

Provisional text

JUDGMENT OF THE COURT (Tenth Chamber)

30 September 2021 (*)

(Reference for a preliminary ruling – Administrative cooperation and combating fraud in the field of value added tax (VAT) – Regulation (EU) No 904/2010 – Articles 10 to 12 – Exchange of information – Tax audit – Time limits – Suspension of the tax audit in case of exchange of information – Non-compliance with the time limits laid down for providing information – Effect on the lawfulness of the suspension of the tax audit)

In Case C-186/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Najvyšší súd Slovenskej republiky (Supreme Court of the Slovak Republic), made by decision of 5 March 2020, received at the Court on 29 April 2020, in the proceedings

HYDINA SK s.r.o.

v

Finančné riaditeľstvo Slovenskej republiky

THE COURT (Tenth Chamber),

composed of M. Ilešič, President of the Chamber, E. Regan (Rapporteur), President of the Fifth Chamber, and I. Jarukaitis, Judge,

Advocate General: G. Pitruzzella,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 21 April 2021,

after considering the observations submitted on behalf of:

- HYDINA SK s.r.o., by M. Kvasňovský, advokát,
- the Slovak Government, by B. Ricziová, acting as Agent,
- the Czech Government, by M. Smolek, O. Serdula and J. Vlášil, acting as Agents,
- the European Commission, by J. Jokubauskaitė and A. Tokár, acting as Agents,

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

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 10 of Council

Regulation (EU) No 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax (OJ 2010 L 268, p. 1).

2 The request has been made in proceedings between HYDINA SK s.r.o. and the Finan?né riadite?stvo Slovenskej republiky (Finance Directorate of the Slovak Republic) ('the Finance Directorate') concerning a tax audit following a claim for deduction of value added tax (VAT) in respect of supplies of goods.

Legal context

European Union law

3 Recitals 5, 7, 8 and 25 of Regulation No 904/2010 state:

'(5) The tax harmonisation measures taken to complete the internal market should include the establishment of a common system for cooperation between the Member States, in particular as concerns exchange of information, whereby the Member States' competent authorities are to assist each other and to cooperate with the [European] Commission in order to ensure the proper application of VAT on supplies of goods and services, intra-Community acquisition of goods and importation of goods.

...

(7) For the purposes of collecting the tax owed, Member States should cooperate to help ensure that VAT is correctly assessed. They must therefore not only monitor the correct application of tax owed in their own territory, but should also provide assistance to other Member States for ensuring the correct application of tax relating to activity carried out on their own territory but owed in another Member State.

(8) Monitoring the correct application of VAT on cross-border transactions taxable in a Member State other than that where the supplier is established depends in many cases on information which is held by the Member State of establishment or which can be much more easily obtained by that Member State. Effective supervision of such transactions is therefore dependent on the Member State of establishment collecting, or being in a position to collect, that information.

...

(25) The time limits laid down in this Regulation for the provision of information are to be understood as maximum periods not to be exceeded, the principle being that, in order for cooperation to be effective, information already available to the requested Member State should be provided without further delay.'

4 Article 1(1) of that regulation provides:

'This Regulation lays down the conditions under which the competent authorities in the Member States responsible for the application of the laws on VAT are to cooperate with each other and with the Commission to ensure compliance with those laws.

To that end, it lays down rules and procedures to enable the competent authorities of the Member States to cooperate and to exchange with each other any information that may help to effect a correct assessment of VAT, monitor the correct application of VAT, particularly on intra-Community transactions, and combat VAT fraud. In particular, it lays down rules and procedures for Member States to collect and exchange such information by electronic means.'

5 Article 10 of that regulation provides:

'The requested authority shall provide the information referred to in Articles 7 and 9 as quickly as possible and no later than three months following the date of receipt of the request.

However, where the requested authority is already in possession of that information, the time limit shall be reduced to a maximum period of one month.'

6 According to Article 11 of that regulation:

'In certain special categories of cases, time limits which are different from those provided for in Article 10 may be agreed between the requested and the requesting authorities.'

7 Article 12 of Regulation No 904/2010 states:

'Where the requested authority is unable to respond to the request by the deadline, it shall inform the requesting authority in writing forthwith of the reasons for its failure to do so, and when it considers it would be likely to be able to respond.'

Slovak law

8 According to the second sentence of Paragraph 3(2) of the zákon ?. 563/2009 Z. z. o správe daní (daňový poriadok) a o zmene a doplnení niektorých zákonov (Law No 563/2009 on tax proceedings (Tax Procedure Code) and amending and supplementing certain laws) of 1 December 2009, in the version applicable to the dispute in the main proceedings ('the Tax Procedure Code'):

'The tax administration is obliged to examine any matter which is the subject of tax collection, to deal with it without unnecessary delay and to use the most appropriate means for the purpose of correct determination and collection of the tax.'

9 Paragraph 46(10) of the Tax Procedure Code provides:

'The period for carrying out a tax audit shall not exceed one year from the date of commencement of the audit. In the case of suspension of the tax audit, Paragraph 61 applies *mutatis mutandis*.'

10 Paragraph 61(1)(b) of that code provides:

'The tax authorities may suspend the tax proceedings, if proceedings have been commenced in respect of another circumstance which is decisive for the adoption of a decision or if it is necessary to obtain information in a manner laid down by special regulations.'

11 Paragraph 61(1)(b) contains a footnote 21a, which refers, as an example of such special regulation, to the zákon ?. 442/2012 Z. z. o medzinárodnej pomoci a spolupráci pri správe daní (Law No 442/2012 on International Assistance and Cooperation in Tax Collection) of 5 December 2012, and Regulation No 904/2010.

12 Paragraph 61(5) of that code provides as follows:

'In the event of a suspension of the tax proceedings, the time limits provided for in this Law shall cease to run.'

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

13 In the tax period relating to December 2013, the applicant in the main proceedings, a company established in Slovakia, claimed a right to deduct VAT in respect of supplies of meat products mentioned in invoices issued by ARGUS Plus spol. s r. o., also established in that Member State.

14 The Daňový úrad Prešov (Tax Administration of Prešov, Slovakia) ('the tax authorities') initiated a tax audit, for the purpose of establishing the validity of that right and the corresponding claim for reimbursement, relating to the excess VAT, or part thereof, for that tax period.

15 In order to examine whether the conditions giving rise to the right to deduct VAT were satisfied, the tax authorities carried out extensive investigations to find evidence verifying the existence of links between ARGUS Plus and the applicant in the main proceedings. In that regard, the tax authorities twice suspended the tax audit concerning the latter due to requests for information that it had sent to the respective competent authorities of two Member States, in accordance with the procedure provided for in Regulation No 904/2010, with a view to determining whether the goods invoiced to it by ARGUS Plus had actually been delivered.

16 The first request for information was submitted to the competent authorities of the Republic of Poland, the Member State in which the goods had been purchased by ARGUS Plus, which led to the suspension of the tax audit for the period from 26 August 2014 to 11 March 2015, the tax authorities lifting the suspension only after receipt of the response from the Polish authorities, which came after the expiry of the three-month period provided for in Article 10 of Regulation No 904/2010. Furthermore, Articles 11 and 12 of the regulation were not applied.

17 The second request for information was submitted to the competent Hungarian authorities to obtain the minutes of a hearing of the Hungarian national managing ARGUS Plus, which again resulted in the suspension of the tax audit, in the period from 20 April to 1 July 2015.

18 At the end of that procedure, the tax authorities concluded that the applicant in the main proceedings had not provided any evidence capable of establishing that, during the tax period relating to December 2013, ARGUS Plus had in fact delivered the goods mentioned on the invoices submitted to it. It found that, during that tax period, ARGUS Plus had not engaged in any genuine economic activity, that it had not actually acquired the right to dispose of those goods as owner and, therefore, that it had been unable to supply those goods to other taxable persons.

19 In those circumstances, the tax authorities adopted a decision on 30 May 2016 by which they established a difference in VAT of EUR 174 699.33 with regard to the applicant in the main proceedings for that tax period.

20 The applicant appealed against that decision. By decision of 17 October 2016, the Finance Directorate upheld the decision of the tax authorities.

21 The applicant in the main proceedings has brought an action before the Krajský súd v Prešove (Regional Court, Prešov, Slovakia) against the decision of the Finance Directorate. In those proceedings, the applicant relied, inter alia, on the excessive length of the overall tax audit. It pointed out that, according to Paragraph 46(10) of the Tax Procedure Code, the duration of the tax audit may not exceed one year from its commencement. In the present case, the tax audit was begun on 21 March 2014 and closed on 7 December 2015.

22 By judgment of 18 January 2018, the Krajský súd v Prešove (Regional Court, Prešov) dismissed that appeal. As regards the duration of the tax audit, that court observed that it follows from Paragraph 61(5) of the Tax Procedure Code that, in the event of suspension of the tax audit,

the time limit laid down in Paragraph 46(10) thereof ceases to run, meaning that, for the purposes of calculating it, the period during which the tax audit was suspended is not taken into account. In the case in the main proceedings, since the tax audit was suspended because of the two requests for information submitted on the basis of Regulation No 904/2010, the Krajský súd v Prešove (Regional Court, Prešov) held that the applicant's complaint concerning the duration of that audit was unfounded.

23 On appeal against that judgment, the Najvyšší súd Slovenskej republiky (Supreme Court of the Slovak Republic) observed, in the first place, that, while the need to obtain information under Regulation No 904/2010 justified the suspension of the tax audit, the fact remained that, under Article 10 of that regulation, read in the light of recital 25 thereof, the requested authorities should provide that information within a maximum of three months from the date of receipt of the request for information addressed to them. The applicant maintains that, in the present case, that time limit was not observed. Furthermore, the failure to comply with the time limit was not regularised under the procedure laid down in Articles 11 and 12 of that regulation, which would allow the time limit to be extended.

24 Noting that footnote 21a to Paragraph 61(1)(b) of the Tax Procedure Code refers to the whole of Regulation No 904/2010 as an example of a special rule, the application of which may justify the suspension of a tax audit, that court wonders whether it is possible, first, to derive from that regulation a legitimate reason justifying the suspension of the tax audit and, secondly, to disregard the provisions of that regulation, in particular Article 10 thereof. It takes the view that that footnote cannot be interpreted as conferring on the regulation the sole function of legitimising the suspension of proceedings, but that account should also be taken of the time limits it sets.

25 In the second place, in the view of the national court, it is essential to specify the nature of the obligations which the time limits laid down in the same regulation place on the competent authorities of the Member States, as well as the consequences of their failure to comply with those time limits, having regard to the possible infringement of taxpayers' rights.

26 In order to determine the lawfulness of the duration of a tax audit, that court considers that it is necessary to assess the lawfulness of the duration of a suspension period, in particular with regard to the principles of proportionality and legal certainty.

27 In those circumstances, the Najvyšší súd Slovenskej republiky (Supreme Court of the Slovak Republic) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is the expression "the time limits laid down in this Regulation for the provision of information are to be understood as maximum periods not to be exceeded" in recital 25 of [Regulation No 904/2010] to be interpreted as meaning that such time limits may not be exceeded and that failure to comply with those time limits renders the suspension of the tax audit unlawful?

(2) Are there any consequences (sanctions) for the requested or the requesting authority in case of non-compliance with the time limits for the international exchange of information laid down in [Regulation No 904/2010]?

(3) Can an international exchange of information which fails to comply with the time limits laid down in [Regulation No 904/2010] be regarded as an unlawful infringement of the taxpayer's rights?'

Consideration of the questions referred

28 By its three questions, which must be considered together, the national court is asking, in essence, whether Article 10 of Regulation No 904/2010, read in the light of recital 25 thereof, must be interpreted as laying down time limits, which if not complied with may affect the lawfulness of the suspension of a tax audit provided for by the national law of the requesting Member State, pending the communication by the requested Member State of the information requested via the mechanism for administrative cooperation established by that regulation.

29 In that connection, it must be recalled that, in accordance with settled case-law, for the purpose of interpreting a provision of EU law, it is necessary to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it is part (see, in particular, judgments of 6 October 2020, *Jobcenter Krefeld*, C-181/19, EU:C:2020:794, paragraph 61 and the case-law cited, and of 24 March 2021, *A*, C-950/19, EU:C:2021:230, paragraph 34).

30 As regards the wording of Article 10 of Regulation No 904/2010, it provides that the requested authority must provide the information requested by the requesting authority as soon as possible, and no later than three months from the date of receipt of the request, that period being reduced to a maximum of one month in cases where the information concerned is already at the disposal of the requested authority.

31 As can be seen from recital 25 of that regulation, Article 10 therefore sets the maximum time limits within which the requested authority must provide the requesting authority with the information requested by the latter.

32 However, in accordance with the case-law referred to in paragraph 29 of the present judgment, in order to determine the scope of Article 10 of Regulation No 904/2010, it is necessary also to take into account Articles 11 and 12 thereof, which together with Article 10 constitute Section 2 of Chapter II of that regulation, entitled 'Time limit for communication'.

33 In that connection, Article 11 of Regulation No 904/2010 provides that, in certain special categories of cases, time limits which are different from those laid down in Article 10 may be agreed between the requested and the requesting authorities. As for Article 12 of that regulation, it provides that, where the requested authority is unable to respond to the request by the deadline, it must immediately inform the requesting authority in writing of the reasons for its failure to do so, and when it considers it would be likely to be able to respond.

34 It is clear from those articles that the EU legislature explicitly envisaged the possibility for the competent tax authorities of the Member States to respond to a request for information after the expiry of the time limits laid down in Article 10 of Regulation No 904/2010.

35 Furthermore, it is also apparent from Articles 11 and 12 of Regulation No 904/2010 that the time limits laid down in Article 10 thereof do not concern relations between the competent tax authorities required to cooperate under the mechanism implemented by that regulation and taxable persons, but only relations between those authorities. First, the tax authorities concerned may, in accordance with Article 11, agree on a longer period, without it being provided that they are obliged to consult the taxable person concerned and, secondly, under Article 12, only the requesting authority, and not the taxable person, is informed by the requested authority of the impossibility of replying to the request within the time limit set.

36 Moreover, neither Articles 10 to 12 of Regulation No 904/2010 nor any other provision of that regulation provide for any consequence in the event of the competent tax authorities exceeding any of the time limits resulting from the application of those articles, either for those

authorities or for taxable persons.

37 Thus, it is clear from the wording of those provisions and, therefore, from the context in which Article 10 appears that non-compliance with one of the time limits laid down in that article does not give the taxable person concerned any rights, or give rise to any specific consequences, including as regards the lawfulness of the suspension of the tax audit provided for by the national law of the requesting Member State pending the provision of the information requested by the requested Member State.

38 That interpretation is supported by the objectives pursued by Regulation No 904/2010.

39 In that regard, it must be observed that, according to Article 1(1) thereof, that regulation lays down the conditions under which the competent authorities in the Member States responsible for the application of the laws on VAT are to cooperate with each other and with the Commission to ensure compliance with those laws and, to that end, lays down rules and procedures to enable the competent authorities of the Member States to cooperate and exchange with each other any information that may help to effect a correct assessment of VAT, monitor the correct application of VAT, particularly on intra-Community transactions, and combat VAT fraud.

40 As is apparent from recitals 5 and 7 thereof, that the aim of Regulation No 904/2010 is, through the establishment of a common system for cooperation between the Member States, in particular as concerns exchange of information, to help ensure that VAT is correctly assessed, in particular as regards activities carried on in the territory of one Member State but for which the relevant VAT is owed in another Member State. As the EU legislature acknowledged in recital 8 of that regulation, monitoring the correct application of VAT on cross-border transactions taxable in a Member State other than that in which the supplier is established depends in many cases on information which is held by the Member State of establishment or which can be much more easily obtained by that Member State (see, to that effect, judgment of 18 June 2020, *KrakVet Marek Batko*, C-276/18, EU:C:2020:485, paragraph 43).

41 However, it must be stated that Regulation No 904/2010 aims to enable administrative cooperation for the purposes of exchanging information that may be necessary for the tax authorities of the Member States (judgment of 18 June 2020, *KrakVet Marek Batko*, C-276/18, EU:C:2020:485, paragraph 48).

42 However, in the absence of any express provision in Regulation No 904/2010 to that effect, the latter cannot be interpreted as conferring on a taxable person any specific right (see, by analogy, judgment of 20 June 2018, *Enteco Baltic*, C-108/17, EU:C:2018:473, paragraph 105 and the case-law cited).

43 Moreover, that regulation does not govern the maximum duration of a tax audit or the conditions for suspending such an audit on commencement of the information exchange procedure provided for therein. Therefore, a taxable person cannot rely on that regulation in order to challenge the lawfulness of the suspension of the tax audit to which he or she is subject on grounds of the excessive duration.

44 Having regard to all the foregoing considerations, the answer to the questions referred is that Article 10 of Regulation No 904/2010, read in the light of recital 25 thereof, must be interpreted as not laying down time limits, the non-compliance with which is liable to affect the lawfulness of the suspension of a tax audit provided for by the law of the requesting Member State pending the communication, by the requested Member State, of the information requested under the administrative cooperation mechanism established by that regulation.

Costs

45 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 (Tenth Chamber) hereby rules:

Article 10 of Council Regulation (EU) No 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax, read in the light of recital 25 thereof, must be interpreted as not laying down time limits, the non-compliance with which is liable to affect the lawfulness of the suspension of a tax audit provided for by the law of the requesting Member State pending the communication, by the requested Member State, of the information requested under the administrative cooperation mechanism established by that regulation.

[Signatures]

* Language of the case: Slovak.