OPINION OF ADVOCATE GENERAL

MAZÁK

delivered on 15 September 2011 (1)

Case C?427/10

Banca Antoniana Popolare Veneta SpA, incorporating Banca Nazionale dell'Agricoltura SpA,

v

Ministero dell'Economia e delle Finanze,

Agenzia delle Entrate

(Reference for a preliminary ruling from the Corte Suprema di Cassazione (Italy))

(Value added tax – Tax invoiced and paid, but not due – Right of the service provider to claim from the tax authority a refund of VAT paid but not due – Right of the recipient of the service to claim from the service provider reimbursement of sums paid but not due by way of VAT, invoiced in error – Change in the interpretation of the provision of national law providing for exemption from VAT – Principles of legal certainty and the protection of legitimate expectations)

Facts and legal background to the dispute in the main proceedings and the questions referred

1. The dispute before the Italian courts concerns the sums paid to the public Treasury by Banca Nazionale dell'Agricoltura SpA ('BNA') by way of value added tax ('VAT') on fees charged for the collection of contributions to various consortia, a transaction carried out on behalf of three Consorzi di Bonifica (land reclamation consortia) from 1984 to 1994.

2. At that time, the collection of consortium contributions was not regarded as a 'transaction relating to the collection of taxes, including [transactions] relating to tax payments made on behalf of taxpayers', which is exempt from VAT under Article 10(5) of Presidential Decree No 633 of 26 October 1972 establishing and governing value added tax (2) ('DPR No 633/72').

3. However, by Circular No 52/E of 26 February 1999, the tax authority changed its original interpretation of Article 10(5) of DPR No 633/72, taking the view that consortium contributions were fiscal in nature and that, in consequence, the payments owed by the consortia fell to be regarded as exempt from VAT. According to the information supplied by the Italian Corte Suprema di Cassazione (Supreme Court of Cassation) in its order for reference, that circular reflected the new direction taken by the case-law, concerning the fiscal nature of consortium contributions.

4. Prompted by the new interpretation of Article 10(5) of DPR No 633/72, the consortia concerned claimed from SIFER SpA – successor to BNA as concessionaire for the collection of

consortia contributions – reimbursement of the VAT paid on the fees charged for the collection of contributions, as being sums paid but not due for the purposes of Article 2033 of the Italian Civil Code.

5. Under Italian law, a dispute of this kind – that is to say, a dispute between, on the one hand, the individual charged with VAT and, on the other, the service provider who has collected the VAT– regarding sums paid but not due is not regarded as fiscal in nature and, accordingly, is treated as falling within the jurisdiction of the ordinary civil courts. Actions for recovery of sums paid but not due are subject to the 10-year time-limit prescribed by the ordinary law, provided for in Article 2946 of the Civil Code.

6. One of the consortia concerned brought an action against SIFER SpA before the civil court, which granted leave for BNA to be joined as a third party in respect of the amounts claimed. The court ordered BNA to reimburse, with interest, the VAT which had been invoiced on the fees charged for the collection of contributions. BNA contested that decision.

7. Following the civil action, BNA brought a claim against the tax authority for a VAT refund equivalent in amount to the sums claimed back by the consortia concerned. Faced with an implied decision rejecting that claim, BNA brought three separate actions against the tax authority.

8. A dispute of this nature – namely, the dispute between, on the one hand, BNA as service provider charging VAT and, on the other, the tax authority, concerning the reimbursement of VAT paid but not due – falls within the jurisdiction of the tax courts. According to the information provided by the referring court, the statutory source of the right to reimbursement is Article 21 of the provisions on tax litigation (Legislative Decree No 546/92), paragraph 2 of which provides that '[s]ave where specific provision is made, the application for a refund may not be submitted more than two years after the date of payment or the date on which the conditions for a refund arise, if later'.

9. Even though, at first instance, the actions brought by BNA were upheld and the tax authority was directed to refund the amounts at issue, the tax court sitting at second instance, after joining the appeals brought by the tax authority, varied the judgments handed down at first instance, on the ground that BNA's right to claim a refund was time-barred because the two-year time-limit laid down in Article 21(2) of Legislative Decree No 546/92 had expired, and observed that Circular No 52/E of the tax authority could not constitute a viable basis for establishing that the conditions governing the right to reimbursement had been satisfied.

10. Relying on the above facts and points of law, the Corte Suprema di Cassazione, hearing the appeal in cassation brought by the Banca Antoniana Popolare Veneta SpA ('BAPV'), which has acquired BNA, against the decision of the tax court of second instance, decided to refer the following questions to the Court of Justice for a preliminary ruling:

‘1. Do the principles of effectiveness, non-discrimination and tax neutrality in relation to VAT preclude national rules or practice in accordance with which the right of the purchaser/client to reimbursement of VAT paid in error is construed, in contrast to the right exercised by the principal debtor (supplier/provider of the service), as a right under the ordinary law to the recovery of sums paid but not due, and time-limits are applied in the case of the purchaser/client which are significantly more generous than those applied to the principal debtor, with the result that the claim of the purchaser/client, brought after the time-limits for the principal debtor have expired, can give rise to an order directing the principal debtor to provide reimbursement, while it is no longer possible for the latter to claim a refund from the tax authority and there is no provision for any bridging instrument, designed to prevent conflicts or disputes, to coordinate the proceedings brought or to be brought before the various courts?

2. Quite apart from that situation, are the above principles compatible with national practice or case-law under which it is possible for a judgment to direct that the purchaser/client be reimbursed by the supplier/provider of the service, where the latter has not brought a reimbursement claim before another court within the time allowed for that purpose – in reliance on an interpretation, handed down by case-law and subsequently implemented through administrative practice, to the effect that the transaction was subject to VAT?’

Assessment

The first question

11. By its first question, the national court seeks to ascertain the compatibility with the principles of VAT neutrality, effectiveness and non-discrimination of national legislation which, as regards VAT paid to the public Treasury but not due, confers different rights as between, on the one hand, the service provider, as a taxable person for the purposes of VAT (namely, the right to a refund of VAT paid to the tax authority but not due, it being necessary to enter such a claim within two years of the date of payment or the date on which the conditions for a refund arise) and, on the other hand, the recipient of services, as the individual charged with the VAT (namely, the right to claim reimbursement from the service provider of payments made but not due, subject to a time-limit of 10 years) and which, as regards any related disputes, confers jurisdiction on different courts (namely, the tax courts for disputes between the service provider and the tax authority, and the civil courts for disputes between the recipient of the service and the service provider).

12. First of all, it should be pointed out that, according to the information provided by the Corte Suprema di Cassazione in its order for reference, that court does not dispute that the taxes in question, invoiced and paid to the public Treasury, were not due. Accordingly, there is no disagreement on that point between the Corte Suprema di Cassazione and the ordinary Italian civil courts which ruled on the claim brought by the consortia concerned against BNA for reimbursement. The problem raised by the questions referred concerns the consequential right, that is to say, the right to reimbursement of VAT paid but not due and, more specifically, the way in which that right is exercised and the conditions for the exercise of that right.

13. To my mind, it can be inferred from the case-law that European Union law places Member States under a general obligation to make it possible for VAT paid but not due to be refunded, and for individuals to enforce the corresponding rights. The Court of Justice took this as its premiss in *Schmeink & Cofreth and Strobel* when ruling on the admissibility of the questions referred. (3)

14. However, 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 (4) is silent regarding the repayment of VAT which has been

invoiced, albeit not due, and subsequently paid to the public Treasury.

15. In that connection, it should be noted that the Court has already pointed out on a number of occasions that, in the absence of Community rules on claims for the repayment of national taxes levied but not due, this problem is resolved in ways which differ from one Member State to another. That being so, it is for the domestic legal system of each Member State to designate the courts and tribunals with jurisdiction in this regard and to lay down the detailed procedural rules governing actions before the courts with a view to safeguarding rights which individuals derive from Community law, provided, first, that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and, second, that they do not make it, in practice, impossible or excessively difficult to exercise rights conferred by Community law (principle of effectiveness). (5)

16. On that point, it should be added that, following the changes introduced by the Treaty of Lisbon, the same obligation arises, for Member States, directly under the Treaty on European Union. Under the second paragraph of Article 19(1) TEU, Member States are to provide remedies sufficient to ensure effective legal protection in the fields covered by European Union law.

17. With regard to the Italian system for the repayment of VAT paid but not due, this is not the first time that those rules, and the attendant three issues, have been the subject of questions referred by the Italian courts to the Court of Justice for a preliminary ruling.

18. First, in *Reemtsma Cigarettenfabriken,* (6) the Court examined the Italian system in the light of the principles of neutrality, effectiveness and non-discrimination and with regard to the fact that the remedies available under that system as regards reimbursement of VAT paid but not due differ as between service providers and recipients. The Court ultimately held that those principles do not preclude national legislation under which only the supplier of services can claim a refund from the tax authorities of sums paid by way of VAT, but not due, while the recipient of the services can bring a civil-law action against the supplier for recovery of sums paid but not due. (7)

19. Secondly, in *Edis*, (8) the Court addressed the other issue raised by the Italian system, namely, the fact that different time-limits or limitation periods apply, depending on whether the claim for a refund of VAT paid but not due has been made against the tax authority or lodged in an action between private individuals. The Court ruled that Community law does not preclude the legislation of a Member State from laying down – alongside time-limits applicable under the ordinary law to actions between private individuals for the recovery of sums paid but not due – special detailed rules, which are less favourable, governing claims challenging taxes and other levies before the courts. (9)

20. Thirdly, as regards the actual duration of the time-limits within which claims for the refund of VAT paid but not due must be brought against the tax authority, it follows from the case-law of the Court that these must be reasonable, protecting both the taxpayer and the administration concerned. Time-limits of that nature are not liable to make it virtually impossible or excessively difficult to exercise rights conferred by Community law. (10) If it were possible, without any limitation in time, to claim a refund of VAT paid but not due, this would be inconsistent with the principle of legal certainty, in accordance with which the tax position of the taxable person, in terms of his rights and obligations in relation to the tax authority, must not to be open to challenge indefinitely. (11)

21. The assessment as to whether time-limits are reasonable is made by the Court on a case-by-case basis. As regards the two-year time-limit, the Court has held that this is reasonable with respect to the right to deduct VAT. (12) In my view, it is possible to apply that conclusion, by analogy, to the right to a refund of VAT paid but not due.

22. It seems, therefore, on the basis of the above case-law, that the Italian system for the reimbursement of VAT levied but not due, which is the subject of these questions referred for a preliminary ruling, is, in general, consistent with the principles of effectiveness, non-discrimination and tax neutrality.

23. However, in the case before the referring court, the stability of the Italian system was disturbed by the tax authority, which, by an administrative circular, adopted a new interpretation of Article 10(5) of DPR No 633/72, under which a transaction consisting in the collection of taxes is exempt from VAT. According to the circular, the consortium contributions were fiscal in nature and, in consequence, the fees charged for collecting them fell to be regarded as exempt from VAT.

24. Given that the above change in interpretation was adopted after the time?limits applying to the taxable person – in this case, BNA – had expired, that taxable person could no longer claim from the tax authority a refund of the VAT, invoiced and then paid to the public Treasury, on the fees charged for collecting consortium contributions, while the consortia, as recipients of a service consisting in the collection of consortium contributions, were still able to claim reimbursement from BNA of the sums in question, as sums paid but not owed.

25. Consequently, it is BNA which bears the VAT burden even though, as a tax on consumption, the VAT burden should generally speaking be borne by the final consumer: in this case, the consortia.

26. As it is, in the present case, however, BNA did not cause this situation. As the Corte Suprema di Cassazione states in its order for reference, BNA merely followed an administrative and legal practice that was in place at the time when the VAT was invoiced and which, on the view that the consortia contributions were not fiscal in nature, indicated that VAT was due.

27. There is nothing to suggest that BNA did not act as a sufficiently prudent and alert taxpayer. It seems therefore that BNA’s failure to claim reimbursement of the sums paid but not due before the expiry of the two-year time-limit, calculated from the time when the VAT was paid, is attributable not to BNA, but to the tax authority.

28. To my mind, it is necessary, in such circumstances, to consider whether the consequences, described above, for the legal situation of BAPV (which acquired BNA) of the change to the interpretation of Article 10(5) of DPR No 633/72 are inconsistent with the principles of legal certainty and the protection of legitimate expectations, which, in accordance with settled case-law, form part of the Community legal order and which, on that basis, must be respected not only by the Community institutions, but also by Member States in the exercise of the powers conferred on them under Community directives. (13)

29. It is not for the Court of Justice to determine whether national legislation, its interpretation and its application are consistent with the principles of legal certainty and the protection of legitimate expectations. That role accrues to the referring court alone. In making a preliminary ruling in response to a reference under Article 267 TFEU, the Court has jurisdiction solely to provide the national court with all the guidance for the interpretation of Community law which may enable it to determine the issue of compatibility. (14)

30. It should be recalled in that regard that the principle of legal certainty requires, on the one hand, that rules of law must be clear and precise and, on the other, that their application must be foreseeable by those subject to them. That requirement must be observed all the more strictly in the case of rules liable to entail financial consequences, in order that those concerned may know precisely the extent of the obligations which those rules impose on them. (15)

31. It is my view, in the present case, that the uncertainty relates not to the clear and precise nature of Article 10(5) of DPR No 633/72, under which transactions consisting in the collection of taxes is to be exempt from VAT, but rather to the foreseeable nature of its application. I predicate my arguments on the view that the application of the law is inseparably linked to its interpretation, which, in the present case, was changed by the tax authority.

32. In order to assess the foreseeable nature of the interpretation and application of Article 10(5) of DPR No 633/72, the referring court should take into consideration not only the fact that the tax authority changed its position as regards the taxation of fees charged for the collection of consortium contributions, but also the fact that the position taken by the Italian courts on that point was changing.

33. As regards the principle of the protection of legitimate expectations, *Elmeka* (16) may be of use to the referring court, even though that judgment concerns the legitimate expectations of taxpayers in relation to the conduct of the administrative authorities. To my way of thinking, the conclusions arising from that judgment may be applied generally to all conduct on the part of administrative authorities.

34. As a first step, therefore, the national court should determine whether the conduct of the tax authority gave rise to a reasonable expectation in the mind of a reasonably prudent and alert economic operator and then, if the answer is affirmative, it should establish the legitimate nature of that expectation. (17)

35. At the hearing, the agent for the Italian Government stated in that connection that the issue of exemption from VAT of the transaction consisting in the collection of consortium contributions had been the subject of debate for such a long time that it was impossible to believe that the conduct of the tax authority had generated justified expectations in the mind of a prudent and informed economic operator.

36. In my opinion, that argument should not, as such, play a decisive role in the assessment made by the referring court. Account should also be taken, first, of the length of time during which the original administrative and legal practice – whereby VAT was applied to the transaction consisting in the collection of consortium contributions – was in force and, secondly, of the point, in relation to the facts of the case before the referring court, at which discussions began regarding the nature of consortium contributions.

37. Lastly, I would add that, as part of its assessment, the referring court must also take into account the right to property guaranteed under Article 1 of the First Additional Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and also enshrined in Article 17 of the Charter of Fundamental Rights of the European Union, which, according to settled case-law, forms part of the general principles of European Union law. According to the case-law, that right is not absolute, but must be viewed in relation to its function in society. Consequently, the exercise of the right to property may be restricted, provided that those restrictions in fact correspond to objectives of public interest pursued by the European Union and do not, in relation to the aim pursued, constitute a disproportionate and intolerable interference, impairing the very substance of the right thus

guaranteed. (18)

38. In the present circumstances, the national court must assess whether the Italian system in question – in particular, the different time-limits or limitation periods laid down by those rules with regard, first, to BAPV and, secondly, to the consortia, with respect to the exercise of their rights arising from the invoicing of VAT which was not due and its payment to the public Treasury – does not, as a result of the intervention of the tax authority consisting in the adoption of a new interpretation, bring about an impairment of BAPV's right to property.

39. If that were so, it would be for the national court to assess whether the conditions arising from the case-law and referred to in point 37 above have been satisfied.

40. In the light of the foregoing, it is my view that the Court should state in reply to the first question that the principles of neutrality, effectiveness and non?discrimination do not preclude national legislation, such as that at issue in the case before the referring court, which, with regard to VAT which was not due but which has been paid to the public Treasury, in the first place, confers different rights, subject to different time-limits or limitation periods, on the service provider as a taxable person for VAT purposes, as compared with the recipient of the services as the individual charged with the VAT, and, in the second place, confers jurisdiction on different courts for any related disputes – provided that that legislation is applied consistently with the principles of legal certainty and the protection of legitimate expectations, and with due respect for the right to property.

The second question

41. By its second question, the Corte Suprema di Cassazione seeks to ascertain whether the principles of effectiveness, non-discrimination and tax neutrality in relation to VAT are compatible with national practice or case-law under which it is possible for a decision to direct the service provider to reimburse the recipient of the service, when the provider has not brought a claim for reimbursement before another court within the time-limits applicable to it, in reliance on an interpretation, handed down by case-law and implemented through administrative practice, to the effect that the transaction was subject to VAT.

42. At the hearing, the agent for the Italian Government requested that the Court declare the second question inadmissible on the ground that the issue concerning the reimbursement of VAT which was invoiced in error by BNA – or, as the case may be, by BAPV, which acquired BNA – is not the subject-matter of the dispute in the main proceedings.

43. As the Court has consistently held, it is for the national courts alone – before which the proceedings are pending and which must assume responsibility for the judgment to be given – to determine, in the light of the particular features of each case, both the need for a preliminary ruling to enable them to give judgment and the relevance of the questions which they refer to the Court. A request for a preliminary ruling from a national court may be rejected only if it is quite obvious that the interpretation of Community law sought by that court is unrelated to the actual nature of the case or to the subject-matter of the main action. (19)

44. It is my belief that this is precisely such a situation. It should be acknowledged that the main action, in the context of which the questions were referred for a preliminary ruling, concerns solely the reimbursement by the tax authority of VAT which was paid but not due to the public Treasury, since the issue of the reimbursement by BAPV – which acquired BNA – of VAT which was invoiced in error has been resolved by another Italian court.

45. Since the Court's answer cannot be of any use for the purposes of resolving the dispute

before the referring court, it is my view that the Court should declare the second question referred by the Corte Suprema di Cassazione inadmissible.

46. In the event that the Court does not concur with my opinion and declares the second question admissible, I would suggest that the answer which I have proposed for the first question would also serve as a reply to the second question, since the latter also seeks to assess the Italian system for the repayment of VAT levied but not due.

Conclusion

47. In the light of the foregoing considerations, I propose that the Court declare the second question referred by the Corte Suprema di Cassazione inadmissible and answer the first question referred by that court as follows:

The principles of neutrality, effectiveness and non-discrimination do not preclude national legislation, such as that at issue in the case before the referring court, which, with regard to VAT which was not due but which has been paid to the public Treasury, in the first place, confers different rights, subject to different time-limits or limitation periods, on the service provider as a taxable person for VAT purposes, as compared with the recipient of the services as the individual charged with the VAT, and, in the second place, confers jurisdiction on different courts for any related disputes – provided that that legislation is applied consistently with the principles of legal certainty and the protection of legitimate expectations, and with due respect for the right to property.

1 – Original language: French.

2 – Ordinary supplement to GURI No 292 of 11 November 1972.

3 – Case C?454/98 *Schmeink & CofrethandStrobel* [2000] ECR I?6973, paragraphs 39 and 49.

4 – OJ 1977 L 145, p. 1.

5 – See, to that effect, Case C?231/96 *Edis* [1998] ECR I?4951, paragraphs 33 and 34; Case C?62/00 *Marks & Spencer* [2002] ECR I?6325, paragraph 34; and Case C?472/08 *Alstom Power Hydro* [2010] ECR I?623, paragraph 17.

6 – Case C?35/05 [2007] ECR I?2425.

7 – *Reemtsma Cigarettenfabriken* (cited in footnote 6, paragraph 42).

8 – Cited in footnote 5.

9 – *Edis* (cited in footnote 5, paragraph 37). The same finding is also made, for example, in Case C?343/96 *Dilexport* [1999] ECR I?579, paragraph 28.

10 – See, to that effect, Case 33/76 *Rewe-Zentralfinanz and Rewe-Zentral* [1976] ECR 1989, paragraph 5; *Edis* (cited in footnote 5, paragraph 35); and Case C?262/09 *Meilicke and Others* [2011] ECR I?0000, paragraph 56.

11 – See, by analogy, Joined Cases C?95/07 and C?96/07 *Ecotrade* [2008] ECR I?3457, paragraph 44, and *Alstom Power Hydro* (cited in footnote 5, paragraph 16).

12 – See *Ecotrade* (cited in footnote 11, paragraph 48) and *Alstom Power Hydro* (cited in footnote 5, paragraph 20).

13 – See, to that effect, Joined Cases C?181/04 to C?183/04 *Elmeka* [2006] ECR I?8167, paragraph 31, and Case C?201/08 *Plantanol* [2009] ECR I?8343, paragraph 43 and the case-law cited.

14 – See, to that effect, *Plantanol* (cited in footnote 13, paragraph 45 and the case-law cited).

15 – See, to that effect, *Plantanol* (cited in footnote 13, paragraph 46 and the case-law cited), and Case C?358/08 *Aventis Pasteur* [2009] ECR I?11305, paragraph 47.

16 – Cited in footnote 13.

17 – See, to that effect, *Elmeka* (cited in footnote 13, paragraph 32 and the case-law cited).

18 – See, to that effect, Joined Cases C?402/05 P and C?415/05 P *Kadi and Al Barakaat International Foundation* v *Council and Commission* [2008] ECR I?6351, paragraph 355 and the case-law cited.

19 – See, to that effect, inter alia, Case C-18/93 *Corsica Ferries* [1994] ECR I?1783, paragraph 14; Case C?266/96 *Corsica Ferries France* [1998] ECR I?3949, paragraph 27; and Case C-345/06 *Heinrich* [2009] ECR I?1659, paragraphs 36 and 37.