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Provisional text

JUDGMENT OF THE COURT (Seventh Chamber)

2 May 2019 (*)

(Reference for a preliminary ruling — Common system of value added tax (VAT) — Directive 2006/112/EC — Article 66 — Chargeable event and chargeability of the tax — Time of the supply of the services — Construction and installation work — Taking into account the time of the acceptance of the work stipulated in the contract for the supply of services)

In Case C-224/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland), made by decision of 28 November 2017, received at the Court on 28 March 2018, in the proceedings

Budimex S.A.

v

Minister Finansów,

THE COURT (Seventh Chamber),

composed of T. von Danwitz, President of the Chamber, E. Levits (Rapporteur) and P.G. Xuereb, Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Budimex S.A., by M. Militz, doradca podatkowy,
- the Polish Government, by B. Majczyna, acting as Agent,
- the European Commission, by M. Siewierska and N. Gossement, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 66 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 proceedings between Budimex S.A. and the Minister Finansów (Minister for Finance, Poland) concerning an individual interpretation that that company sought from the Minister for Finance, concerning the date of chargeability of value added tax (VAT) for the performance of supplies of construction or installation services.

Legal context

European Union law

3 According to recital 24 of the VAT Directive:

'The concepts of chargeable event and of the chargeability of VAT should be harmonised if the introduction of the common system of VAT and of any subsequent amendments thereto are to take effect at the same time in all Member States.'

4 Article 2(1)(c) of that directive provides that 'the supply of services for consideration within the territory of a Member State by a taxable person acting as such' is to be subject to VAT.

5 Article 63 of the directive reads as follows:

'The chargeable event shall occur and VAT shall become chargeable when the goods or the services are supplied.'

6 The first paragraph of Article 66 of the VAT Directive provides:

'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.'

7 Under Article 222 of that directive:

'For supplies of goods carried out in accordance with the conditions specified in Article 138 or for supplies of services for which VAT is payable by the customer pursuant to Article 196, an invoice shall be issued no later than on the fifteenth day of the month following that in which the chargeable event occurs.

For other supplies of goods or services Member States may impose time limits on taxable persons for the issue of invoices.'

Polish Law

8 Article 19a of the Ustawa o podatku od towarów i usług (Law on the tax on goods and services) of 11 March 2004 (Dz. U. 2004, No 54, item 535), in the version in force at the material time in the main proceedings ('the Law on VAT'), reads as follows:

'1. Tax liability shall arise when the goods or services are supplied, subject to paragraphs 5 and 7 to 11 and Articles 14(6), 20 and 21(1).

2. With regard to partially supplied services, such a service is also considered to have been supplied where a part thereof, for which payment was specified, has been supplied.

...

5. Tax liability shall arise when:

...

(3) the invoice is issued in the cases referred to in Article 106b(1) in respect of:

(a) the supply of construction or installation services,

...

7. In those cases referred to in paragraph 5(3) and (4), if the taxable person has not issued an invoice or issued it late, tax liability shall arise on expiry of the time limit for issue of invoices laid down in Article 106i(3) and (4) or, where no such time limit has been imposed, on expiry of the time limit for payment.

...'

9 Article 106b(1) of that law provides:

'The taxable person shall be obliged to issue an invoice documenting:

(1) any sale or supply of goods or services referred to in Article 106a(2) that is performed by him for another person liable to pay VAT, or a similar tax, or for a non-taxable legal person;

...'

10 Article 106i(3) of that law reads as follows:

'The invoice shall be issued no later than:

30 days from the date of the supply of the services in the case referred to in Article 19a(5)(3)(a);

...'

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

11 Following an application for an individual interpretation lodged by Budimex on the date of chargeability of VAT for construction and installation works that that company supplies, the Minister for Finance stated, in his reply of 15 October 2014, that VAT is chargeable from the time when the contractor issues the invoice relating to the work and, if no invoice is issued, 30 days

following actual performance of the work.

12 In that regard, the Minister for Finance underlined that the fact that the terms of the contract pursuant to which the construction and installation work was performed provide that the client who ordered that work must accept it in a formal record of acceptance has no bearing on the date of chargeability of VAT due.

13 Budimex brought an action before the Wojewódzki Sąd Administracyjny w Warszawie (Regional Administrative Court, Warsaw, Poland) against the Minister for Finance's individual interpretation of 15 October 2014 on the ground that the formal requirement of validation of the work performed is expressly provided for in the conditions of contract of the International Federation of Consulting Engineers (FIDIC), which govern contracts that it concludes, and that, therefore, that requirement is an integral part of every construction or installation service that it supplies. That action was dismissed in a judgment of 30 July 2015.

14 Budimex brought an appeal on a point of law against that judgment before the referring court, which considers that the outcome of the case in the main proceedings calls for an interpretation of the VAT Directive, which was transposed by the national provisions relied on by Budimex in its appeal on a point of law.

15 In that regard, the referring court states that the outcome of the case in the main proceedings depends on an interpretation of the concept of 'when the services are supplied' within the meaning of Article 63 of the VAT Directive. In particular, the issue arises of whether the fact that construction or installation services are regarded as supplied, according to the terms of the contract, only after acceptance of the work by the client may affect the calculation of the date of chargeability of VAT relating to those services.

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

'In a situation where the parties to a transaction have agreed that payment for construction works or construction/installation works requires express acceptance by the client of their performance in the formal record of acceptance for the works, does the performance of services, for the purposes of Article 63 of [the VAT Directive], in respect of such a transaction occur at the time of actual performance of the construction or construction/installation works, or at the time of acceptance of the performance of the works by the client, expressed in the formal record of acceptance?'

Consideration of the question referred

17 As a preliminary matter, it should be noted that, according to Article 63 of the VAT Directive, VAT is to become chargeable when the goods or the services are supplied.

18 Point (c) of the first paragraph of Article 66 of that directive states, however, that the Member States may provide that VAT is to become chargeable, in respect of certain transactions, within a specified time no later than on expiry of the time limit for issue of invoices imposed by Member States, where an invoice is not issued, or is issued late relating to the performance of the services supplied.

19 In the present case, according to the order for reference, the Polish legislature implemented the option open to it under Article 66 of the VAT Directive by providing, in Article 19a(7) and Article 106i(3) of the Law on VAT that, where an invoice is not issued or is issued late, VAT is to become chargeable on expiry of the 30 day time limit from the date of the supply of the services.

20 Therefore, by its question, the referring court wishes to know, in essence, whether, if an invoice relating to the performance of the service supplied is not issued or is issued late, point (c) of the first paragraph of Article 66 of the VAT Directive precludes the formal acceptance of that service from being regarded as the time when that service was supplied, where, as in the case in the main proceedings, the Member State provides that VAT is to become chargeable on expiry of a time limit running from the day when the service was supplied.

21 It should be made clear at the outset that the VAT Directive establishes a common system of VAT based, inter alia, on a uniform definition of taxable transactions (judgment of 20 June 2013, *Newey*, C-653/11, EU:C:2013:409, paragraph 39).

22 In particular, recital 24 of that directive states that the concepts of ‘chargeable event’ and ‘chargeability of VAT’ should be harmonised if the introduction of the common system of VAT and of any subsequent amendments thereto are to take effect at the same time in all Member States. The European Union legislature thereby intended maximum harmonisation of the date on which liability to pay VAT arises in all the Member States in order to ensure the uniform collection of that tax (judgment of 16 May 2013, *TNT Express Worldwide (Poland)*, C-169/12, EU:C:2013:314, paragraph 31).

23 Under Article 63 of the directive, the chargeable event is to occur and VAT to become chargeable when the services are supplied.

24 In accordance with point (c) of the first paragraph of Article 66 of the directive, Member States may provide that VAT is to become chargeable, in respect of certain transactions or certain categories of taxable person, within a specified period from the date of the chargeable event where an invoice is not issued, or is issued late.

25 In the present case, Article 19a(5) and (7) of the Law on VAT, read in conjunction with Article 106i(3) of that law, provides that, where the invoice has not been issued 30 days from the date of the supply of the services, VAT shall become chargeable.

26 The parties in the main proceedings disagree as to the time from which the services supplied by Budimex were performed. Budimex claims that, under the terms of the contract that it uses, that time can run only once the work is accepted by the client, regardless of whether the work was in fact completed at an earlier date.

27 Whilst it is true that construction or installation services are commonly regarded as supplied on the actual date the work is completed, the fact remains that, for a transaction to be regarded as a ‘taxable transaction’ within the meaning of the VAT Directive, economic and commercial realities form a fundamental criterion for the application of the common system of VAT, which must be taken into account (see, to that effect, judgment of 22 November 2018, *MEO — Serviços de Comunicações e Multimédia*, C-295/17, EU:C:2018:942, paragraph 43).

28 In that context, it has been held that the relevant contractual terms constitute a factor to be taken into consideration when the supplier and the recipient in a 'supply of services' transaction within the meaning of the VAT Directive have to be identified (judgment of 20 June 2013, *Newey*, C?653/11, EU:C:2013:409, paragraph 43).

29 Therefore, it is not inconceivable that, taking account of contractual terms reflecting the economic and commercial realities in the field in which the service is supplied, that service may be regarded as supplied only at a time after the actual completion of the service, following the performance of certain formalities indistinguishably related to the service and conclusive in ensuring its complete performance.

30 In that regard, it must be borne in mind that a supply of services is taxable only if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient (judgment of 2 June 2016, *Lajvér*, C?263/15, EU:C:2016:392, paragraph 26 and the case-law cited).

31 In the present case, it follows from the information provided by the referring court that the terms of contracts concluded by the applicant in the main proceedings provide the client with the right to check the conformity of the completed construction or installation work before accepting it and the supplier with the obligation to carry out the necessary modifications so that the end product does in fact correspond to what was agreed. In that regard, Budimex claims, in its written observations, that it was often impossible for it to ascertain the taxable amount and the amount of VAT due before acceptance of the work by the client.

32 First, whilst the requirement constituted by the drawing up of a formal record of acceptance by the client takes place only after the time given to the client for notifying the supplier of any defects, which would be for the supplier to remedy so that the construction or installation service complies with the terms of the contract, it is not inconceivable that that service is not entirely performed before the time of acceptance.

33 Second, it must be borne in mind that the taxable amount for the supply of services for consideration is the consideration actually received for them by the taxable person (judgment of 7 November 2013, *Tulic? and Plavo?in*, C?249/12 and C?250/12, EU:C:2013:722, paragraph 33).

34 Therefore, in so far as it is not possible to ascertain the consideration due by the customer before the customer has accepted the construction or installation work, the VAT on such services cannot be chargeable before that acceptance.

35 Accordingly, provided that the acceptance of the work has been stipulated in the contract for the supply of services, provided that such a requirement reflects the conventional rules and standards in the field in which the service is supplied, which is for the referring court to ascertain, it must be held that that requirement is itself a part of the service and that it is therefore decisive in determining whether that service has in fact been supplied.

36 It should be added that other formalities, such as, inter alia, the drawing up of a formal breakdown of the expenses incurred or of a final payment certificate, as mentioned in the order for reference, cannot be relevant in determining the time at which the service was supplied, in so far as, given that they do not form part of the service as such, they are not decisive in determining whether the service has in fact been supplied.

37 In the light of all of the foregoing, the answer to the question referred is that point (c) of the

first paragraph of Article 66 of the VAT Directive must be interpreted as not precluding, if an invoice relating to the performance of the service supplied is not issued or is issued late, the formal acceptance of that service from being regarded as the time when that service was supplied, where, as in the case in the main proceedings, the Member State provides that VAT is to become chargeable on expiry of a time limit running from the day when the service was supplied, provided, first, that the formality of acceptance was stipulated by the parties in the contract that binds them according to contractual terms reflecting the economic and commercial realities in the field in which the service is supplied and, second, that that formality constitutes the actual completion of the service and determines the amount of consideration due, which is for the referring court to ascertain.

Costs

38 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Seventh Chamber) hereby rules:

Point (c) of the first paragraph of Article 66 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 not precluding, if an invoice relating to the performance of the service supplied is not issued or is issued late, the formal acceptance of that service from being regarded as the time when that service was supplied, where, as in the case in the main proceedings, the Member State provides that VAT is to become chargeable on expiry of a time limit running from the day when the service was supplied, provided, first, that the formality of acceptance was stipulated by the parties in the contract that binds them according to contractual terms reflecting the economic and commercial realities in the field in which the service is supplied and, second, that that formality constitutes the actual completion of the service and determines the amount of consideration due, which is for the referring court to ascertain.

[Signatures]

* Language of the case: Polish.