Provisional text

OPINION OF ADVOCATE GENERAL

SZPUNAR

delivered on 14 December 2023 (1)

Case C?746/22

Slovenské Energetické Strojárne A.S.

v

Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága

(Request for a preliminary ruling from the F?városi Törvényszék (Budapest High Court, Hungary))

(Reference for a preliminary ruling – Taxes – Common system of value added tax (VAT) – Directive 2006/112/EC – Article 170 – Refund of VAT to taxable persons not established in the Member State of refund – Directive 2008/9/EC – Article 20 – Request for additional information made by the Member State of refund – Discontinuation of proceedings on account of failure to provide additional information within the time limit – Article 23 – Refusal to take account of information provided for the first time in appeal proceedings)

Introduction

1. In the common system of value added tax (VAT), the right to deduct input tax plays a key role in that it allows the taxable person to avoid the burden of that tax, which is borne only by the consumer. However, on account of the territorial nature of VAT, which is confined to the territory of the individual Member States, no right of deduction arises where a taxable person which has neither a place of business nor a fixed establishment in a particular Member State purchases goods or services in that Member State for the purposes of its taxable activities in another Member State or for the purposes of taxable activities which, however, entail no obligation on the taxable person to pay tax, for example in connection with the ‘reverse charge’ mechanism. In such a case, there is no tax due in the territory of the Member State concerned from which the tax paid on the goods or services purchased by the taxable person in the territory of that Member State can be deducted.

2. Instead of a right of deduction, EU law provides in such a situation for a right to obtain a refund of the VAT paid. EU legislation governs in considerable detail not only the substantive aspects of that right of refund, but also the procedural issues relating to it, including the time limits applicable to the refund application procedure.

3. The Court has already had an opportunity to interpret those provisions on several occasions. (2) However, as the present case demonstrates, different conclusions may be drawn from that case-law as to the legal nature of those time limits and the consequences of failure to comply with them. The Court will therefore have the occasion to clarify the interpretation of those provisions and to dispel the doubts which have arisen.

Legal framework

European Union law

4. Article 170(b) and Article 171(1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, (3) as amended by Council Directive 2008/8/EC of 12 February 2008 ('Directive 2006/112'), (4) provide as follows:

Article 170

'All taxable persons who, within the meaning of … Article 3 of Directive 2008/9/EC [(5)] 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 in so far as the goods and services are used for the purposes of the following:

…

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

Article 171

'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/EC.

…'

5. Articles 3, 5, 7, 15, 19, 20, 21 and 23 of Directive 2008/9 provide, in particular, as follows:

Article 3

'This Directive shall apply to any taxable person not established in the Member State of refund who meets the following conditions:

(a) during the refund period, he has not had in the Member State of refund, the seat of his economic activity, or a fixed establishment from which business transactions were effected, or, if no such seat or fixed establishment existed, his domicile or normal place of residence;

(b) during the refund period, he has not supplied any goods or services deemed to have been supplied in the Member State of refund, with the exception of the following transactions:

…

(ii) the supply of goods and services to a person who is liable for payment of VAT in accordance with Articles 194 to 197 and Article 199 of Directive 2006/112/EC.

…’

Article 5

‘Each Member State shall refund to any taxable person not established in the Member State of refund any VAT charged in respect of goods or services supplied to him by other taxable persons in that Member State or in respect of the importation of goods into that Member State, in so far as such goods and services are used for the purposes of the following transactions:

…

(b) transactions to a person who is liable for payment of VAT in accordance with Articles 194 to 197 and Article 199 of Directive 2006/112/EC as applied in the Member State of refund.

…’

Article 7

‘To obtain a refund of VAT in the Member State of refund, the taxable person not established in the Member State of refund shall address an electronic refund application to that Member State and submit it to the Member State in which he is established via the electronic portal set up by that Member State.’

Article 15

‘1. The refund application shall be submitted to the Member State of establishment at the latest on 30 September of the calendar year following the refund period. The application shall be considered submitted only if the applicant has filled in all the information required under Articles 8, 9 and 11.

…’

Article 19

‘…

2. The Member State of refund shall notify the applicant of its decision to approve or refuse the refund application within four months of its receipt by that Member State.’

Article 20

‘1. Where the Member State of refund considers that it does not have all the relevant information on which to make a decision in respect of the whole or part of the refund application, it may request, by electronic means, additional information, in particular from the applicant or from the competent authorities of the Member State of establishment, within the four-month period referred to in Article 19(2). Where the additional information is requested from someone other than the applicant or a competent authority of a Member State, the request shall be made by electronic means only if such means are available to the recipient of the request.

If necessary, the Member State of refund may request further additional information.

The information requested in accordance with this paragraph may include the submission of the original or a copy of the relevant invoice or import document where the Member State of refund has reasonable doubts regarding the validity or accuracy of a particular claim. …

2. The Member State of refund shall be provided with the information requested under paragraph 1 within one month of the date on which the request reaches the person to whom it is addressed.'

Article 21

'Where the Member State of refund requests additional information, it shall notify the applicant of its decision to approve or refuse the refund application within two months of receiving the requested information or, if it has not received a reply to its request, within two months of expiry of the time limit laid down in Article 20(2). However, the period available for the decision in respect of the whole or part of the refund application shall always be at least six months from the date of receipt of the application by the Member State of refund.

Where the Member State of refund requests further additional information, it shall notify the applicant of its decision in respect of the whole or part of the refund application within eight months of receipt of the application by that Member State.'

Article 23

'1. Where the refund application is refused in whole or in part, the grounds for refusal shall be notified by the Member State of refund to the applicant together with the decision.

2. Appeals against decisions to refuse a refund application may be made by the applicant to the competent authorities of the Member State of refund in the forms and within the time limits laid down for appeals in the case of refund applications from persons who are established in that Member State.

If, under the law of the Member State of refund, failure to take a decision on a refund application within the time limits specified in this Directive is not regarded either as approval or as refusal, any administrative or judicial procedures which are available in that situation to taxable persons established in that Member State shall be equally available to the applicant. If no such procedures are available, failure to take a decision on a refund application within these time limits shall mean that the application is deemed to be rejected.'

Hungarian law

6. Articles 19 to 21 of Directive 2008/9 were transposed into Hungarian law in Paragraphs 251/C, 251/E, 251/F and 251/G of the általános forgalmi adóról szóló 2007. évi CXXVII. törvény (Law No CXXVII of 2007 on value added tax). (6)

7. Under Paragraph 49(1)(b) of the adóigazgatási rendtartásról szóló 2017. évi CLI. törvény (Law CLI of 2017 governing tax administration; 'the Law on tax administration'), (7) tax proceedings are to be discontinued if the applicant has failed to submit a declaration or make a correction at the request of the tax authority, with the result that the application cannot be considered.

8. Paragraph 124 of the Law on tax administration establishes the right to appeal against tax decisions. Under subparagraph 3 thereof, it is not possible, in an appeal, to rely on facts or evidence of which the appellant was aware, but which he or she did not present to the first-

instance authority, despite being requested to do so.

9. Under Paragraph 78(4) of the közigazgatási perrendtartásról szóló 2017. évi I. törvény (the new Code on Administrative Litigation, Act I of 2017), (8) a party may rely before the court on a fact which was not considered in earlier proceedings, either because the authority refused to take it into account or because the party, through no fault of his, her or its own, did not know about the fact or did not rely on it.

Facts, procedure and questions referred

10. Slovenské Energetické Strojárne A.S. (‘SES’), established in Slovakia, carries on activities in the mechanical engineering for energy sector. In 2020, the company provided assembly and installation services at a power plant in Újpest (Hungary). For the purposes of providing those services, it purchased a number of goods and used a number of services in Hungary.

11. On 18 February 2021, SES submitted an application to the Nemzeti Adó- és Vámhivatal Kiemelt Adó- és Vámigazgatósága (Tax and Customs Directorate for Large Taxpayers of the National Tax and Customs Authority, Hungary; ‘the first-tier tax authority’) for a refund of VAT in the amount of 37 013 654 forint (HUF) (approximately EUR 97 400) paid on goods and services which it had purchased in Hungary in 2020.

12. On 22 February 2021, the first-tier tax authority requested SES to submit a number of documents related to its VAT refund application within one month. Although SES received that request by email, it failed to respond to it. (9)

13. In view of the above, by decision of 6 May 2021 the first-tier tax authority discontinued the proceedings in relation to SES’s VAT refund application pursuant to Paragraph 49(1)(b) of the Law on tax administration.

14. On 9 June 2021, SES lodged an appeal against that decision with the Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága (Appeals Directorate of the National Tax and Customs Administration, Hungary; ‘the second-tier tax authority’), submitting at the same time all the documents requested by the first-tier tax authority.

15. By decision of 20 July 2021, the second-tier tax authority upheld the decision of the first-instance tax authority. The second-tier tax authority pointed out, in particular, that the provisions on tax administration do not allow, in appeal proceedings, new evidence to be relied on where the appellant was aware of that evidence before the adoption of the first-tier decision, but did not present it, even though it was requested to do so by the tax authority.

16. SES brought an action against the abovementioned decision before the F?városi Törvényszék (Budapest High Court, Hungary), the referring court in the present case. SES contests the application of Paragraph 124(3) of the Law on tax administration in VAT refund proceedings pursuant to Directive 2008/9 since it restricts, in its view, the right of appeal laid down in Article 23(2) of that directive. In addition, it considers that the one-month period referred to in Article 20(2) of that directive is not mandatory. By contrast, in the view of the second-tier tax authority, Paragraph 124(3) of the Law on tax administration is applicable in VAT refund proceedings. However, that does not deprive a taxable person in a situation such as that of SES of its right to a refund, since a taxable person may apply for restoration of the *status quo ante*.

17. It was in those circumstances that the F?városi Törvényszék (Budapest High Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Is Article 23(2) of Council Directive [2008/9] … to be construed as meaning that national legislation – to be specific, Paragraph 124(3) of [the Law on tax administration] – which, for the purposes of the examination of applications for a refund of [VAT] pursuant to [Directive 2006/112] …, does not allow, at the appeal stage, new facts to be pleaded or new evidence to be relied on or produced, where the applicant was aware of that evidence before the adoption of the first-tier decision but did not present it, even though it was requested to do so by the tax authority, or did not rely on it, thereby creating a material constraint which exceeds the requirements as to form and time limits laid down by Directive [2008/9], is compatible with the requirements laid down in that [directive] with regard to appeals?

(2) Does an affirmative answer to the first question mean that the one-month period indicated in Article 20(2) of Directive [2008/9] is to be considered mandatory? Is the foregoing compatible with the right to an effective remedy and to a fair trial enshrined in Article 47 of the Charter of Fundamental Rights of the European Union (“the Charter”), with [Articles] 167, 169 [and] 170 and [Article] 171(1) of [Directive 2006/112], and with the fundamental principles of fiscal neutrality, effectiveness and proportionality developed by the [Court]?

(3) Is Article 23(1) of Directive [2008/9], which relates to the refusal of a refund application in whole or in part, to be interpreted as meaning that national legislation – specifically, Paragraph 49(1) of the Law on tax administration – pursuant to which the tax authority is to bring the proceedings to a close if the applicant taxable person does not respond to a request from the tax authority or comply with its obligation of rectification, failing which it is not possible to examine the application without the proceedings continuing *ex officio*, is compatible with that provision?’

18. The request for a preliminary ruling was received by the Court on 6 December 2022. Written observations were submitted by SES, Hungary, the Council of the European Union (10) and the European Commission. The Court decided to give a ruling on the case without a hearing.

Analysis

19. The referring court in the present case refers three questions to the Court for a preliminary ruling, the first of which is of fundamental relevance to the resolution of the dispute in the main proceedings. However, I will begin my analysis with the second question since the answer to that question can easily be deduced from the Court’s previous case-law and will have a bearing on the analysis of the first question.

The second question

20. The second question relates to two separate issues. The first is the legal nature of the one-month period for responding to the request from the authority considering the application for a VAT refund to provide additional information pursuant to Article 20(2) of Directive 2008/9. Specifically, the referring court seeks to ascertain whether that period may be considered mandatory, that is to say, whether failure to comply with that period may result in the taxable person losing the possibility of relying on the additional information at a later stage of the refund application procedure. The second question is whether the mandatory nature of that period is compatible with Article 47 of the Charter and with a number of principles and provisions of EU law concerning VAT. The referring court refers the second question for a preliminary ruling in the event that the first question is answered in the affirmative, but that question can be answered, on the basis of the

Court’s previous case-law, without prior consideration of the first question.

Judgment in Sea Chefs Cruise Services

21. The legal nature of the period laid down in Article 20(2) of Directive 2008/9 was defined by the Court in its judgment in *Sea Chefs Cruise Services*. In that judgment, the Court expressly held that that period is not a limitation period and that failure to comply with it does not deprive the taxable person of the possibility of supplementing its application for a refund at the stage of judicial proceedings. (11)

22. The Court based that decision on a literal and systemic interpretation of Directive 2008/9. (12) Furthermore, the Court noted that a request for additional information under Article 20(1) of Directive 2008/9 may be addressed not only to the taxable person applying for the refund, but also to the Member State in which it is established or to third parties. In such a situation, any delay on the part of those persons, over which the taxable person has no control, cannot have the effect of depriving it of its right to a refund. (13)

23. Lastly, the Court has stated that, since, under Article 23(2) of Directive 2008/9, a taxable person is entitled to bring an appeal against a decision refusing a refund, and the period laid down in Article 20(2) thereof is not a limitation period, a taxable person is entitled to rely, in appeal proceedings against such a decision, on additional information in support of its right to a refund. (14) By this, it should be understood that a taxable person may rely, inter alia, on information or documents requested from it by the authority considering the refund application and which the taxable person did not provide within the period laid down in Article 20(2) of Directive 2008/9.

24. It is true that in its judgment in *Sea Chefs Cruise Services* the Court specifically addressed the taxable person’s possibility of relying on additional information in the main proceedings. That, however, arose from the particular circumstances of the main dispute in the case resulting in that judgment and the wording of the question referred. However, the Court expressly referred to the taxable person’s right of appeal against a tax refund decision laid down in Article 23(2) of Directive 2008/9. (15) That provision speaks generally of ‘appeals … to the *competent authorities* of the Member State of refund’, which may encompass both judicial and administrative authorities. That is confirmed in particular by the second subparagraph of that paragraph, under which the taxable person should have access to ‘any administrative or judicial procedures’ in the Member State of refund. In view of the above, the conclusions drawn from the judgment in *Sea Chefs Cruise Services* may apply not only to judicial proceedings but also – as in the present case – to administrative appeals against VAT refund decisions where such an appeal procedure is provided for in the national law of the Member State of refund.

25. The reply to the first part of the second question referred to the Court should therefore be that, in accordance with the judgment in *Sea Chefs Cruise Services*, the period of one month laid down in Article 20(2) of Directive 2008/9 cannot be considered mandatory.

No effect of the judgment in GE Auto Service Leasing

26. That decision is not undermined by the conclusions drawn from the judgment in *GE Auto Service Leasing*. In that judgment, the Court held that the provisions of EU law do not preclude a refusal to refund VAT to a taxable person which has failed to produce all the documents and information required to prove its right to a VAT refund to the competent tax authority within the time limits given, even if the documents and information in question were submitted by the taxable person, at its own initiative, in the review procedure or legal action brought against the decision refusing a refund. (16) However, the particular circumstances of the case resulting in that judgment mean that it cannot, in my view, be applied in the present case.

27. First, the judgment in *GE Auto Service Leasing* did not concern the interpretation of the provisions of Directive 2008/9, but those of Directive 79/1072/EEC, (17) which preceded it. That directive was significantly less detailed than Directive 2008/9. In particular, it laid down only one procedural time limit for taxable persons, namely the time limit for submitting a refund application. (18) It did not govern at all the issue of the tax authority's request for additional information from the taxable person, leaving that issue entirely to national law. That means that, from the point of view of EU law, Member States were limited in that regard only by the principles of equivalence and effectiveness.

28. Secondly, the request of the tax authority in the case resulting in the judgment in *GE Auto Service Leasing* concerned the provision by the taxable person of documents, the attachment of which to the refund application was required by Directive 79/1072 itself in Article 3, namely the invoices covered by the application and a certificate of registration as a VAT taxable person in the Member State of establishment. Under the provisions of that directive, the attachment of those documents to the application was a condition for the exercise by the taxable person of the right of deduction. (19) The absence of those documents therefore made it impossible to establish the existence of that right.

29. By contrast, a request for the provision of additional information under Article 20(1) of Directive 2008/9 may cover, as the use of the word 'additional' indicates, information or documents the attachment of which to the refund application is not required under Articles 8 to 10 of that directive and the absence of which may, but does not have to, result in a refusal to refund. (20)

30. Thirdly, in the operative part of its judgment in *GE Auto Service Leasing*, the Court made the reservation that the interpretation of the provisions of Directive 79/1072 set out therein is applicable, provided that the principles of equivalence and effectiveness have been complied with. Although the Court stated that it did not appear that the exercise by the taxable person of its right to obtain a VAT refund was made excessively difficult or impossible in the main proceedings in the case resulting in that judgment, it left that matter to the national court to assess. That indicates, in my view, that the decision adopted by the Court in the judgment in question turned crucially on the particular circumstances of the case in the main proceedings and need not apply in cases which differ significantly from it.

31. Fourthly and lastly, the fact that in its judgment in *GE Auto Service Leasing* the Court made no reference to the judgment in *Sea Chefs Cruise Services*, delivered over two years earlier, indicates, in my view, that it considered the two cases to be completely different and consequently the judgment in *GE Auto Service Leasing* in no way undermines the conclusions drawn from the judgment in *Sea Chefs Cruise Services*.

The issue of the compatibility of Article 20(2) of Directive 2008/9 with Article 47 of the Charter

32. The issue of the interpretation of Article 47 of the Charter was raised by the referring court in the event that it were found that the period laid down in Article 20(2) of Directive 2008/9 could

be mandatory in nature. In view of the answer which I propose to give to the first part of the second question, that issue does not arise.

33. I would therefore merely note in passing that, in my view, irrespective of whether the period laid down in Article 20(2) of Directive 2008/9 is mandatory in nature or may be treated as such in the national law of the Member States, it does not conflict with Article 47 of the Charter.

34. In probably all legal orders, some procedural time limits, including those relevant from the point of view of the right to a tribunal protected under Article 47 of the Charter, such as the time limit for bringing an action or an appeal, are mandatory in nature and failure to comply with them results in the loss of the possibility of bringing a case before a tribunal. As long as those time limits are set in a reasonable manner, (21) that does not conflict with the right to a tribunal. That right must give way to legal certainty and the permanence of legal relations, and therefore to values which procedural time limits serve to protect. (22) A fortiori, therefore, a time limit, even a mandatory one, for providing the tax authority with the information necessary to consider a tax refund application cannot conflict with the right to a tribunal, if failure to comply with that time limit does not deprive the taxable person of the right to challenge, including before a tribunal, the decision made in its case.

Answer to the second question

35. As regards the other provisions and principles of EU law mentioned by the referring court in its second question, I will discuss their relevance to the present case below when analysing the first question. I propose, therefore, that the answer to the second question referred to the Court should be that Article 20(2) of Directive 2008/9 must be interpreted as meaning that the one-month period laid down therein for providing additional information at the request of the authority considering a VAT refund application submitted by a taxable person established in another Member State cannot be considered mandatory.

The first question

36. The first question is intended to enable the referring court to assess the compatibility with EU law of a provision of national law which excludes the possibility of relying, in appeal proceedings, on additional information or documents requested by the first-tier tax authority and provided by the taxable person only at the stage of appeal to the second-tier tax authority.

37. The literal wording of the question concerns only the interpretation of Article 23(2) of Directive 2008/9. However, that provision merely states that appeals against decisions concerning the refund of VAT to taxable persons established in another Member State are subject to the same rules as appeals by national taxable persons. In order to provide the referring court with a useful answer, it is therefore necessary, in my view, to extend the analysis to other provisions and principles of EU law relating to VAT, in particular Article 170 of Directive 2006/112, Article 20(2) of Directive 2008/9, and the principles of equivalence and effectiveness, as well as fiscal neutrality. Article 170 of Directive 2006/112 and the principles of equivalence and effectiveness and fiscal neutrality were, moreover, mentioned by the referring court in the second question. By its first question, the referring court thus seeks, in essence, to ascertain whether those provisions and principles of EU law preclude the application of national legislation such as that described in point 36 of this Opinion. I will begin my analysis of that issue by recalling the relevant case-law of the Court.

Previous case-law of the Court

38. According to the settled case-law of the Court, the right, laid down in Article 170 of Directive

2006/112, of a taxable person established in another Member State to obtain a VAT refund is the counterpart of the right to deduct tax paid in national territory referred to in Article 168 of that directive. It is a fundamental principle of the common system of VAT which is intended to relieve taxable persons of the burden of that tax and thus ensure tax neutrality. That right is therefore an integral part of that system and in principle may not be restricted. (23)

39. The principle of neutrality further requires that a taxable person be granted the right to deduct or obtain a refund of input tax so long as the substantive requirements governing that right are satisfied, even if that taxable person has failed to comply with some of the formal requirements. The position may be different only if non-compliance with such formal requirements prevents the production of conclusive evidence that the substantive requirements have been satisfied. (24) As regards the time at which proof of satisfaction of the substantive requirements governing the right to obtain a refund must be provided, the Court has held that the possibility of providing such proof without any temporal limit would mean that the position of the taxable person, with regard to its rights and obligations vis-à-vis the tax authorities, could be challenged indefinitely, which would be contrary to the principle of legal certainty. (25)

40. In addition, in matters not governed by EU law, the formal requirements governing the exercise of the right to a VAT refund are determined, in accordance with the principle of procedural autonomy of the Member States, by the national law of those States, subject to compliance with the principles of equivalence and effectiveness. In accordance with those principles, such requirements must not be less favourable than those applicable in similar internal situations and must not make it impossible or excessively difficult in practice to exercise the right to obtain a refund. (26)

41. Lastly, the Court has held, as I have already stated in the part of this Opinion concerning the second question, that the time limit laid down in Article 20(2) of Directive 2008/9 is not a limitation period and consequently the taxable person may provide the information requested by the authority considering a VAT refund application at the stage of judicial proceedings. (27)

42. It is in the light of the case-law discussed above that the first question must be analysed.

Application in the present case

43. On the basis of the case-law discussed in points 38 to 40 of this Opinion, the Court has not ruled out the compatibility with EU law of national legislation of the Member States, which does not allow additional information concerning a VAT refund application by a taxable person not established in the Member State of refund to be submitted only at the stage of judicial proceedings, (28) and also legislation which allows evidence of fulfilment of the conditions for exemption submitted by the taxable person to be disregarded after a tax inspection has been completed. (29) The Court has merely made the permissibility of such legislation under EU law subject to the compliance with the conditions of effectiveness and equivalence, (30) but left it to the national courts to monitor compliance with them.

44. The Court has ruled thus both in a situation where, in providing guidance on the matter to the national court, it considered those conditions, in particular the condition of effectiveness, to be satisfied,(31) and in the opposite situation. In its judgment in *Nec Plus Ultra Cosmetics* the Court found in particular that ‘the refusal to take into account evidence from a date prior to the adoption of … a tax assessment notice is capable of making it excessively difficult to exercise the rights conferred by EU law, in so far as such a refusal restricts the possibility for the taxable person to produce evidence that the substantive conditions for obtaining a VAT exemption are satisfied. National legislation which, at that stage of the tax procedure, does not allow the taxable person to provide evidence which is still outstanding, in order to substantiate the right which [it] claims and

which does not take account of any explanations as to why that evidence was not provided earlier thus appears difficult to reconcile with the principle of proportionality and also with the fundamental principle of VAT neutrality'. (32) Ultimately, the Court left the question of the compatibility of the provisions of national law to be decided by the referring court in the case which led to that judgment.

45. In my view, however, a similar decision would be insufficient in the present case. The procedure for refunding VAT to taxable persons not established in the Member State of refund is laid down in some detail in Directive 2008/9. It would be contrary to the *effet utile* of the harmonisation carried out by the EU legislature to leave the relevant matters – and the effect on a taxable person's right to a refund of failure to comply with the time limit laid down in Article 20(2) of that directive is certainly such a matter – to be determined by the national law of the Member States, subject merely to compliance with the principles of equivalence and effectiveness, subject to review by the national courts.

46. As regards the principle of equivalence, the review of the compatibility of national provisions with it requires an interpretation of those provisions and must therefore be a matter for the courts of the Member States. In the present case, moreover, there is nothing to suggest that that principle has been infringed since the national provisions applicable in this case appear to concern all tax proceedings in general. On the other hand, I believe that the Court should take a firmer position with regard to the compatibility of those provisions with the principle of effectiveness.

47. I would recall that, in accordance with the principle of effectiveness, national provisions adopted in the exercise of Member States' procedural autonomy should not make it excessively difficult or impossible in practice for individuals to assert their rights under EU law. (33) Under the provisions of Hungarian law, a taxable person which has not provided the authority considering its VAT refund application, within the time limit, with the additional information requested by that authority pursuant to Article 20(1) of Directive 2008/9, may not rectify that error by providing it at the stage of appeal against the decision on the application taken by that authority. However, it may, under certain conditions, provide that information in an effective manner in judicial proceedings following a challenge to such a decision. (34) In my view, those provisions make it excessively difficult for taxable persons not established in the Member State of refund to apply for a tax refund.

48. Directive 2008/9 introduces a number of procedural time limits with which both the competent national authorities and the taxable persons concerned are obliged to comply. (35) However, those parties are not in equal positions as regards the rights conferred by the directive, or under EU VAT law more broadly. Those provisions are primarily intended to protect and improve the position of taxable persons, while the tax authorities safeguard the public interest in ensuring the proper functioning of that system. This is particularly important in a VAT system based on the principle of tax neutrality, according to which taxable persons should not, in principle, bear the economic burden of taxation. From that perspective, the time limit laid down in Article 20(2) of Directive 2008/9 serves two purposes in my view. First, it provides a guarantee for taxable persons as to the minimum time left at their disposal by preventing tax authorities from arbitrarily setting excessively short time limits for providing additional information. Secondly, it makes it possible to complete the entire refund application procedure within the time limits laid down in Article 21 of that directive. It is therefore a time limit established in the interests of taxable persons, and not in the interests of the tax authorities.

49. Obviously, as the Court has already noted, procedural time limits also serve the purpose of ensuring that uncertainty as to the taxable person's legal position is not prolonged indefinitely. (36) With regard to the refund of VAT to taxable persons not established in the Member State of refund,

that purpose is served in particular by the period for submitting a refund application laid down in Article 15(1) of Directive 2008/9, which, according to the case-law of the Court, is a limitation period, (37) failure to comply with which results in the loss of the right to a refund. However, allowing a taxable person to provide, at the stage of the administrative appeal proceedings, additional information requested from it by the first-tier authority does not risk prolonging indefinitely the state of uncertainty as to the legal position of that taxable person. Such proceedings are, by their very nature, subject to strict procedural time limits, primarily the time limit for lodging an appeal, and usually come within an easily foreseeable timeframe.

50. I obviously understand that it can be frustrating when a taxable person, which is duly requested by the first-tier authority to provide certain information, without good reason fails to provide it within the time limit and does so only at the stage of appeal proceedings. In such a situation, however, the second paragraph of Article 26 of Directive 2008/9 relieves the Member State of refund of the obligation to pay interest for any delay in paying the amounts due and consequently it is the taxable person which bears the costs of the delay for which it is responsible. I can also imagine national law providing in such cases for the imposition on a negligent taxable person of the additional administrative costs arising from its negligence.

51. However, to make it impossible for a taxable person to provide information in support of its right to a refund after the time limit, despite the fact that there is an opportunity under national law to provide such information, (38) which may result in the taxable person being deprived of that right, is, in my view, disproportionate and contrary to the principle of effectiveness since it makes it excessively difficult, without any apparent need, to exercise that right. I would also recall that what is at issue here is a fundamental right in the common system of VAT, which constitutes the essence of the operating mechanism of that system and which, in principle, cannot be restricted. (39) A restriction of that right on purely formal grounds, where the substantive conditions thereof are met, would therefore also be contrary to Article 170 of Directive 2006/112, under which all taxable persons which meet those substantive conditions have a right to obtain a refund.

52. That conclusion is unchanged by the fact that a taxable person may rely on additional information constituting evidence of its right to obtain a VAT refund in judicial proceedings. This forces the taxable person to contest a decision to refuse a refund (or, as in the present case, to discontinue proceedings) before a court in order to rectify a procedural irregularity of a formal nature, whilst there was a simpler and quicker way of doing so in the administrative appeal proceedings.

53. Furthermore, as I stated in the part of this Opinion where I analyse the second question, the Court held in its judgment in *Sea Chefs Cruise Services* that the period laid down in Article 20(2) of Directive 2008/9 is not a limitation period and consequently a taxable person is entitled to rely, in judicial proceedings, on information which it did not provide within the period laid down in that provision at the request of the authority considering its application for a VAT refund. The same must also apply to administrative appeal proceedings, where national law provides for such proceedings in respect of decisions concerning the refund of VAT to taxable persons not established in the Member State of refund. (40) All the arguments raised by the Court in that judgment are equally applicable to such a procedure. The impossibility of submitting additional information in an administrative appeal procedure, where national law provides for such a procedure, would therefore be contrary to the interpretation of Article 20(2) of Directive 2008/9 adopted by the Court in its judgment in *Sea Chefs Cruise Services*. (41)

54. The foregoing considerations obviously concern the situation where the substantive conditions for the right to obtain a VAT refund are met and the taxable person’s delay in providing the requested additional information is not aimed at fraud or abuse of rights. In a different situation,

the Member States are obviously entitled to apply the measures provided for in their national law to prevent such fraud or abuse of rights. However, as the Court has already had occasion to note, the fact that a taxable person provides additional information only at a later stage of the proceedings does not in itself constitute an abuse of the right. (42)

Answer to the question

55. I propose, therefore, that the answer to the second question referred to the Court should be that Article 170 of Directive 2006/112, Article 20(2) of Directive 2008/9 and the principles of effectiveness and fiscal neutrality must be interpreted as precluding the application of provisions of national law which exclude the possibility of relying, in appeal proceedings, on additional information or documents requested by the first-tier tax authority and provided by the taxable person only at the appeal stage to the second-tier tax authority.

The third question

56. By its third question, the referring court seeks, in essence, to ascertain whether Article 23 of Directive 2008/9 must be interpreted as precluding the application of a provision of national law under which proceedings relating to an application for a refund of VAT to a taxable person established in another Member State are to be discontinued, without the refund application having been considered, where that taxable person has failed to comply with the obligation to provide additional information at the request of the authority considering the application, pursuant to Article 20 of that directive. Although the referring court refers in its question only to Article 23(1) of Directive 2008/9, it is apparent from the clarifications contained in the reference for a preliminary ruling that the referring court wishes to ascertain whether the decision to discontinue proceedings is to be equated with a decision to refuse a tax refund. That issue is governed by the second subparagraph of Article 23(2) of that directive. I propose, therefore, that the subject matter of the third question be deemed to be Article 23 of Directive 2008/9 in its entirety.

57. Article 23(1) of Directive 2008/9 lays down the obligation to state reasons for a decision refusing a VAT refund. Under the first subparagraph of Article 23(2) of that directive, the taxable person must have available the same legal remedies against such a decision as are available under the law of the Member State of refund to national taxable persons. Lastly, the second subparagraph of Article 23(2) of that directive provides that a taxable person established in another Member State should have access to the same administrative or judicial procedures as national taxable persons in the same situation where the failure to take a decision on a refund application does not lead to either the conferral of a right to a refund or a refusal to grant a refund. If, on the other hand, the national law of the State of refund does not lay down such procedures, the failure to take a decision should be regarded as a refusal of a refund.

58. Those provisions must, in my view, be construed as meaning that, in the event that the VAT refund application procedure is terminated without consideration of that application as, for example, in the main proceedings, by a decision to discontinue the procedure on the ground that the taxable person has failed to provide within the time limit the additional information requested from him, the taxable person must have available an effective administrative or judicial remedy which allows it to request reconsideration of its application. I would add that such a decision to discontinue or otherwise terminate proceedings should contain a statement of reasons since that is a condition for the effective exercise of the right to a remedy. However, in the absence of adequate remedies, the termination of the proceedings without consideration of the application must be regarded as a decision to refuse a refund, with all the consequences which flow from Article 23(1) of Directive 2008/9 and the first paragraph of Article 23(2) thereof.

59. That structure of those provisions arises from the special nature of the mechanism for

refunding VAT to taxable persons established in another Member State. Unlike the right of deduction, which the taxable person exercises independently when it pays the tax to the tax authorities, exercise of the right of refund to taxable persons established in another Member State, which is the counterpart of the right of deduction, requires positive action by the Member State of refund in the form of a refund decision and the payment of the appropriate amounts. In that situation, the termination of the procedure without consideration of the application and, consequently, the absence of such a positive decision, are in practice equivalent to a refusal of a refund. Therefore, the taxable person must have available effective remedies against such termination of the procedure.

60. In the context of the present case, it should be added, if the Court endorses my proposed answer to the first and second questions, that the remedies available to a taxable person at the conclusion of proceedings without consideration of the application for a refund must allow the taxable person, inter alia, to rely on the additional information which it did not provide within the time limit at the request of the authority considering the application, pursuant to Article 20 of Directive 2008/9. Otherwise, termination of the refund procedure without consideration would make it impossible for the taxable person to rectify an error in the form of failure to comply with the period for submitting the additional information and that period would itself become mandatory, contrary to the Court's decision in its judgment in *Sea Chefs Cruise Services*.

61. I propose, therefore, that the answer to the third question referred to the Court should be that Article 23 of Directive 2008/9 must be interpreted as not precluding the application of a provision of national law under which proceedings relating to an application for a refund of VAT to a taxable person established in another Member State are discontinued without consideration of the refund application where that taxable person has failed to comply with its obligation to provide additional information at the request of the authority considering the application, pursuant to Article 20 of that directive, provided that there is an effective procedure under national law for appealing against the decision to discontinue the proceedings, allowing the taxable person, in particular, to rely, in the course thereof, on the additional information which it did not provide within the time limit in the discontinued proceedings. Otherwise, the decision to discontinue proceedings should be regarded as a decision to refuse a refund.

Conclusion

62. In view of all the foregoing considerations, I propose the following answers to the questions referred to the Court by the F?városi Törvényszék (Budapest High Court, Hungary):

(1) Article 20(2) 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

must be interpreted as meaning that the one-month period laid down therein for providing additional information at the request of the authority considering a value added tax (VAT) refund application submitted by a taxable person established in another Member State cannot be considered mandatory.

(2) Article 170 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, as amended by Council Directive 2008/8/EC of 12 February 2008, Article 20(2) of Directive 2008/9, and also the principles of effectiveness and fiscal neutrality

must be interpreted as precluding the application of provisions of national law which exclude the possibility of relying, in appeal proceedings, on additional information or documents requested by the first-tier tax authority and provided by the taxable person only at the appeal stage to the

second-tier tax authority.

(3) Article 23 of Directive 2008/9

must be interpreted as not precluding the application of a provision of national law under which proceedings relating to an application for a refund of VAT to a taxable person established in another Member State are discontinued without consideration of the refund application where that taxable person has failed to comply with its obligation to provide additional information at the request of the authority considering the application, pursuant to Article 20 of that directive, provided that there is an effective judicial procedure under national law for appealing against the decision to discontinue the proceedings, allowing the taxable person, in particular, to rely, in the course thereof, on the additional information which it did not provide within the time limit in the discontinued proceedings. Otherwise, the decision to discontinue proceedings should be regarded as a decision to refuse a refund.

1 Original language: Polish.

2 See, in particular, judgments of 21 June 2012, *Elsacom* (C?294/11, EU:C:2012:382); of 2 May 2019, *Sea Chefs Cruise Services* (C?133/18, 'judgment in *Sea Chefs Cruise Services*', EU:C:2019:354); of 17 December 2020, *Bundeszentralamt für Steuern* (C?346/19, EU:C:2020:1050); and of 9 September 2021, *GE Auto Service Leasing* (C?294/20, 'judgment in *GE Auto Service Leasing*', EU:C:2021:723).

3 OJ 2006 L 347, p. 1.

4 OJ 2008 L 44, p. 11.

5 Council Directive 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).

6 *Magyar Közlöny* 2007/155 (XI. 16.).

7 *Magyar Közlöny* 2017/192.

8 *Magyar Közlöny* 2017/30.

9 In its observations, SES explains the reasons for not responding to the first-tier tax authority's request. However, I do not believe that those reasons are relevant to the answer to the questions referred in the present case. In any event, there is nothing in the main proceedings to indicate that SES attempted to abuse its right to obtain a VAT refund.

10 The Council's observations are made in the event that the request for a preliminary ruling in the present case is to be understood as a request to examine the validity of Article 20(2) of Directive 2008/9 in the light of Article 47 of the Charter.

11 Judgment in *Sea Chefs Cruise Services*, operative part.

12 Judgment in *Sea Chefs Cruise Services*, paragraphs 39 to 41 and 43 to 46.

13 Judgment in *Sea Chefs Cruise Services*, paragraph 42.

14 Judgment in *Sea Chefs Cruise Services*, paragraph 48.

15 See, in particular, judgment in *Sea Chefs Cruise Services*, paragraph 48.

16 Judgment in *GE Auto Service Leasing*, point 1 of the operative part.

17 Eighth Council Directive of 6 December 1979 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 the territory of the country (OJ 1979 L 331, p. 11).

18 That time limit is mandatory – see judgment of 21 June 2012, *Elsacom* (C?294/11, EU:C:2012:382, operative part).

19 Judgment in *GE Auto Service Leasing*, paragraph 54.

20 As the Court itself observed – see judgment in *Sea Chefs Cruise Services*, paragraph 44.

21 A one-month period for providing information or documents which are held by a taxable person under normal circumstances as they concern its economic activity does not appear to be excessively strict.

22 See, to that effect, most recently, judgment of 20 May 2021, *Dickmanns* v *EUIPO* (C?63/20 P, EU:C:2021:406, paragraphs 58 and 60).

23 See, to that effect, judgment in *Sea Chefs Cruise Services*, paragraphs 34 to 36.

24 See, to that effect, judgment of 17 December 2020, *Bundeszentralamt für Steuern* (C?346/19, EU:C:2020:1050, paragraphs 47 and 48).

25 See, to that effect, judgment in *GE Auto Service Leasing*, paragraph 60.

26 See, to that effect, judgment in *GE Auto Service Leasing*, paragraph 59.

27 Judgment in *Sea Chefs Cruise Services*, operative part.

28 Judgment in *GE Auto Service Leasing*.

29 Judgment of 2 March 2023, *Nec Plus Ultra Cosmetics* (C?664/21, EU:C:2023:142, operative part).

30 Within the meaning of the case-law referred to in point 39 of this Opinion.

31 See judgment in *GE Auto Service Leasing*, paragraph 61.

32 Judgment of 2 March 2023, *Nec Plus Ultra Cosmetics* (C?664/21, EU:C:2023:142, paragraph 37).

33 See, to that effect, judgment in *GE Auto Service Leasing*, paragraph 59.

34 See the discussion of the provisions of national law in points 8 and 9 of this Opinion.

35 See also recital 2 of that directive.

36 See, to that effect, judgment in *GE Auto Service Leasing*, paragraph 60.

37 See judgment in *Sea Chefs Cruise Services*, paragraph 39 and the case-law cited.

38 Namely the procedure for appealing against a decision of the first-tier tax authority.

39 See the case-law cited in points 38 and 39 of this Opinion.

40 As I have already stated in point 24 of this Opinion.

41 As I have already stated in points 26 to 30 of this Opinion, that interpretation is not undermined by the subsequent judgment in *GE Auto Service Leasing*, delivered on the basis of other, less detailed provisions of EU law.

42 See, to that effect, judgment in *GE Auto Service Leasing*, point 2 of the operative part.