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Provisional text

JUDGMENT OF THE COURT (Seventh Chamber)

8 May 2024 (*)

(Reference for a preliminary ruling – Common system of value added tax (VAT) – Directive 2006/112/EC – Article 73 – Supply of goods or services – In-kind contribution of property – Taxable amount – Consideration – Shares – Nominal value – Issue value)

In Case C-241/23,

REQUEST for a preliminary ruling under Article 267 TFEU from the Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland), made by decision of 24 February 2023, received at the Court on 18 April 2023, in the proceedings

P. sp. z o.o.

v

Dyrektor Izby Administracji Skarbowej w Warszawie,

intervening party:

Rzecznik Małych i Średnich Przedsiębiorców,

THE COURT (Seventh Chamber),

composed of F. Biltgen, President of the Chamber, A. Prechal (Rapporteur), President of the Second Chamber, acting as Judge of the Seventh Chamber, and M.L. Arastey Sahún, Judge,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- P. sp. z o.o., by J. Martini, doradca podatkowy,
- Dyrektor Izby Administracji Skarbowej w Warszawie, by J. Kazimierczak, radca prawny,
- Rzecznik Małych i Średnich Przedsiębiorców, by P. Chrupek, radca prawny,
- the Polish Government, by B. Majczyna, acting as Agent,
- the European Commission, by M. Herold and U. Małecka, acting as Agents,

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

gives the following

Judgment

1 The request for a preliminary ruling concerns the interpretation of Article 73 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 the act concerning the conditions of accession of the Republic of Croatia and the adjustments to the Treaty on European Union, the Treaty on the Functioning of the European Union and the Treaty establishing the European Atomic Energy Community (OJ 2012 L 112, p. 21) ('the VAT Directive').

2 The request has been made in proceedings between P. sp. z o.o. and the Dyrektor Izby Administracji Skarbowej w Warszawie (Director of the Tax Administration Chamber in Warsaw, Poland; 'the appellate authority') concerning that authority's refusal to take into account the deduction, made by that company, of amounts of value added tax (VAT) shown in invoices issued by W. and B. in respect of property contributions made by those companies to P.'s capital.

Legal context

European Union law

3 Article 73 of the VAT Directive provides:

'In respect of the supply of goods or services, other than as referred to in Articles 74 to 77, the taxable amount shall include everything which constitutes consideration obtained or to be obtained by the supplier, in return for the supply, from the customer or a third party, including subsidies directly linked to the price of the supply.'

4 Article 74 of that directive provides:

'Where a taxable person applies or disposes of goods forming part of his business assets, or where goods are retained by a taxable person, or by his successors, when his taxable economic activity ceases, as referred to in Articles 16 and 18, the taxable amount shall be the purchase price of the goods or of similar goods or, in the absence of a purchase price, the cost price, determined at the time when the application, disposal or retention takes place.'

5 Article 80 of that directive is worded as follows:

'1. In order to prevent tax evasion or avoidance, Member States may in any of the following cases take measures to ensure that, in respect of the supply of goods or services involving family or other close personal ties, management, ownership, membership, financial or legal ties as defined by the Member State, the taxable amount is to be the open market value:

(a) where the consideration is lower than the open market value and the recipient of the supply does not have a full right of deduction under Articles 167 to 171 and Articles 173 to 177;

(b) where the consideration is lower than the open market value and the supplier does not have a full right of deduction under Articles 167 to 171 and Articles 173 to 177 and the supply is subject to an exemption under Articles 132, 135, 136, 371, 375, 376, 377, 378(2), 379(2) or Articles 380 to 390c;

(c) where the consideration is higher than the open market value and the supplier does not have a full right of deduction under Articles 167 to 171 and Articles 173 to 177.

For the purposes of the first subparagraph, legal ties may include the relationship between an employer and employee or the employee's family, or any other closely connected persons.

2. Where Member States exercise the option provided for in paragraph 1, they may restrict the categories of suppliers or recipients to whom the measures shall apply.

...'

Polish law

6 Article 29a of the ustawa o podatku od towarów i usług (Law on tax on goods and services) of 11 March 2004 (Dz. U. of 2011, No 177, item 1054), as amended ('the Law on VAT'), provides, in paragraph 1 thereof:

'Subject to paragraphs 2 to 5, Articles 30a to 30c, Article 32, Article 119 and Article 120(4) and (5), the taxable amount shall be everything that constitutes consideration which the supplier of goods or services has received or is to receive on account of a sale from the purchaser, customer or a third party, including subsidies, subventions and other similar amounts received which have a direct effect on the price of the goods or services supplied by the taxable person.'

7 Article 86(1) of that law provides:

'In so far as goods and services are used to conduct taxable transactions, a taxable person within the meaning of Article 15 shall have the right to deduct the amount of input tax from the amount of tax due, subject to Article 114, Article 119(4), Article 120(17) and (19) and Article 124.'

8 Article 88 of that law is worded as follows:

'3a. Invoices and customs documents cannot serve as the basis for the right to deduct tax payable and for a refund of the tax difference or for a refund of input tax where:

...

(4) the invoices, corrective invoices or customs documents issued:

...

(b) state amounts which do not correspond to the true state of affairs, in respect of those items for which amounts not corresponding to the true state of affairs have been stated,

...'

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

9 P. is a company registered for VAT the authorised capital of which is divided into shares.

10 Between the end of 2014 and the beginning of 2015, P. sought to increase that capital through in-kind contributions from W. and B. More specifically, those two companies concluded several contracts with P. concerning the transfer of properties they owned and a cash contribution in exchange for shares in P. Accordingly, on 3 October, 28 November and 29 December 2014, P. concluded contracts with W. under which the latter transferred 23 properties and a certain sum of

money to P. in exchange for, respectively, 4 767, 1 164 and 7 745 shares issued by P. In addition, on 3 October and 28 November 2014, P. concluded contracts with B. under which the latter transferred two properties and a certain sum of money to P. in exchange for, respectively, 2 100 and 133 shares issued by P. Those contracts stipulate that the consideration for the in-kind contributions to P.'s capital is shares in the latter, valued at their issue price. That price is 35 287.19 zlotys (PLN), or approximately EUR 8 123, per share. To determine that price, the parties used, as a basis, the value of the properties contributed, which had been assessed in relation to market prices by a third party.

11 In its VAT returns for the fourth quarter of 2014 and for the first quarter of 2015, P. included the amount of the VAT and the net amount shown in the invoices issued by W. and B. which related to the property contributions to P.'s capital. Those amounts were calculated on the basis of the issue value of the shares in P. received as consideration for those contributions.

12 By decision of 28 March 2017, the Naczelnik Pierwszego Urz?du Skarbowego Warszawa-?ródmie?cie w Warszawie (Director of the First Tax Office of Warsaw – Warsaw City Centre, Poland), which is the authority deciding at first instance, considered that the taxable amount for VAT purposes of the contributions made by W. and B. for increasing P.'s capital should be calculated by taking into account the nominal value of shares in that company, which corresponds to PLN 50 or approximately EUR 11.50 per share, and not their issue value, which corresponds to PLN 35 287.19 PLN or approximately EUR 8 123 per share. That authority therefore questioned P.'s right to deduct the VAT concerning those contributions and corresponding to the amount exceeding the one calculated on the nominal value of the shares.

13 By decision of 30 June 2017, the appellate authority upheld the decision of the authority deciding at first instance after taking the view that the amounts in the invoices issued by W. and B. and relating to the property contributions to P.'s capital in exchange for shares in that company did not fully correspond to the true state of affairs and, accordingly, that, in accordance with Article 86(1) of the Law on VAT, they do not give P. any right to deduct VAT. According to the appellate authority, the consideration received by W. and B. in exchange for in-kind contributions made to P.'s capital must be evaluated on the basis of the shares' nominal value.

14 By judgment of 29 May 2018, the Wojewódzki S?d Administracyjny w Warszawie (Regional Administrative Court, Warsaw, Poland) dismissed P.'s action against the appellate authority. That court, referring in particular to Article 29a(1) and Article 88(3a)(4)(b) of the Law on VAT, held that the consideration due to an entity making an in-kind contribution to a company in a form other than an undertaking or part of an undertaking corresponds to the nominal value of the shares that that company transferred to that entity to remunerate it for that contribution.

15 P. brought an appeal on a point of law against that judgment before the Naczelny S?d Administracyjny (Supreme Administrative Court, Poland), which is the referring court. P. submits, in particular, that Article 29a(1) of the Law on VAT was incorrectly interpreted as requiring that the taxable amount for a transaction constituting an in-kind contribution be determined on the basis of the nominal value of the shares received as consideration. A correct interpretation of that provision requires that the issue price of the shares be taken into account in order to calculate the taxable amount of the contribution in question. That taxable amount should, where appropriate, be reduced by the value of the cash contribution P. received in the transfer of assets.

16 The referring court considers that, in the case of an in-kind contribution in exchange for shares, first, the market value of the object of that contribution cannot be used to determine the taxable amount for VAT purposes of that contribution and, secondly, the consideration is shares in that company.

17 By contrast, that court is of the opinion that the question of whether, in order to determine a taxable amount such as this, it is necessary in such a case to take into account the nominal value of the shares or, on the contrary, their issue value, in accordance with the parties' agreement, has not yet been addressed by the Court of Justice.

18 The referring court, therefore, harbours doubts as to how the taxable base for VAT purposes should be determined in the present case. It specifies, in that regard, that the nominal value of the shares adopted by the relevant tax authorities as the taxable amount clearly does not correspond to the value of the properties which were contributed to P. and that, on account of that imbalance, the parties in question agreed in the contracts regarding in-kind contributions that the consideration for those contributions would be the shares in P. valued at their issue price. It considers that the latter approach allows the transactions in question to be granted a reciprocal character.

19 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:

'Is consideration obtained or to be obtained by the supplier in return for a supply of goods, as referred to in Article 73 of [the VAT Directive], to be understood as meaning the nominal value of the shares acquired or the issue value, if the parties have stipulated that the consideration is to be the issue value of the shares?'

Consideration of the question referred

20 By its question, the referring court asks whether Article 73 of the VAT Directive must be interpreted as meaning that the taxable amount of a contribution of property by one company to the capital of a second company in exchange for shares in the latter must be determined in relation to the nominal value of those shares where those companies agreed that the consideration for that capital contribution was to be the issue value of those shares.

21 In that regard, it is apparent from the wording of Article 73 of the VAT Directive that the taxable amount includes everything which constitutes consideration obtained or to be obtained by the supplier in respect of the supply of goods or services.

22 That consideration does not necessarily have to be monetary. Barter contracts, under which the consideration is by definition in kind, and transactions for which the consideration is in money are, economically and commercially speaking, two identical situations as regards the VAT Directive. Accordingly, the consideration for a supply of services or goods may consist of a supply of services or goods, and so constitute the taxable amount within the meaning of Article 73 of that directive (see, to that effect, judgment of 10 January 2019, A, C-410/17, EU:C:2019:12, paragraphs 36 and 37 and the case-law cited).

23 It is necessary, however that the supply of goods or services be carried out for consideration, that it to say that there be a direct link between the goods or services traded and that the value of the good or service provided in exchange may be expressed in monetary terms. Such a direct link is established 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 (see, to that effect, judgment of 10 January 2019, A, C-410/17, EU:C:2019:12, paragraphs 32 and 36 and the case-law cited).

24 In the present case, P. sought several increases of its capital by acquiring ownership of properties belonging to W. and B. The consideration received by those companies for the contribution of their properties to P.'s capital corresponds to the shares in P. which P. issued for that purpose.

25 There is, therefore, a direct link between the transfer of those properties by W. and B. and the allocation of shares in P. to those companies. Moreover, the value of the shares which were transferred to those companies can be expressed in monetary terms.

26 As regards the monetary valuation of those shares, it is apparent from the documents before the Court that, in Polish law, the nominal value of the shares of a commercial company is defined, in essence, as the value, per share, of the financial and non-financial assets contributed by the founding partners, as defined in the company's articles of association. That value is therefore the value of every share of a company held by its shareholders at the moment of its incorporation and is determined in relation to their contributions to that company at that time. The issue value of a share corresponds to the value of that share when it was issued. Accordingly, when a company is established, the issue value of a share is, in principle, equal to the nominal value thereof. However, the value of a company may increase, just as it may decrease, during its existence on account of, inter alia, its activity, so that the value of every share in that company is then greater or, on the contrary, less than its nominal value. When a company, the shares in which have increased in value since its establishment, issues new shares, their issue price is generally higher than the nominal value of existing shares in order to avoid diluting the latter's value.

27 Furthermore, it follows from settled case-law that the taxable amount for a supply of goods effected for consideration is represented by the consideration actually received for them by the taxable person. That consideration is thus the subjective value, that is to say, the value actually received, and not a value estimated according to objective criteria (see, to that effect, judgment of 19 December 2012, *Orfey Bulgaria*, C-549/11, EU:C:2012:832, paragraph 44 and the case-law cited).

28 Where that value is not a sum of money agreed between the parties, it must, in order to be subjective, be the value which the recipient of goods constituting the consideration for another supply of goods attributes to the goods which it is seeking to obtain and must correspond to the amount which it is prepared to spend for that purpose (see, to that effect, judgment of 19 December 2012, *Orfey Bulgaria*, C-549/11, EU:C:2012:832, paragraph 45 and the case-law cited).

29 In the present case, the subjective value of the consideration for the property contributions corresponds to the monetary value that W. and B. granted to shares in P. when they accepted those shares in exchange for those contributions to the latter's capital.

30 Subject to verification by the referring court, it is apparent from the contracts concluded between W. and B., on the one hand, and P., on the other, that the consideration for the incorporation of properties hitherto belonging to W. and B. into P.'s capital corresponds to the allocation of a number of shares, the value of each of which is established in relation to the issue value of that share. It follows that the subjective value of each of those shares acquired by W. and B. during that increase of capital corresponds to the issue price of those shares.

31 That issue price, which is PLN 35 287.19 or approximately EUR 8 123, corresponds accordingly to the monetary value agreed upon and actually received by W. and B. for each of the shares in P.

32 Consequently, since, first, in accordance with Article 73 of the VAT Directive, the taxable

amount of the properties transferred to P. must be established with regard to the consideration agreed and actually received for them by W. and B. and, secondly, P. and those companies agreed that that consideration is the allocation of shares in P. at an issue price of PLN 35 287.19 or approximately EUR 8 123 per share, that issue price and not the nominal value of those shares, namely PLN 50 or approximately EUR 11.50, must be taken into account in order to determine the taxable amount for the transfer of those properties.

33 That assessment is not called into question by the fact that, in the present case, the issue value of the shares was determined by the parties following an assessment, by a third party, of the market value of the properties contributed. As the Rzecznik Małych i Średnich Przedsiębiorców (Ombudsman for Small and Medium-sized Enterprises, Poland) states in its observations, that assessment demonstrates only the fact that those parties agreed on terms and conditions analogous to those which other parties would have been able to agree on for the sale of such properties on the market. That does not affect the finding that the parties in question in the main proceedings agreed that the value of the shares at issue corresponds to their issue value.

34 Accordingly, the fact that the price agreed corresponds to the market price does not show that the taxable amount for VAT purposes is determined with regard to an objective value instead of the subjective value which was actually agreed on by those parties. Consequently, the consideration actually agreed for the properties in question which forms, in accordance with Article 73 of the VAT Directive, the taxable amount for VAT is determined by taking into account the number of shares in P., valued according to their issue price, which W. and B. acquired.

35 The assessment in paragraph 32 above is likewise not called into question by the argument of the Polish Government, put forward in its observations, and of the appellate authority, as set out in the order for reference, according to which the nominal value of the shares would determine the scope of the property and non-property rights and obligations of the company's shareholders. Even if that is the case, it cannot be inferred from this that the nominal value corresponds to the consideration agreed between the parties since the contracts which they concluded alongside the increase of capital in question stipulate that the new shares issued in exchange for the in-kind contribution of the properties are to be acquired at their issue price.

36 That determination of the taxable amount for VAT does not, however, preclude, as the European Commission noted, the referring court from being able to verify, taking into account all of the relevant circumstances, that the value on which the parties agreed actually reflects economic and commercial reality, and is not the result of an abusive practice (see, to that effect, judgment of 10 January 2019, A, C-410/17, EU:C:2019:12, paragraph 48 and the case-law cited).

37 Moreover, Article 80 of the VAT Directive explicitly permits Member States, in order to prevent tax evasion or avoidance, to, in certain cases, take the open market value as the taxable amount in respect of the supply of goods or services involving family or other close personal ties, management, ownership, membership, financial or legal ties as defined by the Member State.

38 However, since that provision derogates from the rule that the taxable amount is represented by the consideration actually received for the goods or services by the taxable person, it must be interpreted strictly. Accordingly, it has been held that the conditions of application laid down in that provision are exhaustive and, consequently, national legislation cannot on the basis of that provision provide that the taxable amount is to be the open market value of the transaction in cases other than those listed in that provision (judgment of 19 December 2012, *Orfey Bulgaria*, C-549/11, EU:C:2012:832, paragraph 47 and the case-law cited).

39 In the present case, however, there is nothing in the documents before the Court to suggest that the issue value of the shares in question results from an abusive practice or that measures

have been taken by the Republic of Poland under Article 80 of the VAT Directive and are applicable.

40 In light of all the foregoing considerations, the answer to be given to the referring court is that Article 73 of the VAT Directive must be interpreted as meaning that the taxable amount of a contribution of property by one company to the capital of a second company in exchange for shares in the latter must be determined in relation to the issue value of those shares where those companies agreed that the consideration for that capital contribution was to be that issue value.

Costs

41 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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:

Article 73 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, as amended by the act concerning the conditions of accession of the Republic of Croatia and the adjustments to the Treaty on European Union, the Treaty on the Functioning of the European Union and the Treaty establishing the European Atomic Energy Community,

must be interpreted as meaning that the taxable amount of a contribution of property by one company to the capital of a second company in exchange for shares in the latter must be determined in relation to the issue value of those shares where those companies agreed that the consideration for that capital contribution was to be that issue value.

[Signatures]

* Language of the case: Polish.