Provisional text

JUDGMENT OF THE COURT (Ninth Chamber)

14 February 2019 (*)

(Reference for a preliminary ruling — Thirteenth Council Directive 86/560/EEC — Arrangements for the refund of value added tax (VAT) — Principles of equivalence and effectiveness — Company not established in the European Union — Preliminary and final decision refusing the refund of VAT — Incorrect VAT identification number)

In Case C?562/17,

REFERENCE for a preliminary ruling under Article 267 TFEU, from the Audiencia Nacional (National High Court, Spain), made by decision of 15 September 2017, received at the Court on 25 September 2017, in the proceedings

Nestrade SA

v

Agencia Estatal de la Administración Tributaria (AEAT),

Tribunal Económico-Administrativo Central,

THE COURT (Ninth Chamber),

composed of K. Jürimäe, President of the Chamber, E. Juhász and C. Vajda (Rapporteur), Judges,

Advocate General: Y. Bot,

Registrar: L. Carrasco Marco, administrator,

having regard to the written procedure and further to the hearing on 28 November 2018,

after considering the observations submitted on behalf of

– Nestrade SA, by E. Codes Feijoo, procurador, and A. Iglesias Querol, abogada,

– the Spanish Government, by S. Jiménez García, acting as Agent,

– the European Commission, by L. Lozano Palacios and F. Clotuche-Duvieusart, 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 provisions of the Thirteenth Council Directive 86/560/EEC of 17 November 1986 on the harmonisation 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 Community territory (OJ 1986, L 326, p. 40) ('the Thirteenth Directive').

2 The request has been made in proceedings between Nestrade SA, a commercial company established in Switzerland, and the Agencia Estatal de la Administración Tributaria (AEAT) (State Tax Administration Agency, Spain) and the Tribunal Económico-Administrativo Central (Central Tax Tribunal, Spain) concerning the partial refusal to refund value added tax (VAT) owing to a final decision prior to that refusal.

Legal context

European Union law

The Thirteenth Directive

3 According to Article 2 of the Thirteenth Directive:

'1. Without prejudice to Articles 3 and 4, each Member State shall refund to any taxable person not established in the territory of the Community, subject to the conditions set out below, any [VAT] charged in respect of services rendered or moveable property supplied to him in the territory or the country by other taxable persons 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 [the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1)] or of the provision of services referred to in point 1(b) of Article 1 of this Directive.

2. Member States may make the refunds referred to in paragraph 1 conditional upon the granting by third States of comparable advantages regarding turnover taxes.

3. Member States may require the appointment of a tax representative.'

4 Article 3(1) of the Thirteenth Directive provides:

'The refunds referred to in Article 2(1) shall be granted upon application by the taxable person. Member States shall determine the arrangements for submitting applications, including the time limits for doing so, the period which applications should cover, the authority competent to receive them and the minimum amounts in respect of which applications may be submitted. They shall also determine the arrangements for making refunds, including the time limits for doing so. They shall impose on the applicant such obligations as are necessary to determine whether the application is justified and to prevent fraud, in particular the obligation to provide proof that he is engaged in an economic activity in accordance with Article 4(1) of Directive [77/388]. The applicant must certify, in a written declaration, that, during the period prescribed, he has not carried out any transaction which does not fulfil the conditions laid down in point 1 of Article 1 of this Directive.'

Directive 2006/112/EC

5 Article 170 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1), as amended by Council Directive 2008/8/EC of 12 February 2008 (OJ 2007 L 44, p. 1) ('Directive 2006/112') provides:

'All taxable persons who, within the meaning of Article 1 of [the Thirteenth Directive], Article 2(1) and Article 3 of [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)] and Article 171 of this Directive, are not established in the Member State in which they purchase goods and services or import goods subject to VAT shall be entitled to obtain a refund of that VAT insofar as the goods and services are used for the purposes of the following:

(a) transactions referred to in Article 169;

(b) transactions for which the tax is solely payable by the customer in accordance with Articles 194 to 197 or Article 199.'

6 Article 171 of that directive provides as follows:

'1. VAT shall be refunded to taxable persons who are not established in the Member State in which they purchase goods and services or import goods subject to VAT but who are established in another Member State, in accordance with the detailed rules laid down in Directive [2008/9].

2. VAT shall be refunded to taxable persons who are not established within the territory of the Community in accordance with the detailed implementing rules laid down in [the Thirteenth Directive].

The taxable persons referred to in Article 1 of [the Thirteenth Directive] shall also, for the purposes of applying that Directive, be regarded as taxable persons who are not established in the Member State concerned where, in the Member State in which they purchase goods and services or import goods subject to VAT, they have only carried out the supply of goods or services to a person designated in accordance with Articles 194 to 197 or Article 199 as liable for payment of VAT.

3. [The Thirteenth Directive] shall not apply to:

(a) amounts of VAT which according to the legislation of the Member State of refund have been incorrectly invoiced;

(b) invoiced amounts of VAT in respect of supplies of goods the supply of which is, or may be, exempt pursuant to Article 138 or Article 146(1)(b).'

The Spanish law

7 Article 119 bis of Ley 37/1992 del Impuesto sobre el Valor Añadido (Law 37/1992 on value added tax) of 28 December 1992, entitled 'Special scheme relating to refunds for certain traders or professional practitioners not established within the area of application of [VAT] or within the Community or in the Canary Islands, Cueta or Melilla' in the version applicable at the time of the facts in the main proceedings, provides:

'Traders or professional practitioners not established within the area of application of [VAT] or within the Community, or in the Canary Islands, Ceuta or Melilla may apply for a refund of any [VAT] charged in respect of goods acquired or imported or services effected within that area, provided the conditions and restrictions referred to in Article 119 of this law are met, subject only to the special provisions set out below, and in accordance with the procedure laid down by regulation:

... '

8 Article 31 of the Real Decreto 1624/1992 por el que se aprueba el Reglamento del Impuesto sobre el Valor Añadido (Royal Decree 1624/1992 adopting regulations on value added tax), of 29 December 1992, entitled 'Refunds for certain traders or professional practitioners not established

within the area of application of [VAT] or within the Community, or in the Canary Islands, Ceuta or Melilla', in the version applicable at the time of the facts in the main proceedings, provides:

'...

7. ...

Where there is doubt concerning the validity or accuracy of the information contained in a refund application or in the electronic copy of the invoices or import documents referred to therein, the body processing the application may, where necessary, use the procedure for obtaining additional or subsequent information referred to in Article 119(7) of Law 37/1992 to call upon the applicant to produce the originals of such documents. Such original documents shall be made available to the tax authority until the expiry of the limitation period applying to the tax.

The addressee of a request for additional or subsequent information shall respond within one month from the date such request was received.

8. Refund requests shall be decided and the applicant notified within four months from the date on which the application was received by the competent decision-making body.

However, where a request for additional or subsequent information is necessary, the refund request shall be decided and the applicant notified within two months from the date on which the information sought was received or, where the addressee fails to respond to such request, from the date one month after the date on which the request was made. In such cases, the refund procedure shall have a minimum duration of six months from the date on which the application was received by the competent decision-making body.

In any event, where a request for additional or subsequent information is necessary, the refund application shall be decided within a maximum period of eight months from the date on which the application was received and, in the event that clear notification of the decision is not received within the periods referred to in this paragraph, the refund application shall be deemed refused.

...

10. An applicant shall be entitled to appeal against any refusal or partial refusal of an application in accordance with the provisions of Title V of the [Ley 58/2003 General Tributaria (Law 58/2003 establishing the General Tax Code, 'the General Tax Code') of 17 December 2003].

... '

9 Article 31 bis of that Royal Decree 1624/1992 states:

'...

3. The originals of invoices and other documentation constituting evidence of the right to a refund shall be available to the tax authority throughout the limitation period applying to the tax.

...

5. The refund applications to which this article refers shall be processed and decided in accordance with the provisions of Article 31(6) to (11) of this regulation.'

10 Under Article 139 of the General Tax Code, entitled ‘Closure of the limited verification procedure’.

‘1. Closure of the limited verification procedure shall occur in any of the following ways:

(a) By explicit decision of the tax authority containing the elements referred to in the following paragraph;

(b) By lapse of time once the period referred to in Article 104 of this law has expired and no notification of an explicit decision has been issued, without prejudice to the right of the tax authority to restart the procedure within the limitation period.

...

2. Any administrative decision to close the limited verification procedure shall include the following elements as a minimum:

(a) The tax liability or elements thereof and time period to which the verification relates;

(b) A description of the specific measures adopted;

(c) An account of the facts and the legal grounds for the decision;

(d) A provisional assessment ... .’

11 Article 219 of the General Tax Code, entitled ‘Revocation of acts applying taxes and imposing sanctions’, provides:

‘1. A tax authority may revoke its acts for the benefit of an interested party where the acts are considered to be manifestly in breach of the law, where supervening circumstances affecting a particular legal situation show the act to be inappropriate or where during the course of the procedure interested parties have been deprived of their rights of the defence.

In no circumstances shall such a revocation constitute a waiver or exemption which is not provided for in tax legislation, or contravene the principle of equality or be contrary to the public interest or the legal order.

2. Revocation shall be available only where the limitation period has not expired.

... ’

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

12 Nestrade, which has its registered office and tax residence in Switzerland, carries out transactions subject to value added tax in Spain.

13 On 21 September 2010, Nestrade claimed from the AEAT, under the procedure for the refund of input VAT qualifying as Spanish VAT paid by a trader not resident in the European Union, the input VAT charged in respect of the supply of goods by its supplier Hero España, S.A. (‘Hero’) during the third and fourth quarters of 2009. Nestrade also applied for the refund of all the other amounts of VAT paid in the years 2008 to 2010 on the supply of goods by Hero.

14 For all of those financial periods, the AEAT asked Nestrade to provide invoices corresponding to the supplies of goods by Hero (‘the correct invoices’) because the invoices

originally produced showed Nestrade's Netherlands VAT identification number, whereas it was the Swiss VAT identification number which should have been indicated on those invoices.

15 Thus, on 23 November 2010, the AEAT asked Nestrade to produce, within 10 working days of notification of the demand, which was given on 13 December 2010, the correct invoices issued by Hero in respect of the third and fourth quarters of 2009. Nestrade did not respond to that request within the time limit prescribed.

16 On 10 January 2011, Hero issued the corrected invoices for the third and fourth quarters of 2009.

17 On 5 April 2011, AEAT gave a decision refusing to refund the sum of EUR 114 662.59 claimed in respect of the third and fourth quarters of 2009 on the ground that it was unable to determine whether the claim was well founded.

18 That decision, which was not challenged by Nestrade, became final on 14 May 2011.

19 On 5 August 2011, Nestrade again requested AEAT to refund the amounts of input VAT paid during the years 2008 to 2010 and, in addition, also requested the refund of amounts of input VAT paid in the period from January to March 2011. On that occasion, Nestrade produced the corrected invoices and cancelled the invoices originally issued by Hero for each of those years, including in relation to the third and fourth quarters of 2009.

20 In its decision of 12 December 2011 the AEAT decided, in the first place, to grant the refund of the amounts of input VAT paid in 2008 and 2010, and in respect of the first and second quarters of 2009, making a total of EUR 542 094.25. The AEAT considered that Nestrade had responded to its requests and had produced the corrected invoices sought. It granted the refund once it had verified that all the requirements in that regard were met. In the second place, the AEAT decided to refuse to refund the amounts of VAT corresponding to two invoices issued by Hero in respect of the third and fourth quarters of 2009. That refusal was based on the fact that that refund had been refused by the decision of 5 April 2011, which had become final on 14 May 2011.

21 On 8 March 2012 AEAT confirmed the decision of 12 December 2011.

22 Nestrade lodged an administrative action against the decisions of the AEAT of 12 December 2011 and 8 March 2012. That action was dismissed by the decision of the Tribunal Económico-Administrativo Central (Central Tax Tribunal) of 22 January 2015. The main reason for the dismissal was the administrative principle of *res judicata*.

23 Nestrade brought judicial proceedings against the decisions of the AEAT of 12 December 2011 and 8 March 2012, and against the decision of the Tribunal Económico-Administrativo Central (Central Tax Tribunal) of 22 January 2015, before the referring court.

24 The referring court considers that there is a certain conflict between, on the one hand, the need to respect the principle of legal certainty inherent in a final administrative act, such as the decision of 5 April 2011 and, on the other hand, the need uniformly to apply EU law and, in particular, the provisions of Directive 2006/112 concerning the right to deduct VAT.

25 In that context, the referring court recalls that the Court, in the judgment of 8 May 2013, *Petroma Transports and Others* (C?271/12, EU:C:2013:297), held that a refund of input VAT may be refused if the corrected invoices are produced to the tax authority after it has issued its decision refusing the right to a refund of VAT. It wonders, however, whether the case-law should not be applied in circumstances, such as those in the main proceedings, which are characterised by an

absence of negligence or failure to cooperate with the AEAT on the part of Nestrade and by an infringement of the rights of the defence of the latter.

26 In those circumstances, the Audiencia Nacional (National High Court, Spain) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Can the rule [established by the judgment of 8 May 2013, *Petroma Transports and Others* (Case C?271/297, EU:C:2013:297)] be qualified so as to allow a VAT refund sought by an undertaking not established in the European Union, even though the national tax authority has already issued a decision refusing the refund on the grounds that the undertaking had failed to respond to a request for information concerning its tax identification number, in view of the fact that the authority was in possession of that information at the relevant time since it had been provided by the undertaking in response to other requests?

If that question is answered in the affirmative:

(2) Does a retroactive application of the rule [established by the judgment of 15 September 2016, *Senatex* (Case C?518/14, EU:C:2016:691)] mean that an administrative act refusing the refund of the VAT in question must be revoked, in view of the fact that the act merely upheld a previous final administrative decision refusing the VAT refund, which was adopted by the AEAT using a procedure which was not the procedure laid down by law for that situation and which, furthermore, curtailed the rights of the applicant, depriving it of a legal remedy?’

Consideration of the questions referred

27 As a preliminary matter, it should be observed, first, that in its decision the referring court refers to provisions of Directive 2006/112 on the right to deduct VAT and to the Court’s case-law relating thereto.

28 However, the fact that a national court has, formally speaking, worded its request for a preliminary ruling by referring to certain provisions of EU law does not preclude the Court from providing to the national court all the elements of interpretation which may be of assistance in adjudicating on the case pending before it, whether or not that court has referred to them in its questions. It is for the Court to extract from all the information provided by the national court, in particular from the grounds of the order for reference, the points of EU law which require interpretation, having regard to the subject matter of the dispute (judgment of 29 September 2016, *Essent Belgium*, C?492/14, EU:C:2016:732, paragraph 43 and the case-law cited).

29 As the Spanish government and the European Commission have observed, the case in the main proceedings concerns a claim for the refund of amounts of VAT paid by a company established in a third country, namely Switzerland. The arrangements for the refund of VAT to taxable persons not established on the territory of the European Union are governed by the Thirteenth Directive, as is clear from Article 2(1) thereof. The Court has clarified, in that regard, that the provisions of the Thirteenth Directive and, in particular, Article 2(1), must be considered as a *lex specialis* as compared with Articles 170 and 171 of Directive 2006/112 (judgment of 15 July 2010, *Commission* v *UK*, C?582/08, EU:C:2010:429, paragraph 35).

30 Therefore, it is necessary to examine the questions referred in the light of the provisions of the Thirteenth Directive.

31 Secondly, it should be noted that the case in the main proceedings does not concern the temporal effect of corrections to an invoice, which is a question on which the Court has already ruled in relation to the right to deduct VAT in the judgment of 15 September 2016, *Senatex*,

(C?518/14, EU:C:2016:691). By contrast, it concerns the power of Member States to place a time limit on the possibility of rectifying incorrect invoices for the purposes of exercising the right to a VAT refund. The referring court explains that, in Spanish law, such a rectification can no longer produce an effect after the decision of the administration refusing a refund has become final.

32 In view of the foregoing, it should be considered that, by its questions, which it is appropriate to examine together, the referring court asks, in essence, whether the provisions of the Thirteenth Directive must be interpreted as precluding a Member State from imposing a time limit on the possibility of rectifying incorrect invoices, for example by the rectification of the VAT identification number originally shown on the invoice, for the purposes of exercising the right to a refund of VAT.

33 The Court has held that the provisions of the Sixth Directive 77/388 must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, under which the right to deduct VAT may be refused to taxable persons who are recipients of services and are in possession of invoices which are incomplete, even if those invoices are supplemented by the provision of information seeking to prove the occurrence, nature and amount of the transactions invoiced after such a refusal decision was adopted (see, to that effect, judgment of 8 May 2013, *Petroma Transports and Others*, C?271/12, EU:C:2013:297, paragraph 36). However, it should be noted that the Sixth Directive 77/388 also does not prohibit Member States from accepting the rectification of an incomplete invoice after the tax authority has adopted a decision refusing the right to a deduction or the right to a refund of VAT.

34 Such a finding also applies as regards the Thirteenth Directive. It is stated in Article 3(1) thereof that Member States are to determine the arrangements for submitting applications for a refund of VAT, including the time limits for doing so, and that they are to lay down the requirements that are necessary to assess the merits of such an application.

35 Since it is not governed by the Thirteenth Directive, the enactment of measures laying down a limitation period the expiry of which has the effect of penalising a taxable person who has not been sufficiently diligent and has failed to rectify incorrect or incomplete invoices for the purposes of exercising the right to a refund of VAT must be governed by national law, provided that, first, that procedure applies in the same way to analogous rights in tax matters founded on domestic law and to those founded on EU law (principle of equivalence) and, second, that it does not in practice render impossible or excessively difficult the exercise of that right (principle of effectiveness) (see, by analogy, judgments of 8 May 2008, *Ecotrade*, C?95/07 and C?96/07, EU:C:2008:267, paragraph 46, and 26 April 2018, *Zabrus Siret*, C?81/17, C?284/17, EU:C:2018:283, paragraph 38 and the case-law cited).

36 In that regard, it should be recalled that while it is for the national court to determine whether national measures are compatible with EU law, the Court may, however, provide it with any helpful guidance to resolve the dispute before it (judgment of 28 July 2016, *Astone*, C?332/15, EU:C:2016:614, paragraph 36).

37 As regards, in the first place, the principle of equivalence, it should be recalled that it follows from this principle that persons asserting rights conferred by EU law must not be treated less favourably than those asserting rights of a purely domestic nature (judgment of 7 March 2018, *Santoro*, C?494/16, EU:C:2018:166, paragraph 39).

38 The referring court wonders whether the AEAT infringed the principle of equivalence in so far as it did not revoke its decision of 5 April 2011 on the basis of Article 219 of the General Tax Code. In that regard, it must be observed that there is nothing in the case-file before the Court that allows the conclusion to be drawn that that article applies differently depending on whether the right in issue is conferred by EU law or by domestic law.

39 Furthermore, contrary to the submission made by Nestrade at the hearing, the principle of equivalence is also not infringed by the fact that the AEAT treated differently, on the one hand, the claims for refunds of sums of input VAT paid in respect of 2008 and 2010 and for the first and second quarters of 2009 and, on the other hand, the claim for refunds of amounts of VAT in respect of the third and fourth quarters of 2009. In effect, such a difference in treatment, even if it were proven, does not in any way demonstrate a difference in treatment between rights conferred by EU law, and those of a purely domestic nature.

40 As regards, in the second place, the principle of effectiveness, it is clear from the case-law of the Court that the question as to whether a national procedural provision makes the exercise of rights conferred on individuals by EU law practically impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, viewed as a whole, and to the conduct and special features of that procedure before the various national bodies. In that context, it is necessary to take into consideration, where relevant, the principles which lie at the basis of the national legal system, such as the protection of the rights of the defence, the principle of legal certainty and the proper conduct of the proceedings (judgment of 7 March 2018, *Santoro*, C?494/16, EU:C:2018:166, paragraph 43 and the case-law cited).

41 The Court has already held that the possibility of exercising the right to a refund of excess VAT without any temporal limit 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 (judgment of 21 June 2012, *Elsacom*, C?294/11, EU:C:2012:382, paragraph 29). The Court has also stated that it is compatible with EU law to lay down reasonable time limits for bringing proceedings, in the interests of legal certainty, which protects both the taxpayer and the authorities concerned. Such periods are not by their nature liable to make it virtually impossible or excessively difficult to exercise the rights conferred by EU law, even if the expiry of those periods necessarily entails the dismissal, in whole or in part, of the action brought (judgment of 14 June 2017, *Compass Contract Services*, C?38/16, EU:C:2017:454, paragraph 42 and the case-law cited).

42 In the present case, on 23 November 2010 the AEAT asked Nestrade to provide it with the correct invoices within 10 working days of notification of the demand, which was given on 13 December 2010.

43 It should be noted that the order for reference does not indicate that Nestrade had notified AEAT of the fact that it was not in possession of correct invoices on the date of that authority’s request. It is moreover clear from that order that Nestrade did not provide those invoices to the AEAT in the period of almost three months which elapsed between the date on which it obtained them and the date on which the decision refusing the refund of VAT was adopted. Nestrade also did not contest the latter decision before it became final even though, according to the referring court, it could have brought an appeal against that decision within reasonable time limits.

44 In those circumstances, it must be held, subject to verification by the referring court, that the exercise of Nestrade’s right to a refund of VAT was not made impossible or excessively difficult in practice.

45 In that regard, it should be recalled that where the tax authority has the information necessary to establish that the taxable person is liable for VAT, it cannot impose additional conditions which may have the effect of rendering the right to deduct VAT ineffective (see, to that effect, judgment of 30 September 2010, *Uszodaépít?*, C?392/09, EU:C:2010:569, paragraph 40).

46 The same reasoning necessarily applies with regard to the right to a refund of VAT. However, as regards the case in the main proceedings, it appears, as the Commission has submitted, that the AEAT did not have all the information necessary in order to determine the right to the VAT refund in issue in the main proceedings on the basis of the information that had been provided to it by Nestrade in the context of other refunds concerning the same supplier, which it is for the referring court to verify.

47 In the light of the foregoing considerations, the answer to the questions referred is that the provisions of the Thirteenth Directive must be interpreted as not precluding a Member State from imposing a time limit on the possibility of rectifying incorrect invoices, for example by the rectification of the VAT identification number originally shown on the invoice, for the purposes of the exercise of the right to a VAT refund, provided that the principles of equivalence and effectiveness are respected, which it is for the referring court to verify.

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 (Ninth Chamber) hereby rules:

The provisions of the Thirteenth Council Directive 86/560/EEC of 17 November 1986, on the harmonisation 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 Community territory, must be interpreted as not precluding a Member State from imposing a time limit on the possibility of rectifying incorrect invoices, for example by the rectification of the VAT identification number originally shown on the invoice, for the purposes of the exercise of the right to a VAT refund, provided that the principles of equivalence and effectiveness are respected, which it is for the referring court to verify.

[Signatures]

* Language of the case: Spanish.