Provisional text

JUDGMENT OF THE COURT (Fourth Chamber)

19 December 2018 (*)

(Reference for a preliminary ruling — Harmonisation of tax legislation — Common system of value added tax (VAT) — Directive 2006/112/EC — Chargeable event — Special scheme for travel agents — Articles 65 and 308 — Margin obtained by a travel agent — Determination of the margin — Payments on account made before the supply of travel services by the travel agent — Actual cost borne by the travel agent)

In Case C?422/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Naczelny S?d Administracyjny (Supreme Administrative Court, Poland), made by decision of 16 February 2017, received at the Court on 13 July 2017, in the proceedings

Szef Krajowej Administracji Skarbowej

v

Skarpa Travel sp. z o.o.,

THE COURT (Fourth Chamber),

composed of T. von Danwitz, President of the Seventh Chamber, acting as President of the Fourth Chamber, K. Jürimäe, C. Lycourgos, E. Juhász (Rapporteur) and C. Vajda, Judges,

Advocate General: M. Bobek,

Registrar: M. Aleksejev, Head of Unit,

having regard to the written procedure and further to the hearing on 7 June 2018,

after considering the observations submitted on behalf of:

– the Szef Krajowej Administracji Skarbowej, by J. Kaute and M. Kowalewska, acting as Agents,

– Skarpa Travel sp. z o.o., by J. Zaj?c-Wysocka, radca prawny,

– the Polish Government, by B. Majczyna and A. Kramarczyk-Sza?adzi?ska, acting as Agents,

– the German Government, by T. Henze, acting as Agent,

– the European Commission, by M. Siekierzy?ska and N. Gossement, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 5 September 2018,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 65 and 308 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').

2 The request has been made in the context of proceedings between the Szef Krajowej Administracji Skarbowej (Head of the National Revenue Administration, Poland) and Skarpa Travel sp. z o.o. ('Skarpa') concerning a tax opinion issued by the Minister Finansów (Minister for Finance, Poland; 'the Minister') relating to the chargeability and method of calculation of value added tax (VAT) in the event of the receipt of a payment on account for a tourist service supplied by a travel agent.

Legal context

European Union law

3 Pursuant to Article 63 of the VAT Directive, 'the chargeable event shall occur and VAT shall become chargeable when the goods or the services are supplied.'

4 Article 65 of that directive provides:

'Where a payment is to be made on account before the goods or services are supplied, VAT shall become chargeable on receipt of the payment and on the amount received.'

5 Article 66 of the VAT Directive is worded as follows:

'By way of derogation from Articles 63, 64 and 65, Member States may provide that VAT is to become chargeable, in respect of certain transactions or certain categories of taxable person at one of the following times:

(a) no later than the time the invoice is issued;

(b) no later than the time the payment is received;

(c) where an invoice is not issued, or is issued late, within a specified time no later than on expiry of the time limit for issue of invoices imposed by Member States pursuant to the second paragraph of Article 222 or where no such time limit has been imposed by the Member State, within a specified period from the date of the chargeable event.

The derogation provided for in the first paragraph shall not, however, apply to supplies of services in respect of which VAT is payable by the customer pursuant to Article 196 and to supplies or transfers of goods referred to in Article 67.'

6 Article 306 of the VAT Directive provides:

'1. Member States shall apply a special VAT scheme, in accordance with this Chapter, to transactions carried out by travel agents who deal with customers in their own name and use supplies of goods or services provided by other taxable persons, in the provision of travel facilities.

This special scheme shall not apply to travel agents where they act solely as intermediaries and to whom point (c) of the first paragraph of Article 79 applies for the purposes of calculating the taxable amount.

2. For the purposes of this Chapter, tour operators shall be regarded as travel agents.'

7 Article 307 of the VAT Directive is worded as follows:

'Transactions made, in accordance with the conditions laid down in Article 306, by the travel agent in respect of a journey shall be regarded as a single service supplied by the travel agent to the traveller.

The single service shall be taxable in the Member State in which the travel agent has established his business or has a fixed establishment from which the travel agent has carried out the supply of services.'

8 Under Article 308 of that directive: '[t]he taxable amount and the price exclusive of VAT, within the meaning of point (8) of Article 226, in respect of the single service provided by the travel agent shall be the travel agent's margin, that is to say, the difference between the total amount, exclusive of VAT, to be paid by the traveller and the actual cost to the travel agent of supplies of goods or services provided by other taxable persons, where those transactions are for the direct benefit of the traveller.'

9 Article 309 of that directive provides:

'If transactions entrusted by the travel agent to other taxable persons are performed by such persons outside the [European Union], the supply of services carried out by the travel agent shall be treated as an intermediary activity exempted pursuant to Article 153.

If the transactions are performed both inside and outside the [European Union], only that part of the travel agent's service relating to transactions outside the [European Union] may be exempted.'

10 Under Article 310 of the VAT Directive, 'VAT charged to the travel agent by other taxable persons in respect of transactions which are referred to in Article 307 and which are for the direct benefit of the traveller shall not be deductible or refundable in any Member State.'

Polish law

11 Article 19a(8) of the Ustawa o podatku od towarów i us?ug (Law on the tax on goods and services) of 11 March 2004 (Dz. U. No 54, position 535), as amended, ('the Law on VAT') provides:

'Where, before goods or services are supplied, all or part of the payment is received — in particular: prepayments, payments on account, deposits, instalments and construction or housing contributions prior to the establishment of a right in cooperative residential or other premises — tax shall become chargeable on receipt of the payment and on the amount received, without prejudice to paragraph 5(4).'

12 Article 119 of that Law provides:

'1. The taxable amount in respect of the provision of tourist services shall be the amount of the margin, reduced by the amount of tax due, without prejudice to paragraph 5.

2. The "margin" referred to in paragraph 1 shall mean the difference between the amount to be

paid by the purchaser of the service and the actual cost incurred by the taxable person in purchasing goods and services from other taxable persons for the direct benefit of the traveller; “services for the direct benefit of the traveller” shall mean services forming part of the tourist services provided and, in particular, transport, accommodation, meals and insurance.’

13 The referring court points out that, since 1 January 2014, the provisions of national law based on Article 66 of the VAT Directive, determining the date on which that tax becomes chargeable on payments on account for tourist services provided by a travel agent, have no longer been in force in Poland.

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

14 Skarpa, as a travel agent, is subject to the special scheme for travel agents, as provided for in Article 119 of the Law on VAT. Taking the view that the date on which VAT on payments on account received by travel agents becomes chargeable is not apparent from that legislation, it made a request for a tax opinion to the Minister.

15 In his tax opinion, the Minister stated that VAT is chargeable at the time when payments on account are made. According to the Minister, in order to determine the travel agent’s margin, which amounts to the taxable amount for purposes of VAT, Skarpa can deduct from its gross margin the estimated costs that it will have to incur, relating to the supply in question, and make, later, as appropriate, the necessary adjustments, once it is in a position to determine the final amount of the costs actually incurred.

16 Skarpa, taking the view that the VAT on its services should become chargeable only when it is in a position to determine its final profit margin, contested that tax opinion before the Wojewódzki S?d Administracyjny w Krakowie (Regional Administrative Court, Cracow, Poland).

17 By judgment of 25 November 2014, that court annulled that opinion, on the ground that, since Article 119(2) of the Law on VAT refers only to costs actually incurred by the service provider, VAT becomes chargeable only at the time when the actual margin has been definitively determined. It ruled that an estimate of the taxable amount is not provided for when the payment on account relates to the provision of tourist services by a travel agency. That court also took the view that the adjustment of tax returns should be carried out only by way of exception and cannot become the rule.

18 The Minister appealed against that judgment to the referring court, the Naczelny S?d Administracyjny (Supreme Administrative Court, Poland), claiming that, with the exception of the situations mentioned in the Law on VAT, all payments on account are subject to tax as soon as they are received. The Minister accepts that the actual costs incurred by the taxable person up to the receipt of the payment on account can be taken into account in order to calculate the profit margin. However, the fact that it is impossible to determine the actual margin at the time when the payment on account for a tourist service supplied by a travel agent is made cannot have the consequence that VAT becomes chargeable only when that margin can be definitively determined.

19 The referring court is uncertain whether the special rule on the determination of the taxable amount for services supplied by travel agents, laid down in Article 308 of the VAT Directive, affects the determination as to when VAT on those services becomes chargeable. Since the costs actually incurred by the travel agent will be known only after the tourist service has been supplied to its customer, the referring court takes the view that Article 65 of the VAT directive cannot apply in a situation covered by Article 308 of that directive. That court acknowledges, however, that the VAT Directive does not contain provisions to that effect and that such an approach can be inferred only from its general framework.

20 Furthermore, in so far as VAT becomes chargeable, in accordance with Article 65 of the VAT Directive, at the time of receipt of the payment on account by the travel agent, the referring court is unsure whether that tax must be calculated on the amount received or whether the specific method of determining the taxable amount laid down in Article 308 of that directive must be taken into account. In that regard, it states that, on the one hand, the taxation of the entire amount of the payment on account could result in a very heavy burden for the travel agent, even provisionally, but, on the other hand, to allow a travel agent to take account, for the purpose of determining the taxable amount in question at the time when a payment on account is made by a customer, of the price of services yet to be paid would be incompatible with the special scheme for travel agents.

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

‘(1) Must [the VAT Directive] be interpreted as meaning that tax becomes chargeable on payments on account received by a taxable person supplying tourist services, which are taxed under the special scheme for travel agents provided for in Articles 306 to 310 of [the VAT Directive], at the time defined in Article 65 of that directive?

(2) If the answer to the first question is in the affirmative, must Article 65 of [the VAT Directive] be interpreted as meaning that, for taxation purposes, a payment on account received by a taxable person supplying tourist services, taxed under the special scheme for travel agents provided for in Articles 306 to 310 of [the VAT Directive], is reduced by the cost referred to in Article 308of [that directive] actually incurred by the taxable person up to the time when he receives the payment on account?’

Consideration of the questions referred

The first question

22 By its first question, the referring court asks in essence whether Articles 65 and 306 to 310 of the VAT Directive must be interpreted as meaning that, when a travel agent, subject to the special scheme laid down in Articles 306 to 310, receives a payment on account for tourist services which it will provide to the traveller, VAT is chargeable, in accordance with Article 65, on receipt of that payment on account.

23 Skarpa argues that, in order to determine the relevant taxable amount, in accordance with Article 308 of that directive, the travel agent must calculate its actual profit margin, which is, however, impossible without knowing the actual input costs which it will have to incur, in respect of the purchase of goods and services from other taxable persons. Accordingly, the tax is chargeable only when all the costs actually incurred by the travel agent are known and the margin obtained is definitive. Article 65 of that directive, it submits, cannot therefore apply in such a case.

24 It must be noted that the special VAT scheme applicable to travel agents, laid down in Articles 306 to 310 of the VAT Directive, contains rules specific to the activity of travel agents, which derogate from the normal VAT regime (see, to that effect, judgment of 25 October 2012, *Kozak*, C?557/11, EU:C:2012:672, paragraph 16).

25 According to Article 306 of the VAT Directive, Member States must apply the special VAT scheme to transactions carried out by travel agents who deal with customers in their own name, and not as an intermediary, and who use supplies of goods or services provided by other taxable persons, in the provision of travel facilities.

26 For the operations of travel agents, carried out in accordance with Article 306, the EU legislature has laid down, in Articles 307 to 310 of the VAT Directive, specific provisions relating to the place of taxation, the calculation of the taxable amount for VAT and its deductibility.

27 The Court has already ruled that, as an exception to the normal system applicable under the VAT Directive, the scheme laid down in Articles 306 to 310 thereof must be applied only to the extent necessary to achieve its objective (see, to that effect, judgment of 25 October 2012, *Kozak*, C?557/11, EU:C:2012:672, paragraph 20 and the case-law cited).

28 According to the case-law of the Court, the essential aim of the rules of that special scheme is to avoid the difficulties to whicheconomic operatorswould be exposed by application of the normal principles of the VAT Directive concerning transactions involving the supply of services bought in from third parties, since the application of the normal rules on the place of taxation, taxable amount and deduction of input tax would, by reason of the multiplicity of services and the places in which they are provided, entail practical difficulties for those undertakings of such a nature as to obstruct their operations (see, to that effect, judgment of 25 October 2012, *Kozak*, C?557/11, EU:C:2012:672, paragraph 19 and the case-law cited).

29 It follows that the special VAT scheme applicable to travel agents does not, as such, amount to an independent and exhaustive tax scheme, but includes solely provisions that derogate from certain rules of the general VAT system, with the result that the other rules of that general system apply to the transactions of travel agents subject to VAT.

30 Accordingly, all the provisions of the general VAT system may apply to transactions covered by the special scheme for travel agents, except those governing the place of taxation, the calculation of the taxable amount and its deductibility.

31 Consequently, the rules relating to the chargeable event and to chargeability of VAT on supplies of goods and services, set out in, inter alia, Articles 63 and 65 of the VAT Directive, remain applicable to transactions covered by thespecial scheme for travel agents.

32 Under Article 63 of that directive, the chargeable event occurs and tax becomes chargeable when the goods or services are supplied.

33 Nevertheless, Article 65 of the VAT Directive provides that, where payments are made on account before the goods or services are supplied, VAT becomes chargeable on receipt of the payment and on the amount received. That article constitutes a derogation from the rule laid down in Article 63 of that directive and, as such, must be interpreted strictly (see, to that effect, judgment of 13 March 2014, *FIRIN*, C?107/13, EU:C:2014:151, paragraph 35 and the case-law cited).

34 Thus, in order for VAT to become chargeable in such circumstances, all the relevant information concerning the chargeable event, namely, the future supply of services, must already

be known and therefore, in particular, the services must be precisely designated at the time when the payment on account is made (judgment of 13 March 2014, *FIRIN*, C?107/13, EU:C:2014:151, paragraph 36 and the case-law cited).

35 In the present case, the referring court states that, at the time of receipt of apayment on account by a travel agent, such as Skarpa, that payment on account can be linked to a service performed by that agent, such as, for example, a trip to be made on a particular date and to a particular country. It thus appears, subject to verification by that court, that such a payment on account relates to a service precisely designated, with the result that VAT becomes chargeable when the payment on account is received in accordance with Article 65 of the VAT Directive.

36 In those circumstances, the answer to the first question is that Articles 65 and 306 to 310 of the VAT Directive must be interpreted as meaning that, when a travel agent, subject to the special scheme laid down in Articles 306 to 310 of that directive, receives a payment on account for tourist services which it will provide to the traveller, VAT is chargeable, in accordance with that Article 65, on receipt of that payment on account, provided that, at that time, the tourist services to be supplied are precisely designated.

The second question

37 By its second question, the referring court seeks clarification regarding the method of taxation of a payment on account received by a travel agent.

38 According to Article 308 of the VAT Directive, the taxable amount, in respect of the single service provided by thetravel agent, is the travel agent’s profit margin, that is to say, the difference between the total amount, exclusive of VAT, to be paid by the traveller and the actual cost to the travel agent of the supplies of goods or services provided by other taxable persons, where those transactions are for the direct benefit of the traveller.

39 As has been pointed out in paragraphs 26 and 28 of the present judgment, that rule establishes the taxable amount for VAT in situations in which travel agents purchase goods or services from other taxable persons and forms part of the specific provisions laid down by the EU legislature in order to take account of the specific features of the activity of travel agents and to prevent them from encountering practical difficulties of such a kind as to hinder the exercise of their activity.

40 It follows that the interpretation of the provisions of the VAT Directive cannot have the consequence of making it impossible, in practice, to calculate the precise taxable amount laid down specifically in Article 308 of that directive, which presupposes that the travel agent can deduct from the total price, exclusive of VAT, paid by the traveller all of the actual costs which it has incurred for supplies of goods and services provided by other taxable persons, where those transactions are for the direct benefit of the traveller.

41 In the case where the payment on account paid by the customer corresponds to the total price or to a significant part of the price of the tourist service and where, at the time when payment is made, the travel agent has not yet incurred any actual cost, or has incurred only a limited part of the individual total cost of that service, the taking into account of only the actual cost incurred by the travel agent at the time when payment is made can, in certain cases, prevent it from deducting that cost in full or in part from the total price, excluding VAT, of that service and can, therefore, distort the method for calculating the taxable amount as laid down in Article 308 of the VAT Directive.

42 Furthermore, a travel agent may not be in a position to determine the actual cost of the

specific tourist service for a traveller at the time when that traveller makes the payment on account relating to that service.

43 Consequently, in situations such as those covered by the two preceding paragraphs, the travel agent's profit margin can be determined on the basis of an estimate of the total actual cost which it will, ultimately, have to incur. For the purpose of such an estimate, the travel agent must take into account, where relevant, the costs that it has already actuallyincurred at the time of receipt of the payment on account.

44 By deducting the estimated total actual cost from the total price of the trip, the travel agent obtains its projected profit margin. The taxable amount for VAT to be paid at the time of receipt of the payment on account is obtained by multiplying the amount of that payment on account by the percentage corresponding to the part of the total cost of the trip that the estimated profit margin, thus determined, represents.

45 As the Advocate General noted in point 51 of his Opinion, a travel agent of average diligence can reasonably be expected to prepare a rather detailed estimate of the total cost of an individual trip, in order to determine the total price of that trip.

46 The projected costs thus estimated must be linked to the actual tourist service in respect of which the payment on account was received by the travel agent, since that profit margin and the taxable amount must be determined by reference to each individual supply of services provided by the travel agent, namely individually and not globally, having regard to groups of services or all services supplied during a given period (see, to that effect, judgment of 8 February 2018, *Commission* v *Germany*, not published, EU:C:2018:76, paragraphs 89, 91 and 92).

47 That solution has no bearing on the fact that, as soon as the definitive actual individual cost of the trip is known to the travel agent, that cost must be taken into account for the determination of VAT, in accordance with Article 308 of the VAT Directive, by correcting, as necessary, the VAT returns prepared at the time of receipt of the payment on account.

48 In the light of the foregoing, the answer to the second question is that Article 308 of the VAT Directive must be interpreted as meaning that the margin of the travel agent, and, consequently, its taxable amount, corresponds to the difference between the total amount, exclusive of VAT, to be paid by the traveller and the actual input cost incurred by the travel agent in respect of supplies of goods and services provided by other taxable persons, in so far as those transactions are for the direct benefit of the traveller. When the amount of the payment on account corresponds to the total price of the tourist service or to a significant part of that price, and the travel agent has not yet incurred any actual cost, or has incurred only a limited part of the individual total cost of that service, or even when the individual actual cost of the trip incurred by the travel agent cannot be determined at the time when the payment on account is made, the profit margin can be determined on the basis of an estimate of the total actual cost which it will ultimately have to incur. For the purpose of such an estimate, the travel agent must take into account, where relevant, the costs which it has already actuallyincurred at the time of receipt of the payment on account. For the purpose of the calculation of the margin, the estimated total actual cost is deducted from the total price of the trip and the taxable amount for VAT to be paid at the time of receipt of the payment on account is obtained by multiplying the amount of that payment on account by the percentage corresponding to the part of the total cost of the trip that the estimated profit margin, thus determined, represents.

Costs

49 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 (Fourth Chamber) hereby rules:

1. **Articles 65 and 306 to 310 of 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, must be interpreted as meaning that, when a travel agent, subject to the special scheme laid down in Articles 306 to 310 of that directive, receives a payment on account for tourist services which it will provide to the traveller, the value added tax (VAT) is chargeable, in accordance with that Article 65, on receipt of that payment on account, provided that, at that time, the tourist services to be supplied are precisely designated.**

2. **Article 308 of Directive 2006/112, as amended by Directive 2010/45, must be interpreted as meaning that the margin of the travel agent, and, consequently, its taxable amount, corresponds to the difference between the total amount, exclusive of value added tax (VAT), to be paid by the traveller and the actual input cost incurred by the travel agent in respect of supplies of goods and services provided by other taxable persons, in so far as those transactions are for the direct benefit of the traveller. When the amount of the payment on account corresponds to the total price of the tourist service or to a significant part of that price, and the travel agent has not yet incurred any actual cost, or has incurred only a limited part of the individual total cost of that service, or even when the individual actual cost of the trip incurred by the travel agent cannot be determined at the time when the payment on account is made, the profit margin can be determined on the basis of an estimate of the total actual cost which it will ultimately have to incur. For the purpose of such an estimate, the travel agent must take into account, where relevant, the costs which it has already actually incurred at the time of receipt of the payment on account. For the purpose of the calculation of the margin, the estimated total actual cost is deducted from the total price of the trip and the taxable amount for VAT to be paid at the time of receipt of the payment on account is obtained by multiplying the amount of that payment on account by the percentage corresponding to the part of the total cost of the trip that the estimated profit margin, thus determined, represents.**

[Signatures]

* Language of the case: Polish.