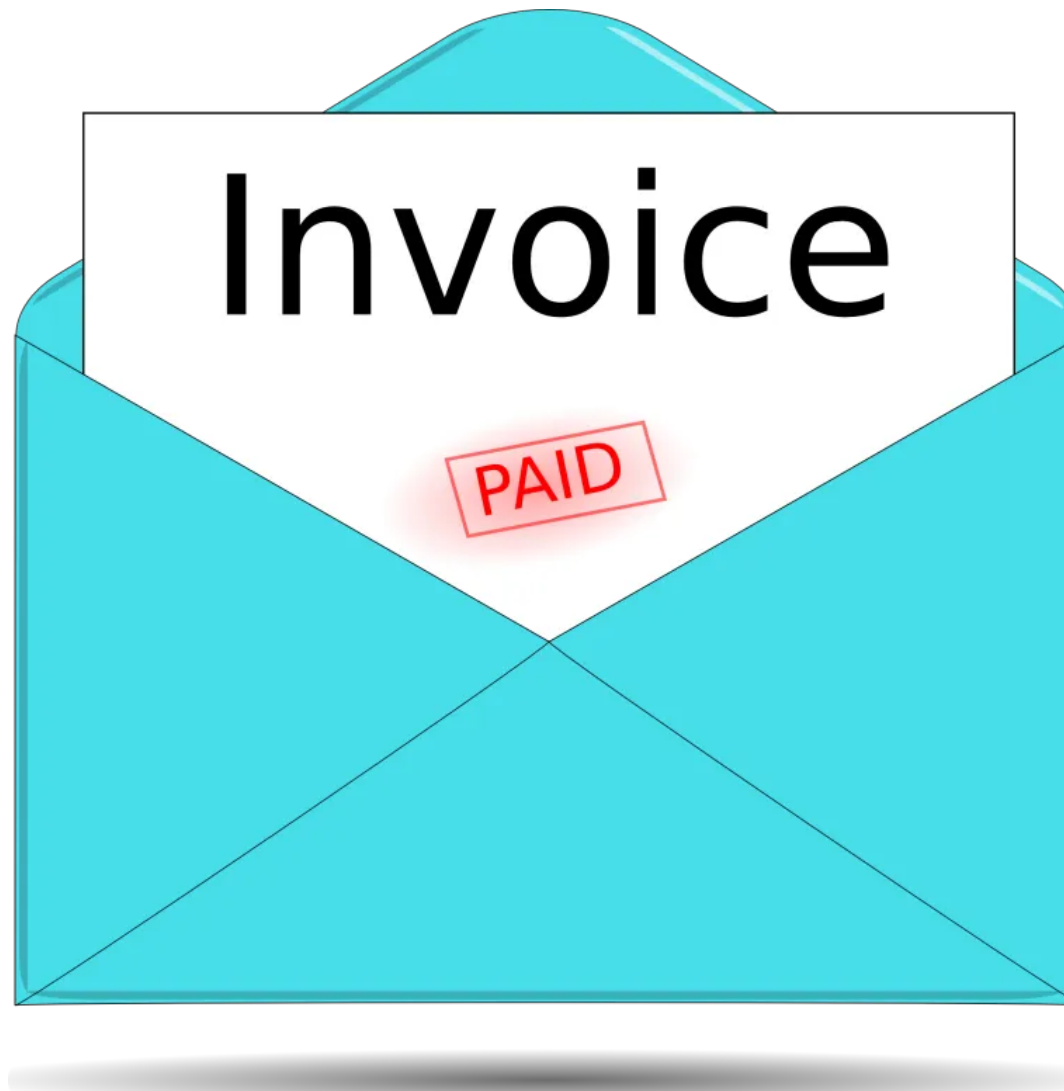


CJEU 12/22/2010 Dankowski C-438/09

By **Editors** - December 22, 2010



CJEU Dankowski judgment

A taxable person is entitled to deduct VAT which he has paid on services provided by another taxable person who is not registered for VAT, where the relevant invoices contain all the

information required, in particular those necessary for identifying the economic operator who these invoices and the nature of the services provided.

National legislation which excludes the right to deduct VAT paid by a taxable person to another taxable person who is a service provider if the latter is not registered for VAT is not permitted.

JUDGMENT OF THE COURT (Third Chamber)

December 22, 2010 (*)

(Sixth VAT Directive - Right to deduct input tax - Provision of services - Taxable person not entered in the VAT register - Compulsory entries on an invoice for VAT purposes - National tax legislation - Exclusion of the right to deduct under Article 17 (6) of the Sixth VAT Directive ”

In Case C - 438/09,

REFERENCE for a preliminary ruling under Article 234 EC by Naczelny Sąd Administracyjny (Poland), made by decision of 14 July 2009, received at the Court on 9 November 2009, in the proceedings

Bogusław Juliusz Dankowski

against

Dyrektor Izby Skarbowej w Łodzi,

points

THE COURT (Third Chamber),

composed of: K. Lenaerts, President of the Chamber, D. Šváby, R. Silva de Lapuerta (Rapporteur), E. Juhász and T. von Danwitz, Judges,

Advocate General: P. Mengozzi,

Registrar: K. Malacek, Administrator,

having regard to the written part of the procedure and further to the hearing on 11 November 2010,

having regard to the comments of:

- B. J. Dankowski, by R. Grzejszczak, J. Skrzydło, T. Grzejszczak and A. Kania, advokaci,
- the Polish Government, by A. Kramarczyk, M. Szpunar and B. Majczyna, acting as Agents,
- the German Government, by C. Blaschke and J. Möller, acting as Agents,
- the Greek Government, by Z. Chatzipavlou, D. Tsagkaraki and K. Georgiadis, acting as Agents,
- the European Commission, by D. Triantafyllou, A. Stobiecka-Kuik and K. Herrmann, acting as Agents,

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

the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 17 (2) and (6), 18 and 22 of the Sixth Council Directive (77/388 / EEC) of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover tax - Common system of value added tax: uniform basis (OJ 2001 L 145, p. 1), as applicable at the material time in the main proceedings.

2 The reference has been made in proceedings between BJ Dankowski and Dyrektor Izby Skarbowej w Łodzi (Director of the Tax Chamber of Łódź) concerning the restriction of the right to deduct value added tax ('the VAT ").

Applicable provisions

Union law

3 Article 2 of the Sixth Directive provides:

'The following are subject to value added tax:

1. the supply of goods and services effected for consideration within the territory of the country by a taxable person acting as such;

[...] ”

4 Article 4 of that directive provides:

"1. Any person who independently carries out any of the economic activities described in paragraph 2, irrespective of the purpose or result of that activity, is considered to be a taxable person.

2. The economic activities referred to in paragraph 1 include all the activities of a manufacturer, trader or service provider, including the extraction of minerals, agriculture and the pursuit of a liberal or equivalent profession. [...] [...] ”

5 Article 17 of the Sixth Directive provides:

"1. The right to deduct arises when the deductible tax becomes chargeable.

2. To the extent that the goods and services are used for taxable transactions, the taxable person may deduct from the tax due by him:

(a) value added tax, which is payable or paid domestically for the goods supplied or to be supplied to him by another taxable person and for the services supplied or supplied for his benefit;

[...]

6. Within four years of the date of entry into force of this Directive, the Council, acting unanimously on a proposal from the Commission, shall determine expenditure for which there is no right to deduct value added tax. In any case, expenditure without a strict professional character, such as wealth and leisure or representation expenses, is excluded from the right to deduct.

Until the rules referred to above enter into force, Member States may maintain any exclusion provided for in their legislation at the time of entry into force of this Directive.

[...] ”

6 Article 18 (1) (a) of the Sixth Directive provides:

'In order to exercise his right of deduction, the taxable person must:

(a) for the deduction referred to in Article 17 (2) (a), are in the possession of an invoice drawn up in accordance with Article 22 (3). "

7 Article 22 (1) of that directive provides:

"(A) Every taxable person shall declare the beginning, change and termination of his activity as a taxable person. [...] [...]

(c) Member States shall take the necessary measures to identify under an individual number:

- any taxable person... carrying out supplies of goods or services within the territory of the country which give rise to a right to deduct, other than supplies of goods or services for which only the customer or the recipient is liable to pay tax... ”.

8 Article 22 (3) of the Sixth Directive provides:

"(A) Each taxable person shall ensure that [...] an invoice is issued for [...] services that he has performed for another taxable person [...].

(b) Without prejudice to the special provisions of this Directive, only the following details are required for VAT purposes on invoices issued in accordance with point a [...]:

- the date of issue;
- a consecutive number [...];
- the VAT identification number referred to in paragraph 1 (c) under which the taxable person [...] rendered the services;
- the VAT identification number of the customer referred to in paragraph 1 (c) under which he [...] provided a service [...];
- the full name and address of the taxable person and his customer;
- the quantity and nature of [...] the services provided;

- the date on which the [...] provision of services took place or was completed;

[...] ”

9 Article 22 (8) of the Sixth Directive provides:

'[Member States] may prescribe... any other obligations which they consider necessary to ensure correct taxation and to prevent fraud.

The option provided for in the first subparagraph may only be used to impose obligations that are additional to those laid down in paragraph 3. "

National regulation

10 Article 96 of the Ustawa o podatku od towarów i usług (Law on the taxation of goods and services) of 11 March 2004, in the version applicable at the material time in the main proceedings, provides that taxable persons must pay before the first day of submit a registration application to the competent tax authority for the exercise of their activity.

11 Article 88 (3a) (1) (a) of that law provides that invoices cannot constitute a basis for reducing input tax or for refund of the difference in tax or input tax when the sale is supported by invoices issued by an operator who does not exist or is not allowed to issue invoices.

12 An implementing decree adopted by the Ministry of Finance under the same law provides that registered taxable persons, as effective taxable persons who have a tax identification number, shall draw up invoices stating 'VAT invoice'.

13 Paragraph 48 (4) (1) (a) of this decision provides that if the sale of goods or services is supported by invoices issued by an economic operator who does not exist or is not allowed to draw up invoices, those invoices cannot form the basis to reduce the tax due or to refund the difference in tax or the input tax.

The main proceedings and the questions referred for a preliminary ruling

14 Dankowski, the plaintiff in the main proceedings, owns Dan-Trak. In the period 2004-2006, Marek Płacek, manager of Artem-Studio, provided a number of taxable commercial services for him. However, Płacek had not complied with the obligation to register in the register of goods and services tax nor paid VAT, even though he had drawn up invoices proving the services provided and indicating the tax due.

15 By decision of 23 March 2007, the Dyrektor Izby Skarbowej w Łodzi, without disputing that the services in question were provided, refused Dankowski to deduct the input tax shown on the VAT invoices drawn up by Płacek.

16 In the recitals to that decision, it is stated that the originator of the disputed invoices was not registered as a taxable person and, because he had failed to comply with the registration obligation imposed by the applicable national provisions, the invoices he had drawn up did not constitute a basis for deduction of input tax.

17 Dankowski then brought an appeal against that decision before the Wojewódzki Sąd Administracyjny w Łodzi (Administrative Court of the Łódź Voivodeship). In support of his action, Dankowski has argued in particular that the registration of an economic operator as a person liable for VAT is merely a technical act which cannot affect the right to deduct input tax.

18 By judgment of 4 December 2007, the Wojewódzki Sąd Administracyjny w Łodzi dismissed the appeal.

19 In the cassation proceedings brought before the Naczelny Sąd Administracyjny, Dankowski alleged, in particular, that the application of the provisions of Polish tax law and the misinterpretation of Article 17 (6) of the Sixth Directive were incompatible with European Union law.

20 Accordingly, the Naczelny Sąd Administracyjny decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) Do the principles of the Community VAT system, in particular Article 17 (6) of the Sixth [Directive], preclude legislation of a Member State according to which a taxable person is not entitled to deduct input VAT arising from a VAT invoice issued by a person who is not entered in the register of taxable persons on tax on goods and services?

2) Is it important for the answer to the first question that:

(a) it is established that the transactions referred to in the VAT invoice are subject to VAT and have actually been carried out;

(b) the invoice contained all the information required by Community law;

(c) the restriction of the taxable person's right to deduct input tax arising from an invoice issued by an unregistered person was in the national legal order prior to the date of accession of the

Republic of Poland to the Community?

3) Does the answer to the first question differ when additional criteria are met (eg proof that the taxable person has acted in good faith)? "

Answer to the questions referred

21 By the three questions, which must be examined together, the referring court essentially asks whether, in the circumstances of the main proceedings and taking into account Articles 18 (1) (a) and 22 (3) (b) of the Sixth Directive, a taxable person is entitled to deduct VAT paid on services provided by another taxable person not registered for VAT purposes and, if so, whether Article 17 (6) of that directive is It precludes national legislation which excludes the right to deduct services supplied by such a taxable person.

The first part of the questions referred

22 As a preliminary point, it should be recalled that the right to deduct provided for in Article 17 (2) of the Sixth Directive forms an integral part of the VAT scheme and cannot, in principle, be limited (see judgments of 8 January 2002, [Metropol and Stadler](#) , C-409/99, ECR I-81, paragraph 42, and 26 May 2005, [Kretztechnik](#) , C-465/03, ECR I-4357, paragraph 33.

23 The right to deduct is immediately exercised for all taxes which have had an effect on the transactions previously performed (see Case C-437/06 [Securenta](#) [2008] ECR I-1597, paragraph 24; 4 June 2009, [SALIX Grundstücks - Vermietungsgesellschaft](#), C-102/08, ECR I-4629, paragraph 70, and 29 October 2009, [SKF](#) , C-29/08, ECR I-10413, paragraph 55.

24 The purpose of the deduction scheme thus established is to fully relieve the entrepreneur of the VAT payable or paid in the context of all his economic activities. In this way, the common VAT system ensures a neutral tax tax on all economic activities, irrespective of the purpose or result of those activities, provided that those activities are in principle themselves subject to VAT (see judgment of 29 April 2004, [Faxworld](#) , C 137/02 ECR I-5547, paragraph 37, and [SKF](#) , cited above, paragraph 56).

25 In the main proceedings, it is common ground that the services in question were provided by an economic operator at an earlier stage and were used by the applicant in the main proceedings at a later stage for taxable transactions.

26 Consequently, the substantive conditions laid down in Article 17 (2) of the Sixth Directive for the right to deduct are met.

27 As regards the exercise of the right to deduct, Article 18 (1) (a) of the Sixth Directive provides that the taxable person must hold an invoice drawn up in accordance with Article 22 (3) of that directive.

28 Article 22 (3) (b) of the Sixth Directive defines the particulars for VAT purposes which must appear on invoices completed in accordance with Article 22 (3) (a). The latter provision provides for the obligation for every taxable person to ensure that an invoice is issued for the services he provides for another taxable person.

29 As regards the statements referred to in Article 22 (3) (b) of the Sixth Directive, the referring court found that the invoices produced by the applicant in the main proceedings contained all the information required by that provision. In particular, it is apparent from the file submitted to the Court and the explanations provided by the Polish Government at the hearing that those invoices contain the tax identification number of the service provider concerned. This number is officially assigned to economic operators by the Polish tax authorities, whether or not they submit a registration application.

30 Even if that provision provides for the indication of the 'VAT identification number', it must nevertheless be considered that the tax identification number allocated in the present case allows the taxable person concerned to be identified and thus meets the requirements of Article 22 (3) (b), third indent, of the Sixth Directive.

31 However, as the referring court has pointed out, the said service provider has not registered with the competent national authority for VAT purposes while drawing up invoices for the services supplied to the applicant in the main proceedings.

32 Indeed, Article 22 (1) of the Sixth Directive provides that every taxable person must declare the start of his activity as a taxable person.

33 However, irrespective of the importance of that registration for the proper functioning of the VAT system, failure by a taxable person to fulfill that obligation cannot affect the right conferred on another taxable person by Article 17 (2) of the Sixth Directive on deduction.

34 Indeed, Article 22 (1) of the Sixth Directive only requires taxable persons to declare the beginning, alteration and cessation of their activities, but in no way gives Member States the power, where such declaration is not made, suspend the exercise of the right to deduct until the effective beginning of the normal performance of the taxable transactions or deny the taxable person the exercise of this right (see judgments of 21 March 2000, [Gabalfrisa](#) and Others, C -

[110/98](#) - C - 147/98, ECR I-1577, paragraph 51, and 21 October 2010, [Nidera Handelscompagnie](#) , C-385/09, not yet published in the ECR, paragraph 48).

35 Where the competent tax administration has the information necessary to establish that the taxable person, as a recipient of commercial transactions, is liable to pay VAT, it may not impose any further conditions on the latter's right to deduct input tax, which may lead to: the exercise of that right is prevented (see Cases C-95/07 and C-96/07 [Ecotrade](#) [2008] ECR I - 3457, paragraph 64, and 30 September 2010, [Uszodaépítő](#), C - 392 / 09, not yet published in the ECR, paragraph 40).

36 Thus, any failure by the service provider to fulfill the obligation laid down in Article 22 (1) of the Sixth Directive cannot affect the right to deduct the recipient of the services under Article 17 (2) of that directive. .

37 The same applies to Article 22 (8) of the Sixth Directive, under which Member States may prescribe other obligations which they consider necessary to ensure correct taxation and to prevent fraud. Although this provision allows Member States to take certain measures, these measures should not go beyond what is necessary for this purpose and should therefore not be used in such a way as to create a systematic obstacle to the right to deduct VAT, which entitlement is a basic principle of the common VAT system (see Case C-286/94 [Molenheide and Others](#) C-340/95, C-401/95 and C-47/96 ECR I-I 7281, paragraph 47; [Gabalfrisa](#) and Others, cited above, paragraph 52, and [Ecotrade](#) , cited above, paragraphs 65 and 66).

38 It follows from those considerations that Articles 18 (1) (a) and 22 (3) (b) of the Sixth Directive must be interpreted as meaning that a taxable person is entitled to deduct VAT which he has paid on services by another taxable person not registered for VAT, where the relevant invoices contain all the information required by this Article 22 (3) (b), in particular those necessary for the identification of the economic operator who has issued those invoices , and the nature of the services provided.

The second part of the questions referred for a preliminary ruling

39 Since the plaintiff in the main proceedings is therefore entitled to a deduction under the Sixth Directive, the referring court asks whether Article 17 (6) of the Sixth Directive must be interpreted as precluding national legislation which provides for the right to deduct excludes VAT paid by a taxable person to another taxable person who is a service provider if the latter is not registered for VAT purposes.

40 In that regard, it should be recalled that that provision is a measure which derogates from the fact that, under certain circumstances, Member States may maintain their existing rules for exclusion from the right to deduct on the entry into force of the Sixth Directive in the Member State concerned until the Council adopts the rules referred to in this Article (see Case C-371/07 [Danfoss and AstraZeneca](#) [2001] ECR I - 9549, paragraph 28, and 15 April 2010, [X Holding and Oracle Netherlands](#) , C - 538/08 and C - 33/09, not yet published in the ECR, paragraph 38).

41 As to the scope of that provision, the Court has ruled that the power conferred on Member States by Article 17 (6) of the Sixth Directive is not an absolute discretion to exercise all or almost all goods and services under the right to VAT to exclude deductions and thus erode the system established by this Directive. That power does not therefore concern general exclusions and does not relieve Member States of the obligation to determine adequately the goods and services for which the right to deduct is excluded (see judgments of 5 October 1999, [Royscot and Others](#), C - 305/97 ECR I-6671, paragraphs 22 and 24, 14 July 2005, [Charles and Charles-Tijmens](#) , Case C-434/03, ECR I-7037, paragraphs 33 and 35, and 30 September 2010, [Oasis East](#) , C - 395/09, not yet published in the ECR, paragraph 23).

42 Moreover, since it concerns a scheme which derogates from the principle of the right to deduct VAT, it must be interpreted strictly (see Case C-414/07 [Magoora](#) [2008] ECR I - 10921, paragraph 28, and [Oasis East](#) , cited above, paragraph 24).

43 As regards the main proceedings and the possible applicability in the present case of the derogation provided for in Article 17 (6) of the Sixth Directive, it must be stated that that Directive is to enter into force in Poland on the date of the accession of that Member State to the European Union on 1 May 2004. That date is therefore relevant for the application of the abovementioned provision for that Member State ([Oasis East](#) , paragraph 25).

44 In order to assess the national legislation at issue in the main proceedings in the light of Article 17 (6) of the Sixth Directive and the case-law cited above, it must be held that it is a measure of a general nature which is excluding VAT for any transaction performed by a taxable person who has not complied with the obligation to register for VAT purposes.

45 Such a scheme therefore contains a restriction on the right to deduct VAT which goes beyond what is permitted under Article 17 (6) of the Sixth Directive.

46 The Court has held that Member States are not empowered to maintain exclusions from the right to deduct VAT which are generally applicable to all expenditure on the purchase of goods or services (judgment of 23 April 2009, [PARAT Automotive Cabrio](#) , C-74/08 ECR I-3459, paragraphs 28 and 29, and [Oasis East](#) , cited above, paragraph 30).

47 It follows from the foregoing that Article 17 (6) of the Sixth Directive must be interpreted as precluding national rules which exclude the right to deduct VAT paid by a taxable person to another taxable person who is a service provider if the latter is not registered for VAT.

Cost

48 As regards the parties to the main proceedings, the proceedings are to be regarded as an incident arising there, so that it is for the national court to decide on the costs. Costs incurred by others for submitting their observations to the Court are not recoverable.

The Court (Third Chamber) hereby rules:

1) Articles 18 (1) (a) and 22 (3) (b) of the Sixth Council Directive (77/388 / EEC) of 17 May 1977 on the harmonization of the laws of the Member States concerning turnover taxes - Common system of value added tax: uniform basis, as amended by Council Directive 2006/18 / EC of 14 February 2006, should be interpreted as meaning that a taxable person is entitled to deduct the value added tax he has satisfied with services provided by another taxable person not registered for value added tax, where the relevant invoices contain all the information required by Article 22 (3) (b), in particular those necessary for identifying the economic operator who has issued those invoices and the nature of the services provided.

2) Article 17 (6) of the Sixth Directive (77/388), as amended by Directive 2006/18, must be interpreted as precluding national legislation which excludes the right to deduct from value added tax value paid by a taxable person to another taxable person who is a service provider, when the latter is not registered for value added tax.

signatures

* Language of the case: Polish.

[ECLI: EU: C: 2010: 818](#)

Related



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In "Court of Justice"



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