

JUDGMENT OF THE COURT (Fifth Chamber)

21 June 2012 (*)

(Eighth VAT Directive — Arrangements for the refund of VAT to taxable persons not established in the territory of the country — Time-limit within which refund applications are to be submitted — Time bar)

In Case C-294/11,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Corte suprema di cassazione (Italy), made by decision of 3 March 2011, received at the Court on 9 June 2011, in the proceedings

Ministero dell'Economia e delle Finanze,

Agenzia delle Entrate

v

Elsacom NV,

THE COURT (Fifth Chamber),

composed of M. Safjan, President of the Chamber, M. Ilešić and M. Berger (Rapporteur), Judges,
Advocate General: E. Sharpston,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Elsacom NV, by S. Petrecca, avvocato,
- the Italian Government, by G. Palmieri, acting as Agent, and G. Galluzzo, avvocato dello Stato,
- the Greek Government, by K. Paraskevopoulou and Z. Chatzipavlou, acting as Agents,
- the Hungarian Government, by M.Z. Fehér, K. Szíjjártó and Z. Tóth, acting as Agents,
- the European Commission, by C. Soulay and D. Recchia, acting as Agents,

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

Judgment

1 This reference for a preliminary ruling concerns the interpretation of the first subparagraph

of Article 7(1) of Eighth Council Directive 79/1072/EEC of 6 December 1979 on the harmonization of the laws of the Member States relating to turnover taxes — Arrangements for the refund of value added tax to taxable persons not established in the territory of the country (OJ 1979 L 331, p. 11) ('the Eighth VAT Directive').

2 The reference was made in proceedings between the Ministero dell'Economia e delle Finanze and the Agenzia delle Entrate (collectively, 'the tax authorities'), the appellants in the main proceedings, and Elsacom NV, a company established in the Netherlands ('Elsacom'), concerning the refund of value added tax ('VAT') paid by that company in Italy in 1999.

Legal context

European Union law

3 Council Directive 2008/9/EC of 12 February 2008 laying down detailed rules for the refund of value added tax, provided for in Directive 2006/112/EC, to taxable persons not established in the Member State of refund but established in another Member State (OJ 2008 L 44, p. 23) repealed and replaced the Eighth VAT Directive. However, Article 28(2) of Directive 2008/9 states that the provisions of the Eighth VAT Directive are to apply to refund applications submitted before 1 January 2010, which is the case in the main proceedings.

4 The third recital in the preamble to the Eighth VAT Directive is worded as follows:

'... discrepancies between the arrangements currently in force in Member States, which give rise in some cases to deflection of trade and distortion of competition, should be eliminated'.

5 Article 2 of the Eighth VAT Directive provides as follows:

'Each Member State shall refund to any taxable person who is not established in the territory of the country but who is established in another Member State, subject to the conditions laid down below, any value added tax charged in respect of services or movable property supplied to him by other taxable persons in the territory of the country or charged in respect of the importation of goods into the country, in so far as such goods and services are used for the purposes of the transactions referred to in Article 17(3)(a) and (b) of Directive 77/388/EEC and of the provision of services referred to in Article 1(b).'

6 Article 3(a) of the Eighth VAT Directive is worded as follows:

'To qualify for refund, any taxable person as referred to in Article 2 who supplies no goods or services deemed to be supplied in the territory of the country shall:

(a) submit to the competent authority ... an application ...'.

7 The last sentence of the first subparagraph of Article 7(1) of the Eighth VAT Directive provides as follows:

'Applications shall be submitted to the competent authority ... within six months of the end of the calendar year in which the tax became chargeable.'

8 Section B of Annex C to the Eighth VAT Directive is worded as follows:

'The application shall be ... submitted by 30 June of the year following that to which the application relates ...'.

9 Article 15(1) of Directive 2008/9 provides as follows:

‘The refund application shall be submitted ... at the latest on 30 September of the calendar year following the refund period. ...’

10 Article 1 of Council Directive 2010/66/EU of 14 October 2010 amending Directive 2008/9 (OJ 2010 L 275, p. 1) is worded as follows:

‘In Article 15(1) of Directive 2008/9/EC the following subparagraph shall be added:

“Refund applications which relate to refund periods in 2009 shall be submitted ... on 31 March 2011 at the latest.”

Italian law

11 Article 16 of Decree No 793 of the President of the Republic of 30 December 1981 (GURI No 358 of 31 December 1981), adopted inter alia for the purpose of bringing the rules on VAT into line with European Union law, inserted in Presidential Decree No 633, establishing and laying down rules on value added tax (Decreto del Presidente della Repubblica n. 633, istituzione e disciplina dell'imposta sul valore aggiunto), of 26 October 1972 (Ordinary Supplement to GURI No 292 of 11 November 1972) ('DPR No 633/72'), Article 38b, which entrusts the Minister for Finance, in consultation with the Treasury Minister, with the task of laying down by decree the detailed rules and time-limits applicable to refund applications.

12 Decree No 2672 of the Minister for Finance laying down rules for the implementation of the provisions in Article 38b of DPR No 633/72, as amended, concerning the procedures to be implemented for the refund of VAT to non-resident taxable persons (Decreto del Ministro delle Finanze n. 2672, norme di attuazione delle disposizioni di cui all'art. 38 ter del [DPR No 633/72], e successive modificazioni, concernente le modalità di esecuzione dei rimborsi dell'imposta sul valore aggiunto a soggetti non residenti) of 20 May 1982 (GURI No 146 of 29 May 1982) provides, in the second subparagraph of Article 1 thereof, that refunds are payable 'on application by the person concerned, such application to be submitted by 30 June of the calendar year' following that to which the application relates.

The facts of the dispute in the main proceedings and the question referred for a preliminary ruling

13 The tax authorities refused to refund the VAT which Elsacom had paid on the basis of invoices received from its trading partners in Italy in 1999. The relevant refund application was submitted on 27 July 2000. The reason given by the tax authorities for refusing the application was that it was out of time, since the time-limit for submitting it under the second subparagraph of Article 1 of Decree No 2672 of the Minister for Finance of 20 May 1982 expired on 30 June 2000.

14 The Commissione tributaria provinciale di Roma (Provincial Tax Court, Rome) upheld the action brought by Elsacom against the tax authorities' decision, taking the view that the six-month period from the end of the year to which the tax relates laid down in the last sentence of the first subparagraph of Article 7(1) of the Eighth VAT Directive was simply indicative in nature and was not, therefore, a mandatory time-limit.

15 The tax authorities appealed against that decision before the Commissione tributaria del Lazio, which upheld the decision of the Commissione tributaria provinciale di Roma.

16 The tax authorities brought an appeal in cassation against that judgment before the Corte

suprema di cassazione (Supreme Court of Cassation), arguing that the period in question is in fact a mandatory time-limit.

17 In those circumstances, the Corte suprema di cassazione decided to stay the proceedings and refer the following question to the Court of Justice for a preliminary ruling:

'Is the period of six months from the end of the calendar year in which value added tax became chargeable, being the time allowed for taxable persons not established in the territory of the country to submit an application for refund of that tax — as laid down in the last sentence of the first subparagraph of Article 7(1) of [the] Eighth [VAT] Directive — a mandatory time-limit, that is to say, a time-limit non-compliance with which results in forfeiture of the right to a refund?'

Consideration of the question referred

Admissibility

18 First, it is necessary to consider the objection raised by Elsacom to the effect that the question referred is inadmissible in so far as the provisions which must be interpreted and applied for the purpose of resolving the dispute before the referring court fall not within the scope of European Union law but domestic law.

19 It should be noted, first, that although the Court does not have jurisdiction to interpret a domestic measure, it does have jurisdiction, in a reference for a preliminary ruling, to supply the national court with a ruling on the interpretation of European Union law so as to enable that court to determine whether the domestic measure is compatible with European Union law, with a view to deciding the case before it (see, to that effect, Case C-172/08 *Pontina Ambiente* [2010] ECR I-1175, paragraph 27 and the case-law cited).

20 Second, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of European Union law, the Court of Justice is, in principle, bound to give a ruling (see Case C-118/11 *Eon Aset Menidjunt* [2012] ECR, paragraph 76 and case-law cited). The questions referred by the national court therefore enjoy a presumption of relevance (see, to that effect, Case C-45/09 *Rosenblatt* [2010] ECR I-9391, paragraph 33).

21 The presumption that questions referred by national courts for a preliminary ruling are relevant may be rebutted only in exceptional cases, where it is quite obvious that the interpretation which is sought of the provisions of European Union law referred to in the questions bears no relation to the purpose of the main action (see Case C-283/09 *Wery?ski* [2011] ECR I-601, paragraph 34 and the case-law cited).

22 In the present case, the question referred by the Corte suprema di cassazione concerns the interpretation of European Union law, namely the first subparagraph of Article 7(1) of the Eighth VAT Directive, and it is not obvious that the interpretation sought of that provision bears no relation to the purpose of the main action. Consequently, the question is admissible.

Substance

23 As regards the substance, by its question the referring court asks, in essence, whether the six-month time-limit laid down in the last sentence of the first subparagraph of Article 7(1) of the

Eighth VAT Directive for submitting an application for a VAT refund is a mandatory time-limit.

24 It should be noted first, in that regard, that it is already clear from the wording of that provision that the period laid down in Article 7(1) is a mandatory time-limit.

25 While it is true that certain language versions of that provision — such as, *inter alia*, the Spanish ('dentro'), Italian ('entro') and English ('within') versions — might give rise to doubts as to the nature of that period, it is apparent from Section B of Annex C of those language versions of the Eighth VAT Directive that the period in question is not simply a non-mandatory time-limit.

26 That interpretation is confirmed by other language versions of the last sentence of the first subparagraph of Article 7(1) of the Eighth VAT Directive. Thus, for example, in the French version, Article 7(1) expressly provides that a refund application must be submitted 'au plus tard' (no later than) within six months of the end of the calendar year in which the tax became chargeable. That clarification indicates very clearly that it is no longer possible to submit a valid application after that date (see, to that effect, Case C-54/09 P *Greece v Commission* [2010] ECR I-7537, paragraph 46). The same applies, *inter alia*, in the German ('spätestens') and Dutch ('uiterlijk') versions. Similarly, Section B of Annex C to that directive contains, at least in the German, French and Dutch versions, a similar reference which confirms that interpretation.

27 It is to be borne in mind that it is settled case-law that the different language versions of a text of European Union law must be given a uniform interpretation and hence, in the case of divergence between the language versions, the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms a part (see, *inter alia*, Case C-340/08 *M and Others* [2010] ECR I-3913, paragraph 44 and case-law cited).

28 Next, with regard to the purpose of the rules in question, it should be recalled that, according to the third recital in the preamble thereto, the objective of the Eighth VAT Directive is to eliminate 'discrepancies between the arrangements currently in force in Member States, which give rise in some cases to deflection of trade and distortion of competition'.

29 Moreover, if it were possible to make an application for the refund of excess VAT without any temporal limit, that would be contrary to the principle of legal certainty, which requires the tax position of the taxable person, having regard to his rights and obligations vis-à-vis the tax authorities, not to be open to challenge indefinitely (see Case C-472/08 *Alstom Power Hydro* [2010] ECR I-623, paragraph 16 and the case-law cited).

30 The setting of a non-mandatory time-limit for submitting an application for a VAT refund under Article 2, in conjunction with Article 3, of the Eighth VAT Directive — whereby failure to comply with the time-limit would not result in the application being time-barred — would be at odds with both the aim of harmonisation pursued by the Eighth VAT Directive and, in some circumstances, the case-law cited in paragraph 29 above.

31 First, if it were necessary to interpret the six-month period referred to in the last sentence of the first subparagraph of Article 7(1) of the Eighth VAT Directive as a non-mandatory time-limit, the effect of that would be to authorise Member States to apply their own rules on limitation periods bringing about the extinguishment of rights, which in some cases may be more restrictive, so that, in such cases, it would be the time-limits under those national rules which would ultimately determine the period of time available to taxable persons to submit an application for a VAT refund. Limitation periods bringing about the extinguishment of rights are not harmonised within the European Union and may, therefore, vary from one Member State to another. Such an interpretation would thus be at variance with the objective pursued by the Eighth VAT Directive of eliminating 'discrepancies between the arrangements currently in force in Member States'.

32 Second, if the first subparagraph of Article 7(1) of the Eighth VAT Directive laid down simply a non-mandatory time-limit and, instead of applying their more restrictive national rules on limitation periods, the Member States referred only to the time-limit laid down in Article 7(1), the possibility of submitting a valid application for a VAT refund would not be subject to any temporal restriction. It would not be possible to reconcile such an outcome with the case-law cited at paragraph 29 above, which can be transposed to the cases involving reimbursement covered by the Eighth VAT Directive.

33 Lastly, for the sake of completeness, it should be observed that, by adopting the first sentence of Article 15(1) of Directive 2008/9, the Member States extended the period in question by three months. As submitted, in essence, by the European Commission, it can be inferred from this that the Member States themselves proceeded on the basis that the time-limit in question was mandatory, there generally being no need to extend a time-limit unless its expiry brings about the forfeiture of the right which should have been exercised before the time-limit expired. The same conclusion may be drawn, *a fortiori*, from the fact that Article 1 of Directive 2010/66 further extended, as an exceptional measure and solely in respect of refund applications relating to a period during 2009, the time-limit for submitting such applications to 31 March 2011, in order to resolve technical problems which had arisen in 2010 in the collation of refund applications relating to the 2009 tax year by the competent authorities.

34 In the light of all the foregoing, the answer to the question referred is that the six-month time-limit laid down in the last sentence of the first subparagraph of Article 7(1) of the Eighth VAT Directive for submitting an application for a VAT refund is a mandatory time-limit.

Costs

35 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 (Fifth Chamber) hereby rules:

The six-month time-limit laid down in the last sentence of the first subparagraph of Article 7(1) of Eighth Council Directive 79/1072/EC of 6 December 1979 on the harmonization of the laws of the Member States relating to turnover taxes — Arrangements for the refund of value added tax to taxable persons not established in the territory of the country — for submitting an application for a value added tax refund is a mandatory time-limit.

[Signatures]

* Language of the case: Italian.