JUDGMENT OF THE COURT (Third Chamber)

18 October 2012 (*)

(VAT – Directive 2006/112/EC – Article 183 – Conditions for the refund of the excess VAT – National legislation deferring the refund of part of the excess VAT pending examination of the taxable person’s annual tax return – Principles of fiscal neutrality and proportionality)

In Case C-525/11,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Augst?k?s tiesas Sen?ts (Latvia), made by decision of 10 October 2011, received at the Court on 17 October 2011, in the proceedings

Mednis SIA

v

Valsts ie??mumu dienests,

THE COURT (Third Chamber),

composed of K. Lenaerts (Rapporteur), acting as President of the Third Chamber, E. Juhász, G. Arestis, T. von Danwitz and D. Šváby, Judges,

Advocate General: Y. Bot,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 11 July 2012,

after considering the observations submitted on behalf of:

– Mednis SIA, by V. Gargažins, advok?ts, and N. Krupe?i?a,

– the Valsts ie??mumu dienests, by N. Jezdakova and M. Kuzenko, acting as Agents,

– the Latvian Government, by I. Kalni?š and K Freimanis, acting as Agents,

– the European Commission, by A. Sauka and C. Soulay, 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 Article 183 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1).

2 The reference has been made in proceedings between Mednis SIA, a company

incorporated under Latvian law (‘Mednis’), and the Valsts ie??mumu dienests (the Latvian tax authority; ‘the VID’) concerning an application for the refund of an amount paid by way of value added tax (‘VAT’) but not due.

Legal context

European Union (‘EU’) law

3 The first paragraph of Article 183 of Directive 2006/112 provides:

‘Where, for a given tax period, the amount of deductions exceeds the amount of VAT due, the Member States may, in accordance with conditions which they shall determine, either make a refund or carry the excess forward to the following period.’

4 Under Article 252(2) of Directive 2006/112:

‘The tax period shall be set by each Member State at one month, two months or three months.

Member States may, however, set different tax periods provided that those periods do not exceed one year.’

Latvian law

5 Article 9(1) of the Law on Value Added Tax (Likums ‘Par pievienot?s v?rt?bas nodokli’, *Latvijas V?stnesis,* 1995, No 49), in the version applicable at the material time (‘the Law on VAT’) provides that the tax period is to correspond to a calendar month. Under Article 9(5), the tax year is to be composed of all the tax periods for a given calendar year.

6 Under Article 11(1) of the Law on VAT, the taxable person is required – save where otherwise provided under that law – to lodge a tax return with the VID, within 15 days of the end of any given tax period, setting out a calculation of the VAT for that tax period. Article 11(6) of the Law on VAT provides that, before 1 May of the year following any given tax year, the taxable person must lodge a return with the VID in respect of that tax year.

7 Pursuant to Article 12(1) of the Law on VAT, the taxable person must, within 15 days of the end of any given tax period, pay the Treasury the VAT in respect of that tax period.

8 Article 12(11) of the Law on VAT provides that the VID is required to refund the excess VAT – that is to say, the amount by which the deductions exceed the VAT due – to the taxable person within 30 days of receiving a reasoned application and supporting documents.

9 Under Article 12(11¹) of that Law, however, the VID is entitled to carry forward the excess VAT where: (i) a decision is adopted starting an inquiry into the VAT to be paid by the taxable person in respect of transactions whose examination requires further information; or (ii) persons deemed to be related to the taxable person for the purposes of Article 1(18) of the Law on Taxes and Charges (Likums ‘Par nodok?iem un nodev?m’) owe VAT to the Treasury; or (iii) the taxable person is unable to provide documentary proof that his application for a tax rate of zero percent is justified.

10 Article 36(14) of the Law on VAT authorises the Council of Ministers to lay down limits regarding the amount of excess VAT which may be refunded and to specify the circumstances in which no limitation is to apply to such a refund.

11 The Council of Ministers adopted Decree No 933 of 14 November 2006 laying down

provisions for implementing the Law on Value Added Tax (Ministru kabineta 2006. gada 14. novembra noteikumi Nr. 933 ‘Likuma “Par pievienot?s v?rt?bas nodokli” normu piem?rošanas k?rt?ba’, *Latvijas V?stnesis,* 2006, No 191; ‘Decree No 933’).

12 Article 285 of Decree No 933 is worded as follows:

‘For the purposes of applying Article 12(11) of the Law, the [VID] may decline to refund … the part of the excess VAT that is over 18% of the total value of the taxable transactions carried out in the course of those monthly tax periods (account being taken, in respect of those tax periods, of the tax already paid). The remainder of the excess VAT shall be refunded by the Treasury on the basis of the annual tax return.’

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

13 On 7 and 14 December 2007, Mednis applied to the VID for a refund amounting in total to LVL 2 081.79, corresponding to excess VAT paid for November 2007.

14 Of that total amount, the VID refused to refund LVL 1 455.82. Taking as its legal basis Article 285 of Decree No 933, the VID adopted Decision No 19/11599 of 22 April 2008 (‘the contested decision’), in which it stated as the grounds for that refusal the fact that, during the period to which the excess VAT related, part of that excess tax was over 18% of the total value of the taxable transactions carried out in the months at issue.

15 Mednis brought an action before the Administrat?v? rajona tiesa (District Administrative Court) for annulment of the contested decision.

16 By judgment of 7 July 2009, the Administrat?v? rajona tiesa dismissed that action, holding that the VID’s refusal to refund Mednis all of the excess VAT was consistent with Article 285 of Decree No 933.

17 By judgment of 3 June 2010, the Administrat?v? apgabaltiesa (Regional Administrative Court) dismissed Mednis’ appeal. It adopted the grounds stated at first instance, adding that the deferral of the deadline by which the VID had to refund the excess VAT to the taxable person has a legitimate objective relating to the Treasury’s interest in having the taxable person’s right to a VAT refund limited where it is found that the amount of tax paid to the Treasury is significantly lower than the amount which the Treasury must refund.

18 Mednis lodged an appeal on a point of law against that judgment before the Augst?k?s tiesas Sen?ts.

19 The referring court observes that, under Article 285 of Decree No 933, as applied by the VID in practice, where it is ascertained that the excess VAT is over the percentage specified in that provision, the part of the excess which is over that percentage is not to be repaid to the taxable person until the VID has examined that person’s annual tax return. Depending on the circumstances, the taxable person may be required to wait over a year for a refund of excess VAT simply because that excess is over the general VAT rate.

20 The referring court has doubts as to whether the legislation and the practice concerned are consistent with the principles of fiscal neutrality and proportionality devolving from Article 183 of Directive 2006/112 given that, by dint of that legislation and practice, the decision to defer the VAT refund is adopted without any examination of the circumstances of the case and without account being taken of the waiting period pending examination of the annual return.

21 In those circumstances, the Augst?k?s tiesas Sen?ts decided to stay the proceedings and to

refer the following question to the Court of Justice for a preliminary ruling:

‘Does Article 183 of … Directive 2006/112 … give a Member State the right, without carrying out any specific analysis and solely on the basis of an arithmetical calculation, not to refund that part of the excess tax that is over 18% (the standard rate of VAT) of the total value of the taxable transactions carried out in the corresponding monthly tax periods until the State tax authority has received the annual return of the person subject to [VAT]?’

Consideration of the question referred

22 By its question, the referring court is essentially asking whether Article 183 of Directive 2006/112 must be interpreted as authorising the tax authority of a Member State to defer, without undertaking a specific analysis and solely on the basis of an arithmetical calculation, the refund of part of the excess VAT which has arisen during a tax period, pending the examination by that authority of the taxable person’s annual tax return.

23 In that connection, it should be noted that the freedom which the Member States enjoy, under the actual terms of Article 183 of Directive 2006/112, for the purposes of determining the conditions for the refund of excess VAT does not mean that no control may be exercised over those conditions in the light of EU law (see, to that effect, Case C-274/10 *Commission* v *Hungary* [2011] ECR I-7289, paragraphs 39 and 40 and the case-law cited).

24 Those conditions cannot undermine the principle of fiscal neutrality by making the taxable person bear the burden of the VAT in whole or in part. In particular, such conditions must enable the taxable person, in appropriate circumstances, to recover the entirety of the credit arising from that excess VAT. This implies that the refund must be made within a reasonable period of time by a payment in liquid funds or equivalent means and that, in any event, the method of refund adopted must not entail any financial risk for the taxable person (see, inter alia, Case C-78/00 *Commission* v *Italy* [2001] ECR I-8195, paragraphs 33 and 34; Case C-25/07 *Sosnowska* [2008] ECR I-5129, paragraph 17; Case C-107/10 *Enel Maritsa Iztok 3* [2011] ECR I-3873, paragraph 33; and *Commission* v *Hungary*, paragraph 45).

25 Admittedly, the deferral of the refund of excess VAT over several tax periods following that in which the excess arose is not necessarily irreconcilable with the first paragraph of Article 183 of Directive 2006/112 (see, to that effect, *Enel Maritsa Iztok* 3, paragraph 49, and *Commission* v *Hungary*, paragraph 55).

26 However, in the case before the referring court, while as a general rule the tax period is fixed, pursuant to Article 9(1) of the Law on VAT, at one calendar month, the application of Article 285 of Decree No 933 may – as both the referring court and the European Commission have pointed out – lead to taxable persons not obtaining a full refund of excess VAT until a year, or even longer, after the tax period during which that excess arose.

27 That period, during which the taxable persons have to bear the financial burden of the VAT, at least to the extent of the part of the excess VAT over the percentage specified in Article 285, cannot be regarded as reasonable (see, to that effect, *Sosnowska*, paragraphs 20 and 27, and *Enel Maritsa Iztok 3*, paragraph 55). Consequently, it is inconsistent with the principle of fiscal neutrality, referred to in paragraph 24 above.

28 The VID and the Latvian Government argue that the aim of Article 285 of Decree No 933 is to reduce the risk of tax evasion or avoidance and that, in practice, it is applied only where there are factors indicative of the existence of such a risk. They contend that such a risk arises, in particular, where the type of economic activity engaged in by the taxable person does not normally

lead to excess VAT or where the amount which that person has paid to the Treasury by way of VAT is appreciably lower than the amount of VAT refundable.

29 The VID and the Latvian Government contend that the application of Article 285 in the case before the referring court was justified precisely by the fact that the VID had detected a risk of VAT evasion, since it had noted, on examining Mednis' request for a refund, that the application of VAT at the rate of zero percent accounted to a large extent for the significant excess VAT paid by that company.

30 At the hearing, the VID and the Latvian Government also contended that it was only in a limited number of cases that, because of evidence of tax evasion or avoidance, the VID had deferred the refund of the excess VAT over the percentage specified in Article 285, pending the examination of the taxable person's annual tax return.

31 In that respect, it is admittedly true that the Member States have a legitimate interest in taking appropriate steps to protect their financial interests and that the prevention of tax evasion, avoidance and abuse is an objective recognised and encouraged by Directive 2006/112 (see, to that effect, *Sosnowska*, paragraph 22 and the case-law cited, and Joined Cases C-80/11 and C-142/11 *Mahagében and David* [2012] ECR, paragraph 41).

32 Nevertheless, Member States must, in accordance with the principle of proportionality, employ the means which, whilst enabling them to attain that objective effectively, are the least detrimental to the objectives and principles laid down by EU legislation, such as the fundamental principle of the right to deduct VAT (see *Sosnowska*, paragraph 23, and Case C-284/11 *EMS-Bulgaria Transport* [2012] ECR, paragraph 69).

33 In the present case, the referring court – which alone has jurisdiction both to interpret the national law and to find and assess the facts in the case before it and, in particular, the way in which that law is applied by the tax authority (see, to that effect, Case C-594/10 *van Laarhoven* [2012], paragraph 36, and Case C-618/10 *Banco Español de Crédito* [2012] ECR, paragraph 76) – states that the VID applies Article 285 of Decree No 933 in a general and preventative manner, purely on the basis of the arithmetical finding that the excess VAT at issue is over the percentage specified in that provision, without undertaking any specific analysis of the circumstances, in the course of which the taxable person concerned would have a chance to demonstrate that there was no risk of tax evasion or avoidance.

34 As the Commission pointed out at the hearing, that information from the referring court is not irreconcilable with the terms of Article 285 of Decree No 933, which do not make the application of that provision conditional upon evidence of tax evasion or avoidance.

35 Moreover, it does not emerge from the information provided to the Court by the referring court that the contested decision, the basis for which is Article 285 of Decree No 933, was adopted by the VID upon completion of an examination which would have revealed such evidence in the case before the referring court.

36 Clearly, that preventative and generalised application of Article 285 of Decree No 933 is inconsistent with the principle of proportionality, set out in the case-law referred to in paragraph 32 above (see, to that effect, *Sosnowska*, paragraphs 24 to 26).

37 The possibility that the legitimate objective of preventing tax evasion or avoidance might justify such an application is further undermined by the fact that the tax authority may, under Article 12(11[1]) of the Law on VAT, defer the refund of such an excess, inter alia, where a decision is adopted to start an inquiry into the tax paid by the taxable person in respect of transactions

whose examination requires further information or where the person concerned cannot provide documentary proof that his request for a tax rate of zero percent is justified (see, by analogy, *Sosnowska*, paragraph 28).

38 In the light of all the foregoing considerations, the answer to the question referred is that Article 183 of Directive 2006/112 must be interpreted as not authorising the tax authority of a Member State to defer, without undertaking a specific analysis and solely on the basis of an arithmetical calculation, the refund of part of the excess VAT which has arisen during a one-month tax period, pending the examination by that authority of the taxable person's annual tax return.

The temporal effects of the present judgment

39 The Latvian Government has asked the Court to limit the temporal effects of the present judgment in the event that the Court construes Article 183 of Directive 2006/112 as precluding national legislation and practice of the kind at issue in the main proceedings.

40 In support of its request, the Latvian Government draws attention to the risk that such an interpretation might have serious repercussions for the national budgetary resources, and to the good faith of the Latvian tax authority.

41 In that connection, it should be borne in mind that the interpretation which, in the exercise of the jurisdiction conferred on it by Article 267 TFEU, the Court gives to a rule of EU law clarifies and defines the meaning and scope of that rule as it must be or ought to have been understood and applied from the time of its entry into force. It follows that the rule as thus interpreted may, and must, be applied by the courts even to legal relationships which arose and were established before the judgment ruling on the request for interpretation, provided that in other respects the conditions for bringing a dispute relating to the application of that rule before the competent courts are satisfied (see, inter alia, Joined Cases C-338/11 to C-347/11 *Santander Asset Management SGIIC and Others* [2012] ECR, paragraph 58 and the case-law cited).

42 It is only quite exceptionally that the Court may, in application of the general principle of legal certainty inherent in the EU legal order, be moved to restrict for any person concerned the opportunity of relying on a provision which it has interpreted with a view to calling into question legal relationships established in good faith. Two essential criteria must be fulfilled before such a limitation can be imposed: those concerned must have acted in good faith and there must be a risk of serious difficulties (see, inter alia, *Santander Asset Management SGIIC and Others*, paragraph 59).

43 More specifically, the Court has taken that step only in quite specific circumstances, where there was a risk of serious economic repercussions owing in particular to the large number of legal relationships entered into in good faith on the basis of rules considered to be validly in force and where it appeared that individuals and national authorities had been led to adopt practices which did not comply with EU law by reason of objective, significant uncertainty regarding the implications of EU provisions, to which the conduct of other Member States or the European Commission may even have contributed (see, inter alia, *Santander Asset Management SGIIC and Others*, paragraph 60).

44 It is also settled case-law that the financial consequences which might ensue for a Member State from a preliminary ruling do not in themselves justify limiting the temporal effects of the ruling (see, inter alia, *Santander Asset Management SGIIC and Others*, paragraph 62).

45 In the present case, it should be noted, first, that the Latvian Government has not provided any data which would enable the Court to assess whether the present judgment poses a risk of

serious economic repercussions for the Republic of Latvia.

46 Secondly, it cannot be considered that the Latvian tax authority was, as purported, prompted by an objective and significant uncertainty regarding the implications of Article 183 of Directive 2006/112 to adopt in good faith, for the purposes of applying Article 285 of Decree No 933, practices which did not comply with EU law. It follows from case-law already established before that decree that, in accordance with the principle of fiscal neutrality, which is a fundamental principle of the common system of VAT, the national conditions for the refund of excess VAT, as referred to in Article 183 of Directive 2006/112, must enable the taxable person, in appropriate circumstances and within a reasonable period, to recover the entirety of the credit arising from that excess, without entailing any financial risk for that taxable person (see, to that effect, *Commission* v *Italy*, paragraphs 33 and 34).

47 Accordingly, there is no need to limit the temporal effects of the present judgment.

Costs

48 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 (Third Chamber) hereby rules:

Article 183 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as not authorising the tax authority of a Member State to defer, without undertaking a specific analysis and solely on the basis of an arithmetical calculation, the refund of part of the excess VAT which has arisen during a one-month tax period, pending the examination by that authority of the taxable person's annual tax return.

[Signatures]

* Language of the case: Latvian.