JUDGMENT OF THE COURT (First Chamber)

13 January 2022 (*)

(Reference for a preliminary ruling – Common system of value added tax (VAT) – Directive 2006/112/EC – Article 168 – Right of deduction – Supply of postal services mistakenly exempted – VAT deemed to be included in the commercial price of the supply for the purpose of exercising the right of deduction – Not included – Concept of VAT ‘due or paid’)

In Case C?156/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Supreme Court of the United Kingdom, made by decision of 1 April 2020, received at the Court on 6 April 2020, in the proceedings

Zipvit Ltd

v

The Commissioners for Her Majesty’s Revenue and Customs,

THE COURT (First Chamber),

composed of L. Bay Larsen, Vice-President of the Court, acting as President of the First Chamber, J.?C. Bonichot (Rapporteur) and M. Safjan, Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Zipvit Ltd, by D. Garcia, L. Allen and W. Shah, Solicitors, and by R. Thomas QC,

– the United Kingdom Government, by S. Brandon, acting as Agent, and by S. Grodzinski QC and E. Mitrophanous QC,

– the Czech Government, by M. Smolek, J. Vlá?il and O. Serdula, acting as Agents,

– the Greek Government, by M. Tassopoulou and I. Kotsoni, acting as Agents,

– the Spanish Government, by I. Herranz Elizalde and S. Jiménez García, acting as Agents,

– the European Commission, initially by R. Lyal and P. Carlin, and subsequently by P. Carlin, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 8 July 2021,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 168(a) and of Article 226(9) and (10) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1).

2 The request has been made in proceedings between Zipvit Ltd and The Commissioners for Her Majesty's Revenue and Customs (United Kingdom; 'the tax and customs administration'), concerning the decision by which the latter did not accede to Zipvit's request for deduction of value added tax (VAT).

Legal context

3 Article 63 of Directive 2006/112 provides:

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

4 Article 90 of that directive states:

'1. In the case of cancellation, refusal or total or partial non-payment, or where the price is reduced after the supply takes place, the taxable amount shall be reduced accordingly under conditions which shall be determined by the Member States.

2. In the case of total or partial non-payment, Member States may derogate from paragraph 1.'

5 Under Article 132(1)(a) of Directive 2006/112, Member States are required to exempt the supply by the public postal services of services other than passenger transport and telecommunications services, and the supply of goods incidental thereto.

6 Article 167 of that directive states:

'A right of deduction shall arise at the time the deductible tax becomes chargeable.'

7 Under Article 168 of that directive:

'In so far as the goods and services are used for the purposes of the taxed transactions of a taxable person, the taxable person shall be entitled, in the Member State in which he carries out these transactions, to deduct the following from the VAT which he is liable to pay:

(a) the VAT due or paid in that Member State in respect of supplies to him of goods or services, carried out or to be carried out by another taxable person;

…'

8 Article 185 of Directive 2006/112 provides:

'1. Adjustment shall, in particular, be made where, after the VAT return is made, some change occurs in the factors used to determine the amount to be deducted, for example where purchases are cancelled or price reductions are obtained.

2. By way of derogation from paragraph 1, no adjustment shall be made in the case of transactions remaining totally or partially unpaid or in the case of destruction, loss or theft of property duly proved or confirmed, or in the case of goods reserved for the purpose of making gifts

of small value or of giving samples, as referred to in Article 16.

However, in the case of transactions remaining totally or partially unpaid or in the case of theft, Member States may require adjustment to be made.'

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

9 Zipvit, a company established in the United Kingdom, carries on the business of supplying vitamins and minerals by mail order.

10 Between 1 January 2006 and 31 March 2010, Royal Mail, the operator responsible for the public postal service in the United Kingdom, supplied postal services to Zipvit under contracts which had been negotiated individually with Zipvit. Those supplies were regarded as exempt from VAT on the basis of national legislation and directives published by the tax and customs administration intended to transpose, inter alia, Article 132(1)(a) of Directive 2006/112 and, consequently, led to Royal Mail issuing invoices without VAT, indicating that those supplies were exempt from VAT.

11 However, on 23 April 2009 the Court delivered the judgment in *TNT Post UK* (C?357/07, EU:C:2009:248), from which it is apparent that the exemption from VAT referred to in Article 132(1)(a) of Directive 2006/112 does not apply to services supplied by the public postal services for which the terms have been individually negotiated.

12 Zipvit, taking the view that the payments which it had made to Royal Mail had therefore to be regarded retrospectively as including VAT, submitted two applications for deduction of input VAT relating to the supplies at issue to the tax and customs administration, on 15 September 2009 and 8 April 2010, for a total amount of 415 746 pounds sterling (GBP) (approximately EUR 498 900), together with interest.

13 By decision of 12 May 2010, the tax and customs administration dismissed those applications on the grounds that the supplies at issue had not been subject to VAT and that Zipvit had not paid that tax.

14 On 2 July 2010, the tax and customs administration reviewed and confirmed that decision.

15 It is apparent from the order for reference, first, that Royal Mail did not attempt to recover the VAT mistakenly unpaid from Zipvit or from its other customers in the same situation, having regard, in particular, to the administrative burden and costs which this would have generated and, second, that the tax and customs administration also failed to issue a tax adjustment notice against Royal Mail, on account, in particular, of the legitimate expectation which it considered that it had created for Royal Mail in that regard.

16 Furthermore, both the tax and customs administration and Royal Mail could no longer take such steps, given the expiry of the limitation periods.

17 Zipvit brought proceedings, in turn, before the First-tier Tribunal (Tax Chamber) (United Kingdom), the Upper Tribunal (Tax Chamber) (United Kingdom), the Court of Appeal (United Kingdom), and, subsequently, the Supreme Court of the United Kingdom, seeking the annulment of the decision of 2 July 2010.

18 Taking the view that the case before it raises questions concerning the interpretation of Directive 2006/112 and that it is, moreover, a precedent for many pending disputes, the Supreme Court of the United Kingdom decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Where (i) a tax authority, the supplier and the trader who is a taxable person misinterpret European VAT legislation and treat a supply, which is taxable at the standard rate, as exempt from VAT, (ii) the contract between the supplier and the trader stated that the price for the supply was exclusive of VAT and provided that if VAT were due the trader should bear the cost of it, (iii) the supplier never claims and can no longer claim the additional VAT due from the trader, and (iv) the tax authority cannot or can no longer (through the operation of limitation) claim from the supplier the VAT which should have been paid, is the effect of [Directive 2006/112] that the price actually paid is the combination of a net chargeable amount plus VAT thereon so that the trader can claim to deduct input tax under Article 168(a) of [Directive 2006/112] as VAT which was in fact “paid” in respect of that supply?

(2) Alternatively, in those circumstances can the trader claim to deduct input tax under Article 168(a) of [Directive 2006/112] as VAT which was “due” in respect of that supply?

(3) Where a tax authority, the supplier and the trader who is a taxable person misinterpret European VAT legislation and treat a supply, which is taxable at the standard rate, as exempt from VAT, with the result that the trader is unable to produce to the tax authority a VAT invoice which complies with Article 226(9) and (10) of [Directive 2006/112] in respect of the supply made to it, is the trader entitled to claim to deduct input tax under Article 168(a) of [Directive 2006/112]?

(4) In answering Questions (1) to (3):

(a) Is it relevant to investigate whether the supplier would have a defence, whether based on legitimate expectation or otherwise, arising under national law or EU law, to any attempt by the tax authority to issue an assessment requiring it to account for a sum representing VAT in respect of the supply?

(b) Is it relevant that the trader knew at the same time as the tax authority and the supplier that the supply was not in fact exempt, or had the same means of knowledge as them, and could have offered to pay the VAT which was due in respect of the supply (as calculated by reference to the commercial price of the supply) so that it could be passed on to the tax authority, but omitted to do so?’

The jurisdiction of the Court

19 It follows from Article 86 of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (OJ 2020 L 29, p. 7), which entered into force on 1 February 2020, that the Court has jurisdiction to give preliminary rulings on requests from courts and tribunals of the United Kingdom made before the end of the transition period, fixed at 31 December 2020, which is the case in regard to the present request.

Consideration of the questions referred

The first, second and fourth questions

20 By its first, second and fourth questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 168(a) of Directive 2006/112 must be interpreted

as meaning that VAT may be regarded as being due or paid, and therefore deductible by the taxable person, in the case where, first, that person and its supplier have mistakenly assumed, on the basis of an incorrect interpretation of EU law by the national authorities, that the supplies at issue were exempt from VAT and that, consequently, the invoices issued did not refer to VAT, in a situation where the contract between those two persons provides that, if that tax were due, the recipient of the supply should bear the cost of it, and, second, no step to recover the VAT was taken in good time, with the result that any action by the supplier and the tax and customs administration to recover the unpaid VAT is time-barred.

21 In that regard, it must be borne in mind that, according to the Court's settled case-law, the right to deduct provided for in Article 167 et seq. of Directive 2006/112 is an integral part of the VAT scheme and may not, in principle, be limited. In particular, the right to deduct is exercisable immediately in respect of all the taxes charged on input transactions (judgment of 12 April 2018, *Biosafe – Indústria de Reciclagens*, C?8/17, EU:C:2018:249, paragraph 29 and the case-law cited).

22 However, that right of deduction is subject to compliance with requirements, in particular the requirement, laid down in Article 168(a) of Directive 2006/112, that the VAT in respect of which deduction is sought must be due or paid.

23 As regards, first of all, the question whether the VAT may be regarded as having been paid on the ground that it should, in circumstances such as those in the main proceedings, be regarded, as Zipvit maintains, as being included in the price paid on the combined basis of the principles arising from the judgment of 7 November 2013, *Tulic? and Plavo?in* (C?249/12 and C?250/12, EU:C:2013:722), and from Articles 90 and 185 of Directive 2006/112, it should be observed that, in paragraph 43 of that judgment, the Court held that Directive 2006/112 must be interpreted as meaning that, when the price of a product has been established by the parties without any reference to VAT and the supplier of that product is the taxable person for the VAT owing on the taxed transaction, the price agreed must be regarded as already including the VAT, in a case where the supplier is not able to recover from the purchaser the VAT claimed by the tax authorities.

24 That interpretation is based, in particular, on the basic principle of Directive 2006/112, according to which the VAT system is aimed at taxing only the end consumer (judgment of 7 November 2013, *Tulic? and Plavo?in*, C?249/12 and C?250/12, EU:C:2013:722, paragraph 34 and the case-law cited).

25 The Court took the view that, when a contract of sale has been concluded without reference to VAT, in a situation where the supplier has no means under national law of recovering from the purchaser the VAT claimed subsequently by the tax authorities, taking the total price, without deducting the VAT, as the taxable amount on which the VAT is to be levied leads to a situation in which it is the supplier which bears the VAT burden, thereby conflicting with the principle that VAT is a tax on consumption to be borne by the end consumer (judgment of 7 November 2013, *Tulic? and Plavo?in*, C?249/12 and C?250/12, EU:C:2013:722, paragraph 35).

26 Taking that amount as the taxable amount also conflicts with the rule that the tax authorities may not charge an amount of VAT which exceeds the amount paid 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 36 and the case-law cited).

27 The analysis will be otherwise in the case where the supplier has the possibility under national law of adding to the agreed price a supplement equal to the tax applicable to the transaction and recovering it from the purchaser of the product (judgment of 7 November 2013, *Tulic? and Plavo?in*, C?249/12 and C?250/12, EU:C:2013:722, paragraph 37).

28 However, as is apparent from the order for reference, the circumstances of the case in the main proceedings are different from those at issue in that judgment.

29 It is in fact apparent from the order for reference that the contract between Zipvit and Royal Mail expressly provided that the price of the supply was exclusive of VAT and that, if VAT were nevertheless due, the trader should bear the cost of it.

30 Furthermore, as is apparent from the documents before the Court, it was legally not impossible for Royal Mail to recover from Zipvit the amount of VAT mistakenly unpaid after it had become aware that the services which it had supplied should have been subject to VAT.

31 Since, in that context, Royal Mail nevertheless failed to recover the amount of VAT from Zipvit, and in view of the fact that the tax and customs administration itself waived recovery of VAT from that supplier for considerations relating to, inter alia, the protection of legitimate expectations, it must be held that the price invoiced to Zipvit for the supply of postal services is a price exclusive of VAT. However, given that VAT is a tax which must be charged, at each stage, only on the added value and must ultimately be borne by the final consumer (see, to that effect, judgment of 7 August 2018, *Viking Motors and Others*, C?475/17, EU:C:2018:636, paragraph 33), a taxable person such as Zipvit cannot claim to deduct an amount of VAT for which it has not been charged and which it has therefore not passed on to the final consumer.

32 That interpretation is not called into question by Zipvit’s argument based on the national provisions transposing Articles 90 and 185 of Directive 2006/112. Since an amount of VAT has never been charged on the price of the services supplied by Royal Mail to Zipvit, there cannot be any question of reducing the taxable amount within the meaning of Article 90 of Directive 2006/112 or of adjusting the input deductions within the meaning of Article 185 of that directive, since those articles are applicable only in so far as VAT has been applied to the price (see, to that effect, judgment of 15 October 2020, *E. (VAT – Reduction of the taxable amount)*, C?335/19, EU:C:2020:829, paragraphs 21 and 37 and the case-law cited).

33 Consequently, in circumstances such as those in the main proceedings, VAT cannot be regarded as being included in the price paid by the recipient of the services.

34 In those circumstances, the situation referred to in the fourth question, relating to the legitimate expectations of the supplier capable of being relied on against the tax and customs administration in the event of a request for adjustment and the fact that the recipient of the supplies did not pay that tax once it became aware of the mistake made, when both the tax and customs administration and the supplier knew that VAT should have been applied, are not capable of altering that analysis.

35 It follows that Article 168(a) of Directive 2006/112 must be interpreted as meaning that VAT cannot be regarded as having been paid, within the meaning of that provision, in circumstances such as those in the main proceedings.

36 As regards, next, the question whether, in such circumstances, VAT could nevertheless be regarded as being due, within the meaning of that provision, it should be borne in mind that Article 167 of Directive 2006/112 provides that the right of deduction arises at the time when the

deductible tax becomes chargeable.

37 It follows from the case-law of the Court that the term ‘due’, within the meaning of Article 168(a) of Directive 2006/112, refers to an enforceable tax claim and therefore requires that the taxable person has an obligation to pay the amount of VAT which that person seeks to deduct as input VAT (see, to that effect, judgment of 29 March 2012, *Véleclair*, C?414/10, EU:C:2012:183, paragraph 20).

38 While it is true that Article 63 of Directive 2006/112 provides that VAT is to become chargeable when the goods or services are supplied, it should be noted that the mere fact that a supply exempt from VAT is ultimately regarded, once completed, as being subject to VAT cannot suffice for a finding that that tax is deductible if no request for payment of that tax has been sent to the recipient of that supply, even though it is not impossible for the supplier to address such a request to that recipient.

39 Lastly, the circumstances mentioned in the fourth question, referred to in paragraph 34 of the present judgment, are not capable of altering that analysis either.

40 It follows that Article 168(a) of Directive 2006/112 must be interpreted as meaning that VAT cannot be regarded as being due, within the meaning of that provision, in circumstances such as those in the main proceedings.

41 In the light of the foregoing, the answer to the first, second and fourth questions is that Article 168(a) of Directive 2006/112 must be interpreted as meaning that VAT cannot be regarded as being due or paid, within the meaning of that provision, and is therefore not deductible by the taxable person, in the case where, first, that person and its supplier have mistakenly assumed, on the basis of an incorrect interpretation of EU law by the national authorities, that the supplies at issue were exempt from VAT and that, consequently, the invoices issued did not refer to it, in a situation where the contract between those two persons provides that, if that tax were due, the recipient of the supply should bear the cost of it, and, second, no step to recover the VAT was taken in good time, with the result that any action by the supplier and the tax and customs administration to recover the unpaid VAT is time-barred.

The third question

42 By its third question, the referring court asks, in essence, whether Directive 2006/112 must be interpreted as meaning that a recipient of supplies mistakenly exempted from VAT may rely on the right to deduct input VAT due or paid if it does not hold invoices containing the details set out in Article 226(9) and (10) of that directive.

43 In view of the answer given to the first, second and fourth questions, an answer to the third question does not appear necessary for the dispute in the main proceedings.

Costs

44 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 (First Chamber) hereby rules:

Article 168(a) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning that value added tax (VAT) cannot be regarded as being due or paid, within the meaning of that provision, and is therefore not deductible by the taxable person, in the case where, first, that person and its supplier have mistakenly assumed, on the basis of an incorrect interpretation of EU law by

the national authorities, that the supplies at issue were exempt from VAT and that, consequently, the invoices issued did not refer to it, in a situation where the contract between those two persons provides that, if that tax were due, the recipient of the supply should bear the cost of it, and, second, no step to recover the VAT was taken in good time, with the result that any action by the supplier and the tax and customs administration to recover the unpaid VAT is time-barred.

Bay Larsen

Bonichot

Safjan

Delivered in open court in Luxembourg on 13 January 2022.

A. Calot Escobar

K. Lenaerts

Registrar

President

* Language of the case: English.