Reports of Cases

JUDGMENT OF THE COURT (Sixth Chamber)

17 July 2014*

(Reference for a preliminary ruling — Value added tax — Sixth Directive 77/388/EEC — Directive 2006/112/EC — Exemption of imported goods which are intended to be placed under warehousing arrangements other than customs — Obligation to physically place the goods in the warehouse — Non-compliance — Obligation to pay VAT notwithstanding the fact that it has already been settled under the reverse charge mechanism)

In Case C-272/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Commissione tributaria regionale per la Toscana (Italy), made by decision of 25 May 2012, received at the Court on 21 May 2013, in the proceedings

Equoland Soc. coop. arl

v

Agenzia delle Dogane — Ufficio delle Dogane di Livorno,

THE COURT (Sixth Chamber),

composed of A. Borg Barthet, President of the Chamber, E. Levits and F. Biltgen (Rapporteur), Judges,

Advocate General: N. Jääskinen,

Registrar: L. Carrasco Marco, Administrator,

having regard to the written procedure and further to the hearing on 9 April 2014,

after considering the observations submitted on behalf of:

— Equoland Soc. coop. arl, by M. Turci, R. Vianello and D. D'Alauro, avvocati,

— the Italian Government, by G. Palmieri, acting as Agent, assisted by G. Albenzio, avvocato dello Stato,

— the Spanish Government, by J. García-Valdecasas Dorrego and L. Banciella Rodríguez-Miñón, acting as Agents,

— the European Commission, by D. Recchia and C. Soulay, acting as Agents,

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

* Language of the case: Italian.

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 16 of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145. p. 1), as amended by Council Directive 2006/18/EC of 14 February 2006 (OJ 2006 L 51, p. 12) ('the Sixth Directive'), and Articles 154 and 157 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1) ('the VAT directive').

2 The request has been made in proceedings between Equoland Soc. coop. arl ('Equoland') and the Agenzia delle Dogane — Ufficio delle Dogane di Livorno (the Livorno Customs Agency, 'the Customs Agency') involving a decision of the latter requiring Equoland to pay value added tax ('VAT') on the importation of goods not physically placed in a tax warehouse, even though Equoland had already paid that tax under the reverse charge mechanism.

Legal context

EU law

3 Article 10(3) of the Sixth Directive provides:

'The chargeable event shall occur and the tax shall become chargeable when the goods are imported. Where goods are placed under one of the arrangements referred to in Article 7(3) on entry into the Community, the chargeable event shall occur and the tax shall become chargeable only when the goods cease to be covered by those arrangements.

However, where imported goods are subject to customs duties, to agricultural levies or to charges having equivalent effect established under a common policy, the chargeable event shall occur and the tax shall become chargeable when the chargeable event for those Community duties occurs and those duties become chargeable.

Where imported goods are not subject to any of those Community duties, Member States shall apply the provisions in force governing customs duties as regards the occurrence of the chargeable event and the moment when the tax becomes chargeable.'

4 Article 16(1) of the Sixth Directive, in the version resulting from Article 28c of that directive ('Article 16(1) of the Sixth Directive'), provides:

'Without prejudice to other Community tax provisions, Member States may, subject to the consultations provided for in Article 29, take special measures designed to exempt all or some of the following transactions, provided that they are not aimed at final use and/or consumption and that the amount of [VAT] due on cessation of the arrangements [or] situations referred to at A to E corresponds to the amount of tax which would have been due had each of these transactions been taxed within the territory of the country:

A. imports of goods which are intended to be placed under warehousing arrangements other than customs.

B. supplies of goods which are intended to be:

(a) produced to customs and, where applicable, placed in temporary storage;

(b) placed in a free zone or in a free warehouse;

(c) placed under customs warehousing arrangements or inward processing arrangements;

…

(e) placed, within the territory of the country, under warehousing arrangements other than customs warehousing.For the purposes of this Article, warehouses other than customs warehouses shall be taken to be:

— for products subject to excise duty, the places defined as tax warehouses for the purposes of Article 4(b) of [Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products (OJ 1992 L 76, p. 1)].

— for goods other than those subject to excise duty, the places defined as such by the Member States. However, Member States may not provide for warehousing arrangements other than customs warehousing where the goods in question are intended to be supplied at the retail stage.

…'

5 Article 17 of the Sixth Directive, as amended by Article 28f thereof, provides:

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

2. In so far as the goods and services are used for the purposes of his taxable transactions, the taxable person shall be entitled to deduct from the tax which he is liable to pay:

…

(b) the [VAT] due or paid in respect of imported goods within the territory of the country;

…'

6 Under Article 4(b) of Directive 92/12, a tax warehouse means 'a place where goods subject to excise duty are produced, processed, held, received or dispatched under duty-suspension arrangements by an authorised warehousekeeper in the course of his business, subject to certain conditions laid down by the competent authorities of the Member State where the tax warehouse is located'.

Italian law

7 Decree Law No 331 of 30 August 1993, concerning harmonisation of the provisions relating to taxes on mineral oils, alcohol, alcoholic beverages and manufactured tobacco, and in respect of VAT, with the provisions laid down in the EEC directive, and amendments deriving from such harmonisation, as well as provisions relating to the system of authorised tax assistance centres, tax reimbursement procedures, the exclusion of local income tax ('ILOR') from business income up to the amount

corresponding to direct professional expenses, the establishment for 1993 of an extraordinary consumption tax on certain goods, and other tax provisions (GURI No 203, of 30 August 1993), provides in Article 50a(4):

'The following transactions may be carried out without payment of [VAT]:

…

(b) releases for free circulation of non-Community goods which are to be placed in a VAT warehouse, on presentation of a suitable guarantee commensurate with the tax. The presentation of the guarantee is not required for those economic operators certified under Article 14a of Regulation (EEC) No 2454/1993 … and for those exempted by Article 90 of the Consolidated text of the legislative provisions in customs matters provided for by Decree No 43 of the President of the Republic of 23 January 1973.'

8 Article 13 of Legislative Decree No 471 of 18 December 1997 on the reform of non-criminal tax penalties in the field of direct taxation, value added tax and tax collection, in accordance with Article 3(133)(q) of Law No 662 of 23 December 1996 (GURI No 5 of 8 January 1998, Ordinary Supplement) ('Legislative Decree No 471/97'), provides:

'1. Any person who fails to pay, in whole or in part, within the prescribed periods, instalments, periodic payments, the equalisation payment or the balance of tax due on the tax return, after deduction in those cases of the amount of the periodic payments and instalments, even if they have not been paid, shall be liable to an administrative penalty amounting to 30% of each outstanding amount, even where, after the correction of material or calculation errors noted during the inspection of the annual tax return, it appears that the tax is greater or that the deductible surplus is less. For payments on loans guaranteed in full by forms of real or personal security prescribed by law or recognised by the tax authority, made with a delay not exceeding 15 days, the penalty referred to in the first sentence, in addition to the provisions of Article 13(1)(a) of Legislative Decree No 472 of 18 December 1997, is further reduced to an amount equal to one-fifteenth for each day of delay. The same penalty applies in the case of assessment of the tax increased under Articles 36(a) and 36(b) of Decree No 600 of the President of the Republic of 29 September 1973, and Article 54 of Decree No 633 of the President of the Republic of 26 October 1972.

2. Except in cases of registered assessments, the penalty shall apply in all cases of non-payment of a tax or a portion of that tax within the prescribed period.

3. The penalties provided for in this article shall not apply if the payments were made in good time at a desk, office or concession holder other than that which is competent.'

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

9 On the basis of the order for reference and the observations submitted by Equoland, the Italian and Spanish Governments and by the European Commission, the facts in the main proceedings may be summarised as follows.

10 In June 2006 Equoland imported, via from the Customs Agency, a consignment of goods from a third country. On the customs declaration, it was stated that those goods were destined for the tax warehouse for the purposes of VAT. Consequently, no payment of VAT on importation was requested on the date of that transaction.

11 On the day after the import, the manager of the warehouse to which the goods were destined registered them in the warehouse register. However, the goods were never physically stored in the warehouse, but were placed there 'virtually', namely by including them in that register. The goods were then immediately withdrawn from the tax warehouse arrangements and the VAT was paid by Equoland under the reverse charge mechanism.

12 Considering that, as the goods were not physically placed in the tax warehouse, the necessary conditions for the postponement of payment of VAT on importation were not met, the Customs Agency considered that Equoland had not paid the tax due and sought, under Article 13 of Legislative Decree No 471/97, payment of the VAT on importation plus a penalty of 30% of that VAT amount.

13 Equoland brought an action against that decision before the Commissione tributaria provinciale di Livorno (Provincial Tax Court of Livorno) arguing that it had regularised its situation with regard to the VAT on importation through the reverse charge mechanism, paying that VAT on importation to the Agenzia delle Entrate (the tax authority) rather than paying it to the Customs Agency. Consequently, it argued that Article 13 of Legislative Decree No 471/97 is not applicable to a case such as that in the main proceedings.

14 Since its action was dismissed, Equoland appealed against that dismissal decision to the Commissione Tributaria Regionale per la Toscana, reiterating its view that the adjusted assessment notice was based solely on the fact that the imported goods had not been 'physically' placed in the tax warehouse, with no VAT deduction since, at the time of release for consumption, Equoland had undertaken to issue invoices to itself for the purchase by importation and to pay the adjusted VAT. Moreover, Equoland argues that, in several Member States, the 'virtual' placing of goods in a tax warehouse is legal.

15 The Customs Agency claims, first, that the application of the law on VAT warehouses, which suspends the obligation to pay the tax upon importation and allows it to be paid only at the time of the periodic VAT return, is subject to the necessary condition that the imported goods are 'physically' placed in such a warehouse. The national provisions are clear and require the 'physical' placing of those goods in the warehouse since the delayed collection of the VAT would be guaranteed only by the presence of those goods in a duly authorised tax warehouse.

16 Next, the principle of VAT neutrality, which relates to the economic effects of that tax on consumption only, cannot be relied on in order to evade the obligation to pay VAT when the chargeable event occurs. In the present case, this is when the goods are imported.

17 Finally, as VAT on importation is a tax related to crossing the border, it should be calculated and collected by the customs authorities, in this case the Customs Agency, which, moreover, allows payment of the part owed to the European Union in good time.

18 When the referring court heard the case, it noted that the interpretation advocated by the Customs Agency would result in the VAT being charged twice for failure to comply with an obligation which should be considered as being purely formal in nature. The infringement of such an obligation could be independently penalised if the physical placing of the goods in the tax warehouse were held to be mandatory, but this should not lead to VAT being applied to those goods where there has not been a taxable transaction.

19 In those circumstances, the Commissione tributaria regionale per la Toscana decided to stay proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) In order to benefit, under Article 16 of the [Sixth Directive] and Articles 154 and 157 of [the VAT Directive], from the exemption from the payment of the VAT on importation resulting from the placement of the imported goods under warehousing arrangements other than customs warehousing, that is to say under VAT warehousing arrangements, is it sufficient that such placement occur only on paper and not physically?

(2) Do the [Sixth Directive] and [the VAT Directive] preclude a practice whereby a Member State collects VAT on importation despite the fact that that VAT — by error or irregularity — has been settled already under the reverse charge mechanism through self-invoicing and simultaneous entry in the sales and purchases register?

(3) Is the principle of VAT neutrality breached when the Member State seeks to collect VAT which has already been settled under the reverse charge mechanism through self-invoicing and simultaneous entry in the sales and purchases register?’

Consideration of the questions referred

20 As is apparent from the file submitted to the Court, the importation of the goods at issue in the main proceedings took place during the month of June 2006, so that Directive 2006/112, which only came into force on 1 January 2007, is not applicable, ratione temporis, to the main proceedings.

21 Accordingly, the request for a preliminary ruling must be understood as seeking an interpretation of the Sixth Directive only.

The first question

22 By its first question, the referring court asks, in essence, whether Article 16(1) of the Sixth Directive must be interpreted as precluding national legislation which makes the grant of an exemption from the payment of the VAT on importation provided for by that legislation subject to the condition that the goods imported and destined for a tax warehouse for the purposes of VAT are physically placed in that warehouse.

23 In that regard, it should be pointed out, first, that Article 16(1) of the Sixth Directive, in so far as it derogates from the principle, set out in Article 10(3) of that directive, that the chargeable event shall occur and the VAT on importation shall become chargeable when the goods are imported, is to be interpreted strictly.

24 Next, the EU legislature made the exercise of the option conferred on Member States by Article 16(1) of the Sixth Directive subject to two substantive conditions, namely, first, that the goods to be exempted upon importation are not aimed at final use or consumption and, secondly, that the amount of VAT due upon cessation of the arrangements to which those goods were subject corresponds to the amount of VAT which would have been due had each of the transactions been taxed within the territory of the country.

25 Finally, under the power vested in Member States, the latter may take specific measures to grant the benefit of the exemption set out in Article 16(1) of the Sixth Directive.

26 In those circumstances, and in the absence of other guidance in that regard in the Sixth Directive, it is, in principle, for the Member States to determine the procedural requirements which the taxable person must meet in order to qualify for exemption from payment of VAT under that provision.

27 It must be added, however, that when exercising the powers thus vested in them, the Member States must comply with EU law and its general principles and, consequently, the principle of proportionality (see judgment in *Rēdlihs*, C-263/11, EU:C:2012:497, paragraph 44 and the case-law cited).

28 In the present case, as is apparent from the order for reference, the Italian legislation provides that, in order to qualify for exemption from payment of VAT on importation, the taxable person is required to physically place the imported goods in the tax warehouse, as that physical presence is intended to ensure subsequent collection of the tax.

29 However, it should be noted that such an obligation, notwithstanding its formal nature, is likely to be an efficient way to achieve the objectives pursued, namely to ensure correct collection of VAT and to prevent evasion of that tax, and does not, as such, go beyond what is necessary in order to achieve those objectives.

30 Therefore, the answer to the first question is that Article 16(1) of the Sixth Directive must be interpreted as not precluding national legislation which makes the grant of an exemption from the payment of the VAT on importation provided for by that legislation subject to the condition that goods which are imported and destined for a tax warehouse for the purposes of VAT be physically placed in that warehouse.

The second and third questions

31 By its second and third questions, which it is appropriate to examine together, the referring court asks, in essence, whether the Sixth Directive is to be interpreted, in accordance with the principle of neutrality of VAT, as precluding national legislation under which a Member State requires the payment of VAT on importation even though that VAT has been settled already under the reverse charge mechanism through self-invoicing and entry in the sales and purchases register of the taxable person.

32 In that regard, it must be recalled that where, to exercise the powers assigned under Article 16(1) of the Sixth Directive, Member States adopt measures, such as the obligation to physically place the imported goods in the tax warehouse, those Member States are also empowered, in the absence of legislation in relation to penalties, to choose the penalties which seem to them to be appropriate (see, to that effect, judgment in *Rēdlihs*, EU:C:2012:497, paragraph 44).

33 It is therefore legitimate for a Member State, in order to ensure the correct collection of VAT on importation and to prevent evasion, to provide, in its national legislation, appropriate penalties for failure to observe the obligation to physically place imported goods in the tax warehouse.

34 Such penalties must not, however, go further than is necessary to attain those objectives (see, to that effect, judgments in *Ecotrade*, C-95/07 and C-96/07, EU:C:2008:267, paragraphs 65 to 67; *EMS-Bulgaria Transport*, C-284/11, EU:C:2012:458, paragraph 67; and *Rēdlihs*, EU:C:2012:497, paragraph 47).

35 In order to assess whether such a penalty is consistent with the principle of proportionality, the nature and the degree of seriousness of the infringement which that penalty seeks to sanction must, inter alia, be taken into account, as must also the means of establishing the amount of that penalty.

36 As regards, in the first place, the nature and seriousness of the infringement, it must be recalled, on the one hand, that the obligation to physically place imported goods in the tax warehouse is, as has been found in paragraph 29 above, a formal requirement.

37 It is important to note, on the other hand, that, as the referring court pointed out, failure to comply with that obligation has not, at least in the main proceedings, resulted in non-payment of VAT on importation since that was settled by the taxable person under the reverse charge mechanism.

38 It could indeed be argued that, since the imported goods were not physically placed in the tax warehouse, the VAT was due upon importation and that, therefore, payment under the reverse charge mechanism constitutes late payment of that VAT.

39 However, the Court has consistently held that a belated settlement of VAT, in the absence of attempted evasion or detriment to the budget of the State, constitutes merely a formal infringement that cannot call into question the taxable person's right to deduct. In any event, such belated payment cannot be equated with evasion, which presupposes, first, that the transaction concerned, notwithstanding compliance with the conditions laid down by the relevant provisions of the Sixth Directive and the national legislation transposing it, results in the accrual of a tax advantage the grant of which would be contrary to the purpose of those provisions and, secondly, that it is apparent from a number of objective factors that the essential aim of the transaction concerned is to obtain a tax advantage (see, to that effect, judgments in *Halifax and Others*, C-255/02, EU:C:2006:121, paragraphs 74 and 75, and *EMS-Bulgaria Transport*, EU:C:2012:458, paragraph 74).

40 In the second place, with regard to the methods for determining the amount of the penalty, it must be noted, at the outset, that the requirement that the taxable person must, in addition to an increase of 30%, again pay the VAT on importation, without consideration being given to the payment already made, amounts, in essence, to depriving that taxable person of his right to deduct. To make a single transaction subject to double imposition of VAT, while only allowing that tax to be deducted once, leaves the taxable person liable to pay the remaining VAT.

41 In that regard, without it being necessary to examine the compatibility of that part of the penalty with the principle of proportionality, it suffices to recall, first, that the Court has repeatedly held that, in view of the preponderant position which the right to deduct has in the common system of VAT, which seeks to ensure complete neutrality of taxation of all economic activities, that neutrality presupposes that a taxable person may deduct the VAT paid or payable in the course of all his economic activities, a penalty consisting of a refusal of the right to deduct is not compatible with the Sixth Directive where no evasion or detriment to the budget of the State is ascertained (see, to that effect, judgments in *Sosnowska*, C-25/07, EU:C:2008:395, paragraphs 23 and 24, and *EMS-Bulgaria Transport*, EU:C:2012:458, paragraphs 68 and 70).

42 Furthermore, it is clear from the case-law of the Court that, contrary to what the Italian Government argued at the hearing, the reverse charge mechanism provided for under the Sixth Directive enables authorities, inter alia, to counter the tax evasion and avoidance observed in certain types of transactions (see judgment in *Véleclair*, C-414/10, EU:C:2012:183, paragraph 34).

43 In so far as, according to the referring court, there is neither evasion nor attempted evasion in the main proceedings, the part of the penalty consisting of requiring a new payment of VAT already paid, without that second payment giving rise to a right to deduct, cannot be regarded as consistent with the principle of VAT neutrality.

44 Next, in relation to the part of the penalty consisting of an increase of the tax at a fixed percentage, it suffices to point out that the Court of Justice has already held that such a procedure for establishing the amount of the penalty — which does not include any possibility of gradation — may go further than is necessary to ensure the correct levying and collection of the VAT and the prevention of evasion (see, to that effect, judgment in *Rēdlihs*, EU:C:2012:497, paragraphs 45 and 50 to 52).

45 In this case, having regard to the level of the percentage used for the increase laid down by national legislation and the impossibility of adapting it to the specific circumstances of each case, it is possible that the procedure for establishing the amount of the penalty and, therefore, the part corresponding to that increase, may prove to be disproportionate (judgment in *Rēdlihs*, EU:C:2012:497, paragraph 52).

46 Finally, it should further be added that, in accordance with the Court's case-law, the payment of default interest may constitute an adequate penalty in the case of infringement of a formal obligation, provided that it does not go further than is necessary to achieve the objectives pursued, of ensuring the correct collection of VAT and of preventing evasion (see judgment in *EMS-Bulgaria Transport*, EU:C:2012:458, paragraph 75).

47 However, if the overall sum of interest for which the taxable person is liable had to correspond to the amount of deductible tax, thereby depriving him of his right to deduct, such a penalty should be considered disproportionate.

48 In any event, it is for the referring court alone to make the final assessment as to whether the penalty at issue in the main proceedings is proportionate.

49 In view of the foregoing, the answer to the second and third questions referred for a preliminary ruling is that the Sixth Directive must be interpreted, in accordance with the principle of neutrality of VAT, as precluding national legislation under which a Member State requires the payment of VAT on importation even though that VAT has been settled already under the reverse charge mechanism through self-invoicing and entry in the sales and purchases register of the taxable person.

Costs

50 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 (Sixth Chamber) hereby rules:

1. **Article 16(1) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment, as amended by Council Directive 2006/18/EC of 14 February 2006, in the version resulting from Article 28c of the Sixth Directive, must be interpreted as not precluding national legislation which makes the grant of an exemption from the payment of the value added tax on importation provided for by that legislation subject to the condition that goods which are imported and destined for a tax warehouse for the purposes of value added tax be physically placed in that warehouse.**

2. **Sixth Directive 77/388, as amended by Directive 2006/18, must be interpreted, in accordance with the principle of neutrality of value added tax, as precluding national legislation under which a Member State requires the payment of value added tax on importation even though that tax has been settled already under the reverse charge mechanism through self-invoicing and entry in the sales and purchases register of the taxable person.**

[Signatures]