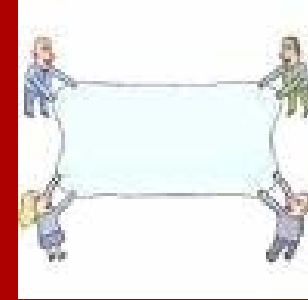


IATJ 3rd

Assembly Munich

October 18th and 19th, 2012

Interpretation of Art. 90 of the Directive 2006/112/EC



Judge Friederike Grube

(Supreme Tax Court – Bundesfinanzhof - Germany)

Judge Dagmara Dominik-Ogińska

(Voivodship Administrative Court in Wroclaw –
Poland)



Introduction

Producer --< -input VAT--<--A--< -output VAT--<--B---Private P

If trader A sells goods to another trader B, A has to pay „output VAT“ which he received by B according to the invoice about the goods, to the tax authorities.

At the same time A may deduct „input VAT“ which he has payed himself to the producer from the „output VAT“.

Being a taxable person A has to declare all this in his VAT return.

System of VAT in Europe

- Principle of neutrality: Although the taxable persons have to pay the VAT they received from their customers to the tax authorities, they are not charged with VAT in the end, because they are entitled to deduct the „input VAT“, they have payed themselves to the sellers of the goods.
- Principle of consumption: In the end the final customer, who usually is a private person, and who is not entitled to deduct „input-VAT“, is charged with the VAT.

Purpose of the system of VAT

ART. 73 OF THE VAT- DIRECTIVE 2006/112/EC

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.

ART. 90 OF THE VAT- DIRECTIVE 2006/112/EC

- 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.**
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ART. 273 OF THE VAT- DIRECTIVE 2006/112/EC

Member States may impose other obligations which they deem necessary to ensure the correct collection of VAT and to prevent evasion, subject to the requirement of equal treatment as between domestic transactions and transactions carried out between Member States by taxable persons and provided that such obligations do not, in trade between Member States, give rise to formalities connected with the crossing of frontiers.

The option under the first paragraph may not be relied upon in order to impose additional invoicing obligations over and above those laid down in Chapter 3.

Case C-588/10

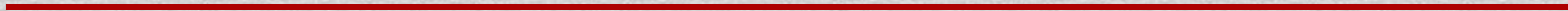
Kraft Foods Polska

S.A.



JUDGMENT OF THE EUROPEAN COURT
on 26 January 2012

THE DISPUTE IN THE MAIN PROCEEDINGS AND THE QUESTION REFERRED FOR A PRELIMINARY RULING



Article 29(4a) to (4c) of the Law on the tax on goods and services of 11 March 2004

Legal context

- 4a. In the cases provided for, the taxable person may reduce the taxable amount in relation to the amount set out in the invoice on condition that, before the expiry of the time limit for submitting the VAT declaration for the tax period in which the purchaser of the goods or services received the correcting invoice, he is in possession of acknowledgement of receipt of that invoice by the purchaser. Where the purchaser of the goods or services receives the invoice after the expiry of the time limit for submitting the tax declaration for a given tax period, the taxable person shall be entitled to take account of the correcting invoice for the tax period in which he obtained acknowledgement of receipt by the purchaser.
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- 4b. The condition that the taxable person must obtain acknowledgement of receipt of the invoice by the purchaser of the goods or services shall not apply:
 - (1) in the case of the export of goods, intra-Community supply of goods or the supply of goods in respect of which the place of taxation is outside the territory of the country;
 - (2) in relation to purchasers to whom electrical and thermal energy, mains gas, telecommunication and radio-communication services or services referred to at points 138 and 153 of Annex No 3 to this law are sold.
 - 4c. Paragraph 4a shall apply mutatis mutandis where an error is found in the amount of tax set out in the invoice and an invoice is issued correcting the invoice showing an amount of tax greater than that due.
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- **KFP produces and distributes foodstuffs.**
- **In the course of sales of its goods to a wide range of contractors, it issues a significant number of invoices and correcting invoices, the latter being issued, inter alia, where discounts are given, goods returned or errors identified.**

Application for an interpretation

- **Taking the view that it was entitled to reduce the taxable amount and the amount of VAT payable on the basis of the correcting invoice taken into account in the VAT declaration for the period in which that invoice was issued, even where, on that date on which the declaration was submitted, it had not received acknowledgment of receipt of the correcting invoice, KFP submitted a request to the Minister of Finance seeking confirmation of its interpretation of Article 29 of the Law on VAT.**

Application for an interpretation

- It can be seen from the literal wording of Article 29(4a) of the Law on VAT that, in order for the seller to be able to reduce the amount of VAT payable, it is necessary for it to be in possession of acknowledgment of receipt of the correcting invoice by the purchaser and any practical difficulties KFP might experience in obtaining such acknowledgment of receipt were irrelevant.

Interpretation of the Minister of Finance

- May a condition such as that laid down in Article 29(4a) of the Law on VAT which makes the right to reduce the taxable amount set out in an invoice contingent on the taxable person holding, before the expiry of the time limit for submitting the tax declaration for the tax period in which the purchaser of the goods or services received a correcting invoice, acknowledgement of receipt of the correcting invoice by the purchaser of the goods or services constitute a condition for the purpose of Article 90(1) of the VAT Directive, which provides that, where the price is reduced after the supply has taken place, the taxable amount is to be reduced accordingly under conditions to be determined by the Member States, and does that condition infringe the principles of VAT neutrality and proportionality?

Question to the Court of Justice for a preliminary ruling

- It follows that Articles 90(1) and 273 of the VAT Directive do not, outside the limits laid down therein, specify either the conditions or the obligations which the Member States may impose.
- Those provisions give the Member States a margin of discretion, inter alia as to the formalities to be complied with by taxable persons vis-à-vis the tax authorities of those States in order to ensure that, where the price is reduced after the supply has taken place, the taxable amount is reduced accordingly.

Judgment of the CJ

- The Polish requirement provided for in 29 (4a) of Law on VAT which ensure the correct collection of VAT and to prevent evasion amounts, at the same time, to a condition for the purpose of Article 90(1) of the VAT Directive and an obligation for the purpose of Article 273 of the directive.

Judgment of the CJ

- The principles of VAT neutrality and proportionality do not, in principle, preclude such a requirement.
- The requirement at issue in the main proceedings may, in principle, contribute not only to ensuring the correct collection of VAT and preventing evasion but also to eliminating the risk of loss of tax revenue.
- It follows that requirement pursues the legitimate objectives set out in Articles 90(1) and 273 of the VAT Directive 2006/112/EC.

Judgment of the CJ

- However, possession of acknowledgment of receipt being, under national law, an essential condition for calculating the VAT payable on the basis of the amounts set out in the correcting invoice or for recovering the excess VAT paid, it must be held that, VAT neutrality is affected when it is impossible or excessively difficult for the supplier of goods or services to obtain such acknowledgment of receipt within a reasonable period of time

Judgment of the CJ

- According to the Court if it is impossible or excessively difficult for the supplier of goods or services to recover, within a reasonable period, the excess VAT paid to the tax authorities on the basis of the initial invoice because of the condition at issue in the main proceedings, the principles of VAT neutrality and proportionality require the Member State concerned to permit the taxable person to establish by other means before the national tax authorities, first, that he has taken all the steps necessary in the circumstances of the case to satisfy himself that the purchaser of the goods or services is in possession of the correcting invoice and that he is aware of it and, second, that the transaction in question was in fact carried out in accordance with the conditions set out in the correcting invoice.
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- It is for the referring court to verify which forms of acknowledgment of receipt the tax authorities will accept as proof that the requirement at issue in the main proceedings has been satisfied.
 - It will be copies of the correcting invoice and the reminder addressed to the purchaser of the goods or services to send acknowledgment of receipt and, a proof of payment or the production of entries from the accounts which make it possible to identify the amount actually paid to the taxable person in connection with the transaction in question by the purchaser of the goods or services may serve that purpose.
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Conclusions

- Judgment - partial satisfaction for the taxpayers
- Illusory measure?
- What about the principle of proportionality?
- The burden of proof



Thank you for your attention

