as they made the option for a vendor to refund tax to travellers subject to fulfilment of the requirement that it attain a turnover greater than PLN 400 000 (approximately EUR 96 284) for the preceding tax year.

15 The Wojewódzki Sąd Administracyjny w Lublinie (Regional Administrative Court, Lublin) found that the minimum level of turnover thus set was not merely informational or formal in nature, but rather that it constituted a substantive condition on which the option for the vendor to refund the tax directly depended in principle. That court therefore held, contrary to Mr Piekrowski's argument, that the threshold of PLN 400 000 (approximately EUR 96 284) could not be described as an 'administrative barrier' to the application of a zero VAT rate.

16 Mr Piekrowski appealed on a point of law to the Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland) submitting, in particular, 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.

17 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 threshold during the preceding tax year in order to apply the VAT exemption to goods carried in the personal luggage of travellers.

18 In particular, it would not appear that Article 131 of the VAT Directive can form the basis for the imposition of the condition laid down in Article 127(6) of the Law on VAT.

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

20 Furthermore, the referring court considers that, contrary to the view of the Wojewódzki Sąd Administracyjny w Lublinie (Regional Administrative Court, Lublin), the condition that a minimum level of turnover be attained in the preceding tax year cannot, in the light of the VAT Directive, be regarded as a substantive condition for the exemption, in the absence of any legal basis in the wording of Articles 146 and 147 of the VAT Directive justifying the establishment of such a condition.

21 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. The referring court is uncertain, however, as to whether a Member State imposing a requirement that a minimum level of turnover of PLN 400 000 (approximately EUR 96 284) be attained achieves the aims of that article.

22 In those circumstances, the Naczelny Sąd Administracyjny (Supreme Administrative Court) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Must Article 146(1)(b) and Articles 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?'

## Consideration of the question referred

23 By its question, the referring court asks, in essence, whether Article 131, Article 146(1)(b) and Articles 147 and 273 of the VAT Directive must be interpreted as precluding national legislation under which, in the context of a supply of goods for export to be carried in the personal luggage of travellers, the vendor, a taxable person, must have attained a minimum level of turnover in the preceding tax year, or have concluded an agreement with a person authorised to refund VAT to travellers, where the mere failure to meet those conditions results in the definitive loss for the vendor of the exemption in relation to that supply.

24 It should be noted that, under Article 146(1)(b) of the VAT Directive, the Member States are to exempt the supply of goods dispatched or transported to a destination outside the European Union by or on behalf of a customer. That provision must be read in conjunction with Article 14(1) of that directive, according to which 'supply of goods' means the transfer of the right to dispose of tangible property as owner.

25 It follows from those provisions and, in particular, from the term 'dispatched' in Article 146(1)(b) that the export of goods is effected and the exemption of the supply of goods for export becomes applicable when the right to dispose of the goods as owner has been transferred to the purchaser and the supplier establishes that those goods have been dispatched or transported outside the European Union and that, as a result of that dispatch or that transport, they have physically left the territory of the European Union (judgment of 19 December 2013, *BDV Hungary Trading*, C-563/12, EU:C:2013:854, paragraph 24 and the case-law cited).

26 In the main proceedings, it is not disputed that supplies of goods within the meaning of Article 14 of the VAT Directive have taken place and that the goods concerned by the transactions at issue in the main proceedings have physically left the territory of the European Union carried in the personal luggage of travellers.

27 However, where the supply of goods referred to in point (b) of Article 146(1) of the VAT Directive relates to goods to be carried in the personal luggage of travellers, the exemption is to apply only when certain additional conditions, laid down in Article 147 of that directive, are met.

28 In that respect, it follows from the order for reference that, in the main proceedings, the conditions provided for in Article 146(1)(b) and Article 147 of the VAT Directive have in fact been met.

29 The Court notes that neither Article 146(1)(b) nor Article 147 of the VAT Directive provides for a condition that the taxable person must have attained a minimum level of turnover during the preceding tax year or, if that condition is not met, concluded an agreement with a person authorised to refund VAT in order for the export exemption provided for in Article 146(1)(b) to be applicable.

30 Moreover, the conditions laid down in Article 147 of the VAT Directive concern only the purchasers of the goods at issue and do not refer to the vendors of those goods.

31 It follows that the application of Article 146(1)(b) and Article 147 of the VAT Directive cannot depend on meeting the conditions set by the national legislation at issue in the main proceedings, a failure to comply with which would result in the definitive loss for the taxable person of the export exemption.

32 Admittedly, as is apparent from Article 131 of the VAT Directive, the exemptions provided for

in Chapters 2 to 9 of Title IX of that directive, in which Articles 146 and 147 are found, apply in accordance with conditions which the Member States are to lay down for the purposes of ensuring the correct and straightforward application of those exemptions and of preventing any possible evasion, avoidance or abuse. In addition, Article 273 of the VAT Directive provides that Member States may impose other obligations which they deem necessary to ensure the correct collection of VAT and to prevent evasion.

33 In that regard, the Court has already ruled that in the exercise of the powers conferred on them by Articles 131 and 273 of the VAT Directive, the Member States must respect the general principles of law that form part of the legal order of the European Union, including, in particular, the principles of legal certainty and proportionality and the principle of protection of legitimate expectations (judgment of 19 December 2013, *BDV Hungary Trading*, C-563/12, EU:C:2013:854, paragraph 29 and the case-law cited).

34 In particular, as regards the principle of proportionality, the Court has already held that, in accordance with that principle, the Member States must employ means which, whilst enabling them effectively to achieve the objectives pursued by their domestic laws, cause the least possible detriment to the objectives and principles laid down by the relevant EU legislation (judgment of 19 December 2013, *BDV Hungary Trading*, C-563/12, EU:C:2013:854, paragraph 30 and the case-law cited).

35 In the present case, on the one hand, according to the Polish Government, the primary objective of the national legislation at issue in the main proceedings is to minimise the risk of tax avoidance and evasion linked to an incorrect application of the exemption provided for in Article 146(1)(b) of the VAT Directive.

36 On the other hand, according to the information provided by the referring court, the condition concerning the obligation for the taxable person to have attained a minimum level of turnover during the preceding tax year is not absolute in so far as the taxable person has the possibility of benefiting from the exemption, if the minimum level of turnover is not attained, by concluding an agreement with a person authorised to refund VAT to travellers.

37 However, it should be noted in that regard that a failure to meet that condition leads to the refusal of the export exemption even though the conditions for benefiting from it laid down in Article 146(1)(b) and Article 147 of the VAT Directive have been met.

38 However, 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. In those circumstances, there is no longer, in principle, any risk of tax evasion or loss of tax which could justify the transaction concerned being taxed (judgment of 19 December 2013, *BDV Hungary Trading*, C-563/12, EU:C:2013:854, paragraph 40).

39 Consequently, it must be held that legislation such as that at issue in the main proceedings is not necessary in order to attain the objective of preventing tax avoidance and evasion.

40 In the light of the considerations above, the answer to the question referred is that Article 131, Article 146(1)(b) and Articles 147 and 273 of the VAT Directive must be interpreted as precluding national legislation under which, in the context of a supply of goods for export to be carried in the personal luggage of travellers, the vendor, a taxable person, must have attained a minimum level of turnover in the preceding tax year, or have concluded an agreement with a person authorised to refund VAT to travellers, where the mere failure to meet those conditions

results in the definitive loss for the vendor of the exemption in relation to that supply.

### **Costs**

41 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 (Fifth Chamber) hereby rules:

**Article 131, Article 146(1)(b) and Articles 147 and 273 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as precluding national legislation under which, in the context of a supply of goods for export to be carried in the personal luggage of travellers, the vendor, a taxable person, must have attained a minimum level of turnover in the preceding tax year, or have concluded an agreement with a person authorised to refund VAT to travellers, where the mere failure to meet those conditions results in the definitive loss for the vendor of the exemption in relation to that supply.**

[Signatures]

\* Language of the case: Polish.