

Summary: Order of the Supreme Administrative Court of 6 December 2018, Case No. I FSK 2261/15

Reference for a preliminary ruling – Article 90 of Directive 2006/112/EC – bad debt relief – principle of VAT neutrality – principle of VAT proportionality

Against the backdrop of three (joined) cases initiated by taxpayers requesting individual tax interpretations, the Supreme Administrative Court analysed the Polish rules on bad debt relief as provided for in the VAT Act.

The Court had doubts regarding the margin of discretion conferred on Member States for the purpose of specifying the conditions of exercising the regulation provided for in Article 90 of Directive 2006/112 in the national legislation. In particular, the Court had doubts whether the conditions of using the bad debt relief as provided for in Article 89a of the VAT Act should not be restricted only to such conditions that make it possible to prove that amounts due have not been paid, without any conditions relating to the tax status of the creditor or the debtor. The Court emphasised that Article 89a of the VAT Act, apart from specifying which amounts due are considered unpaid, introduced other conditions as well. Pursuant to Article 89a(2) of the VAT Act, the taxable amount and the tax due may be adjusted if:

- 1) goods or services are provided to the taxpayer referred to in Article 15(1), registered as an active VAT payer against whom no bankruptcy or liquidation proceedings are pending;
- 3) as of the date preceding the date of filing a tax return, in which the adjustment referred to in paragraph 1 is to be made:
 - a) the creditor and the debtor are taxpayers registered as active VAT taxpayers,
 - b) no bankruptcy or liquidation proceedings are pending against the debtor;
- 5) the invoice supporting the amounts due is no older than 2 years, calculating from the end of the year in which it was issued.

The Supreme Administrative Court also noted that any finding to the effect that the EU legislation precludes the application of the condition provided for in Article 89a(2) of the VAT Act by the Member State would evidently distort the coherence of the Polish legal system. Against this backdrop, the Court referred to other regulations related to the provision of the VAT Act at issue, i.e. the obligation to file an adjustment by a taxpayer/debtor who failed to pay (Article 86b(1) of the VAT Act), as well as the rules on the seniority of debts within bankruptcy proceedings.

Having regard to the above, the Supreme Administrative Court has decided to refer to the CJEU the following question in its reference for a preliminary ruling

Does the provision of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (Journal of Laws of 2006 r. No. L347, p. 1) – in particular its Article 90(2) – allow for introducing to the national legislation any restrictions on the possibility of reducing the tax base in case of partial or full default in payment on the grounds of any specific tax status of the debtor and the creditor, given the principles of tax neutrality and proportionality? 2) In particular, does the EU law preclude the adoption in the national legislation of a regulation allowing for the possibility of using “bad debt relief” provided that on the date on which the services/goods were delivered and on the date preceding the date of tax return adjustment for the purpose of using the relief: - no bankruptcy or liquidation proceedings are pending against the debtor? - the creditor and the debtor are registered as active VAT taxpayers?