



Reports of Cases

JUDGMENT OF THE COURT (Seventh Chamber)

6 July 2017*

(Reference for a preliminary ruling — Common system of value added tax (VAT) — Directive 2006/112/EC — Article 183 — Principle of fiscal neutrality — Deduction of input tax — Refund of overpaid VAT — Investigation procedure — Fine imposed on the taxable person in the course of such a procedure — Extension of the period within which the refund must be made — Exclusion of payment of default interest)

In Case C-254/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Fővárosi Közigazgatási és Munkaügyi Bíróság (Administrative and Labour Court, Budapest, Hungary), made by decision of 24 March 2016, received at the Court on 3 May 2016, in the proceedings

Glencore Agriculture Hungary Kft., formerly Glencore Grain Hungary Kft.,

v

Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatóság

THE COURT (Seventh Chamber),

composed of A. Prechal, President of the Chamber, A. Rosas and E. Jarašiūnas (Rapporteur), Judges,

Advocate General: M. Wathelet,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Glencore Agriculture Hungary Kft., formerly Glencore Grain Hungary Kft., by D. Kelemen and Z. Várszegi, ügyvédek,
- the Hungarian Government, by M.Z. Fehér and G. Koós and by A.M. Pálfy, acting as Agents,
- the Czech Government, by J. Vláčil and M. Smolek, acting as Agents,
- the European Commission, by L. Lozano Palacios and by L. Havas, acting as Agents,

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

* Language of the case: Hungarian.

gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 183 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1, ‘the VAT Directive’).
- 2 The request has been made in proceedings between Glencore Agriculture Hungary Kft., formerly Glencore Grain Hungary Kft. (‘Glencore’), and Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatóság (Appeals Directorate of the National Tax and Customs Administration, Hungary) (‘the tax authority’) concerning the payment of default interest relating to the refund of overpaid value added tax (VAT).

Legal context

EU law

- 3 Article 183 of the VAT Directive provides:

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

...’

Hungarian law

- 4 As stated in the order for reference, Article 37(4) of the adózás rendjéről szóló 2003. évi XCII. törvény (Law No XCII of 2003 on the Code of fiscal procedure, *Magyar Közlöny* 2003/131 (XI. 14.), ‘Code of fiscal procedure’) provides that the disbursement of budgetary aid due to a taxpayer is to be governed by the schedules to that law or by separate legislation. Budgetary aid and the VAT claimed must be disbursed after the date on which the application or the tax return was received, no earlier than 30 days following the date for the payment of budgetary aid and within 75 days of the date for the payment of the VAT. If budgetary aid is confirmed by the tax authority, that aid is to be granted within 30 days following the entry into force of the relevant decision taken in that regard.
- 5 Article 37(4)(c) of the Code of fiscal procedure provides that if an investigation concerning the legality of a disbursement claim commences within 30 days of the application (tax return) being received and if a fine is imposed for obstructing the investigation or the person concerned has received a warrant to appear before a court, the period for disbursement is to be calculated as of the date on which the formal report on the findings of the investigation was delivered.
- 6 Under Article 37(6) of that code, if the tax authority is late in paying a refund, it is to pay interest on such an amount for each day of delay calculated in accordance with the rate of default interest. However, no interest is to be paid for late payment if a refund was delayed as a result of negligence on the part of the taxpayer or the person subject to compulsory data disclosure.

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

- 7 Glencore is an undertaking subject to VAT operating in the grain trade. It lodged an application for a refund with the tax authority for overpaid VAT in the amount of HUF 4 485 975 000 (Hungarian forint) (approximately EUR 12.4 million) in respect of input VAT paid in September 2011.
- 8 Following that application and prior to the refund claimed, the tax authority initiated an investigation procedure concerning the legality of the claim. In connection with that investigation, the tax authority sent Glencore numerous requests for data disclosure and imposed three fines on the ground of delay in responding to some of its requests, since the delay in its replies was, according to that authority, found to have obstructed the conduct of the investigation.
- 9 On 13 November 2013, the tax authority paid Glencore HUF 1 858 301 000 (approximately EUR 5.9 million) as a partial refund of the overpaid VAT. Glencore requested that authority to pay it HUF 411 910 990 (approximately EUR 1.3 million) as default interest for the period from 4 December 2011, the date on which, according to Glencore, the period for refunding the overpaid VAT expired, to 13 November 2013.
- 10 The tax authority rejected the request on the ground that Glencore was fined for obstruction of the investigation of the legality of the claim for a refund and that, consequently, under the applicable Hungarian legislation, the period for a refund of the overpaid VAT and, if applicable, any default interest were to be calculated from the date of the delivery of the formal report containing the findings of the investigation. Accordingly, that authority took the view that there had not been any late payment and, since it was as a result of failure to disclose the data requested that the conduct of the investigation and the refund of overpaid VAT had been obstructed, Glencore was not entitled to default interest.
- 11 On 5 November 2015, Glencore brought an action before the Fővárosi Közigazgatási és Munkaügyi Bíróság (Administrative and Labour Court, Budapest, Hungary) challenging the decision of the tax authority refusing its application.
- 12 Glencore submitted before that court that the Hungarian legislation, under which the payment of default interest is calculated from the delivery of the formal report closing the investigation procedure relating to the refund of overpaid VAT, is contrary to EU law, in particular, to the principles of proportionality, legal certainty and fiscal neutrality. According to Glencore, the investigation procedure at issue in the main proceedings took more than two years for reasons which were not connected with the late disclosure of the documents requested, but principally with the actions of the tax authority. In addition, the tax authority compelled Glencore to disclose to it a large quantity of data within the first two weeks of that investigation procedure and, upon each request, gave it only three working days in which to disclose the data. According to Glencore, the tax authority should have refunded the VAT claimed within the 45 day period laid down in Article 37 of the Code of fiscal procedure for claims exceeding HUF 500 000 (approximately EUR 1 600). Failing such a refund, that authority was required to pay it default interest. The principle of fiscal neutrality requires that a taxable person may obtain a refund of overpaid VAT within a reasonable period and that the time of that refund cannot be influenced by procedural acts of a tax authority.
- 13 The tax authority maintained that Glencore's action should be dismissed on the ground that the imposition of the fines for the late disclosure of documents necessary to a tax investigation was a result of the wrongful conduct of Glencore and that it is due to Glencore's negligence that the period for the refund of the overpaid VAT was extended.
- 14 The referring court notes that the Court has previously held that the principle of neutrality precludes Member States from making refunds of overpaid VAT subject to conditions which impose an additional burden on taxable persons by affecting their financial situation, that the Member States

must ensure that a refund is made within a reasonable period of time and that the conditions governing the refund do not themselves give rise to any financial risk for the taxable person. According to the referring court, the Court has also held that taxable persons who were refunded overpaid VAT after a period which could not be described as reasonable are entitled to default interest and that it is for the legal order of each Member State to lay down the conditions under which such interest must be paid, whilst adhering to the principles of equivalence and effectiveness.

- 15 However, the referring court takes the view that the Court's case-law does not contain sufficiently clear indications, in particular, as to the consequences of fines imposed by a tax authority, such as that at issue in the main proceedings. It considers that to refund Glencore the overpaid VAT within an approximately two-year period, rather than within the normal period of 45 days, infringes the principle of proportionality and, consequently, that Glencore's claim for default interest must be upheld. The referring court also considers that the fact that the tax authority, by an abusive literal interpretation of the relevant national law, may, by imposing a fine on a taxable person for non-compliance with a duty of disclosure, continue tax investigations without any time limit and without being required to pay default interest amounts to an infringement of that principle.
- 16 In those circumstances, the Fővárosi Közigazgatási és Munkaügyi Bíróság (Administrative and Labour Court, Budapest) decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:
- (1) Must Article 183 of [the VAT Directive] be interpreted as precluding national legislation under which the period within which overpaid VAT must be refunded is to be extended up to the date on which the report drawn up following an investigation is delivered in the case where, in the course of a tax investigation procedure initiated within 30 days from the receipt of the application for a refund, a fine is imposed on the taxable person for non-compliance with an obligation?
- (2) Having regard to the principles of fiscal neutrality and proportionality, does Article 183 of [the VAT Directive] preclude national legislation under which, in the event of late payment of a sum, payment of default interest is excluded in the case where, in the context of an investigation concerning the refund of that sum, the taxable person was fined by the authority in connection with the obligation to cooperate, even though the investigation, which lasted several years, was significantly delayed for reasons which cannot principally be attributed to the taxable person?
- (3) Must Article 183 of [the VAT Directive] and the principle of effectiveness be interpreted as meaning that a claim for payment of interest in connection with tax withheld or not allocated contrary to EU law is a substantive right which flows directly from EU law itself, such that an infringement of EU law is sufficient for a right to interest to be claimed before the courts and other authorities of the Member States?
- (4) If, in the light of the answers given to the preceding questions, the referring court should conclude that the domestic legislation of the Member State is incompatible with Article 183 of the VAT Directive, would it be acting in accordance with EU law if it were to take the view that the refusal, in the decisions of the Member State's authorities, to pay default interest was incompatible with Article 183 of the VAT Directive?

Consideration of the questions referred

- 17 By its questions, which it is appropriate to consider together, the referring court asks, in essence, whether EU law must be interpreted as precluding national legislation, such as that at issue in the main proceedings, under which, where a tax investigation procedure is initiated by a tax authority and where a taxable person is fined for failure to cooperate, the date of the refund of overpaid VAT may be delayed until the formal report on that investigation is delivered to the taxable person and the

payment of default interest may be refused, even where the duration of the tax investigation procedure is excessive and cannot be attributed entirely to the conduct of the taxable person. If so, the referring court asks what are its obligations, as regards EU law, in disposing of the case in the main proceedings.

- 18 As a preliminary point, it should be noted that although Article 183 of the VAT Directive does not lay down any obligation to pay interest on a refund of overpaid VAT or the date from which such interest is payable, it cannot be concluded from that fact alone that that article must be interpreted as meaning that no control may be exercised under EU law over the procedures established by Member States for the refund of overpaid VAT (judgments of 12 May 2011, *Enel Maritsa Iztok 3*, C-107/10, EU:C:2011:298, paragraphs 27 and 28, and of 24 October 2013, *Rafinăria Steaua Română*, C-431/12, EU:C:2013:686, paragraph 19).
- 19 It follows from the Court's case-law that some specific rules must be complied with by the Member States in implementing the right to a refund of overpaid VAT arising from Article 183 of the VAT Directive, interpreted in the light of the general context and principles governing VAT (see judgment of 24 October 2013, *Rafinăria Steaua Română*, C-431/12, EU:C:2013:686, paragraph 21 and the case-law cited).
- 20 The Court has thus held that the conditions for the refund of overpaid VAT laid down by a Member State must not undermine the principle of fiscal neutrality by making the taxable person bear the burden of the VAT in whole or in part. In particular, such conditions must enable the taxable person, in appropriate circumstances, to recover the entirety of the credit arising from that overpayment of VAT. This implies that the refund be made within a reasonable period of time and that, in any event, the method of refund adopted must not entail any financial risk for the taxable person (judgments of 12 May 2011, *Enel Maritsa Iztok 3*, C-107/10, EU:C:2011:298, paragraph 33; of 28 July 2011, *Commission v Hungary*, C-274/10, EU:C:2011:530, paragraph 45; and order of 17 July 2014, *Delphi Hungary Autóalkatrész Gyártó*, C-654/13, not published, EU:C:2014:2127, paragraph 31).
- 21 That period of time may, as a general rule, be extended in order to carry out a tax investigation and there is no need for such an extended period to be regarded as unreasonable provided that the extension does not go beyond what is necessary for the successful completion of the investigation (judgment of 12 May 2011, *Enel Maritsa Iztok 3*, C-107/10, EU:C:2011:298, paragraph 53).
- 22 Where the refund of the overpaid VAT to the taxable person is not made within a reasonable period, the principle of fiscal neutrality of the VAT system requires that the financial losses incurred by the taxable person owing to the unavailability of the sums of money at issue should be compensated through the payment of default interest (judgment of 24 October 2013, *Rafinăria Steaua Română*, C-431/12, EU:C:2013:686, paragraph 23).
- 23 It also follows from the Court's case-law that the calculation of the interest payable by the Treasury which does not take as its starting point the date on which the overpaid VAT would have had to be repaid in the normal course of events in accordance with the VAT Directive is, in principle, contrary to the requirements of Article 183 of that directive (judgments of 12 May 2011, *Enel Maritsa Iztok 3*, C-107/10, EU:C:2011:298, paragraph 51, and of 24 October 2013, *Rafinăria Steaua Română*, C-431/12, EU:C:2013:686, paragraph 24).
- 24 In addition, legislation which empowers the tax authorities to instigate a tax investigation at any time, including at a date close to that on which the period for refunding overpaid VAT expires, thus making it possible to extend considerably the period in which the refund is to be made, not only exposes the taxable person to financial disadvantages, but also places the taxable person in a position in which he is unable to predict the date from which funds corresponding to the overpaid VAT will be available to him, which entails an additional burden for that person (see order of 21 October 2015, *Kovozber*, C-120/15, not published, EU:C:2015:730, paragraph 27).

- 25 It follows from the foregoing that, in a situation such as that at issue in the main proceedings, although the period for the refund of overpaid VAT may be delayed until the delivery to the taxable person of the formal report closing the tax investigation procedure to which he has been subject, it is on the condition that that procedure does not result in an extension of that period beyond what is necessary for the successful completion of the procedure. If the duration of the procedure is excessive, the taxable person may not be deprived of default interest.
- 26 Since the referring court raises, in that regard, the issue of the implications of the conduct of a taxable person whose negligence during a tax investigation procedure was penalised by several fines, it should be noted that, indeed, as the Hungarian Government claims, it cannot be accepted that a taxable person who, by refusing to cooperate with a tax authority and by thus impeding the conduct of the investigation procedure, caused the delay in the refund of overpaid VAT, may claim default interest for that delay.
- 27 Nevertheless, national legislation or practices according to which the mere fact that a taxable person has been fined due to his negligence during a tax investigation to which he was subject allows the tax authority to extend that investigation over a period not justified by that negligence, without having to pay him default interest, cannot be considered to be compatible with the requirements arising from the principle of fiscal neutrality.
- 28 Accordingly, in a situation such as that at issue in the main proceedings, for the purposes of determining whether default interest is due and, where relevant, the point in time from which the right to such interest arises, the proportion of the duration of the tax investigation procedure which can be attributed to the conduct of the taxable person must be ascertained.
- 29 In the present case, according to the documents in the case-file before the Court, the first partial refund of the overpaid VAT, corresponding to September 2011, took place only on 13 November 2013, that is to say almost two years after the expiry of the period of time ordinarily laid down for the payment in the Hungarian legislation.
- 30 Glencore states, in its written observations, that the tax authority initiated the investigation procedure concerning the legality of its application for a refund of overpaid VAT at a date very close to the expiry of the time period laid down in the Hungarian legislation for that refund. Glencore also notes that the tax authority imposed on it an initial fine 41 days after it had lodged its VAT return, whereas the first partial payment, at issue before the referring court, was made 755 days after that tax return had been lodged and that the formal report containing the findings of the tax investigation conducted was delivered 539 days after the last request of the tax authority for the taxable person to disclose certain documents to it.
- 31 The referring court states that the Hungarian legislation does not provide for the actual impact on the duration of the tax investigation procedure of the conduct of a taxable person who has been fined to be taken into account for the purposes of determining whether default interest is payable. It also states that the tax authority may, where relevant, continue such a procedure for a long time without being required to pay the taxable person default interest.
- 32 It is clear that such national legislation may, in the event of initiation of an investigation procedure and the imposition of a fine on a taxable person, have the effect, during that procedure, of depriving the taxable person of funds corresponding to the overpaid VAT for a long time, preventing him from predicting the date at which those funds will be available to him and precluding his right to default interest.

- 33 Such legislation is not in conformity with the requirements arising from the principle of fiscal neutrality, set out in paragraphs 20 to 22 above, according to which overpaid VAT must be refunded within a reasonable period and, if that is not the case, the financial loss thereby caused to the detriment of the taxable person must be compensated by the payment of default interest.
- 34 As regards the obligations of the referring court, it should be noted that when national courts apply domestic law they are bound to interpret that law, so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive and, consequently, to comply with the third paragraph of Article 288 TFEU. This obligation to interpret national law in conformity with EU law is inherent in the system of the Treaty on the Functioning of the European Union, since it permits national courts, for the matters within their jurisdiction, to ensure the full effectiveness of EU law when they determine the disputes before them (see, *inter alia*, judgment of 11 April 2013, *Rusedespred*, C-138/12, EU:C:2013:233, paragraph 37 and the case-law cited).
- 35 In accordance with equally settled case-law, being called upon, within the exercise of its jurisdiction, to apply provisions of EU law, a national court must give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national law, and it is not necessary for that court to request or to await the prior setting aside of that provision of national law by legislative or other constitutional means (judgment of 5 July 2016, *Ognyanov*, C-614/14, EU:C:2016:514, paragraph 34 and the case-law cited).
- 36 Having regard to all of the foregoing considerations, the answer to the questions referred is that EU law must be interpreted as precluding national legislation, such as that at issue in the main proceedings, under which, where a tax investigation procedure is initiated by a tax authority and where a taxable person is fined for failure to cooperate, the date of the refund of overpaid VAT may be delayed until the formal report on that investigation is delivered to the taxable person and the payment of default interest may be refused, even where the duration of the tax investigation procedure is excessive and cannot be attributed entirely to the conduct of the taxable person.

Costs

- 37 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 (Seventh Chamber) hereby rules:

EU law must be interpreted as precluding national legislation, such as that at issue in the main proceedings, under which, where a tax investigation procedure is initiated by a tax authority and where a taxable person is fined for failure to cooperate, the date of the refund of overpaid value added tax may be delayed until the formal report on that investigation is delivered to the taxable person and the payment of default interest may be refused, even where the duration of the tax investigation procedure is excessive and cannot be attributed entirely to the conduct of the taxable person.

[Signatures]