Reports of Cases

ORDER OF THE COURT (Sixth Chamber)

3 March 2021 *

(Reference for a preliminary ruling – Common system of value added tax (VAT) – Directive 2006/112/EC – Article 90 – Reduction of the taxable amount – Total or partial non-payment of the price – Debt which has become definitively irrecoverable – Limitation period regarding applications for a subsequent reduction in the taxable amount of VAT – Date on which time starts to run)

In Case C-507/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Pécsi Törvényszék (High Court, Pécs, Hungary), made by decision of 17 September 2020, received at the Court on 8 October 2020, in the proceedings

FGSZ Földgázszállító Zrt.

v

Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága

THE COURT (Sixth Chamber),

composed of L. Bay Larsen, President of the Sixth Chamber, C. Toader (Rapporteur) and M. Safjan, Judges,

Advocate General: J. Kokott,

Registrar: Calot Escobar,

having regard to the decision taken, after hearing the Advocate General, to give a decision by reasoned order, in accordance with Article 99 of the Rules of Procedure of the Court of Justice,

makes the following

* Language of the case: Hungarian.

Order

1 This reference for a preliminary ruling concerns the interpretation of Article 90 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') and the principles of fiscal neutrality, effectiveness, equivalence and proportionality.

2 The application has been made in proceedings between FGSZ Földgázszállító Zrt., a Hungarian trading company ('FGSZ'), and Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága (Appeals Directorate of the National Tax and Customs Administration, Hungary ('the Appeals Directorate'), concerning the latter's refusal to grant FGSZ the right to a reduction in the taxable amount of value added tax (VAT) equal to the consideration for the VAT it did not receive as a result of the debtor's insolvency.

Legal context

European Union law

3 Article 90 of the VAT Directive provides:

'1. In the case of cancellation, refusal or total or partial non-payment, or where the price is reduced after the supply takes place, the taxable amount shall be reduced accordingly under conditions which shall be determined by the Member States.

2. In the case of total or partial non-payment, Member States may derogate from paragraph 1.'

4 Under Article 185 of that directive:

'1. Adjustment shall, in particular, be made where, after the VAT return is made, some change occurs in the factors used to determine the amount to be deducted, for example where purchases are cancelled or price reductions are obtained.

2. By way of derogation from paragraph 1, no adjustment shall be made in the case of transactions remaining totally or partially unpaid or in the case of destruction, loss or theft of property duly proved or confirmed, or in the case of goods reserved for the purpose of making gifts of small value or of giving samples, as referred to in Article 16.

However, in the case of transactions remaining totally or partially unpaid or in the case of theft, Member States may require adjustment to be made.'

5 Article 273, first paragraph, of that directive provides:

'Member States may impose other obligations which they deem necessary to ensure the correct collection of VAT and to prevent evasion, subject to the requirement of equal treatment as between domestic transactions and transactions carried out between Member States by taxable persons and provided that such obligations do not, in trade between Member States, give rise to formalities connected with the crossing of frontiers.'

Hungarian law

6 The az adózás rendjéről 2003. évi XCII. törvény (Law No XCII of 2003 on the Code on Tax Procedure) [*Magyar Közlöny* 2003/131. (XI. 14., p. 9990)] (the 'former Code on Tax Procedure'), which is applicable to the facts in the dispute in the main proceedings, provides in substance, in Article 4(3)(b), that the refund of VAT must be treated as budgetary aid and is therefore subject to the statutes of limitation applicable to budgetary aid.

7 Article 164(1) of Law No XCII 2003, the wording of which was taken over from Article 202(1) of the Tax Procedure Code, provides, in substance, that the right to apply for budgetary aid is time-barred after the expiry of a five-year period starting from the year in which the right to make such an application arose.

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

8 Between October 2010 and January 2011, FGSZ sent EMFESZ Kft., a partner company ('the debtor company'), several invoices including VAT. During 2011, FGSZ declared and paid the VAT on those invoices to the tax authority.

9 Before those invoices were paid, the debtor company was subject to winding up proceedings, including the proceedings commenced on 28 January 2014 by the Fővárosi Törvényszék (Budapest-Capital Court, Hungary). The debt arising from those invoices was declared by FGSZ, since on 7 May 2018, the liquidator of the debtor company confirmed its admissibility. On 13 December 2019, the liquidator recorded that the debt had become irrecoverable.

10 On 19 December 2019, FGSZ filed an application for the recovery of the VAT in respect of those invoices and for the payment of interest for late payment.

11 By decision of 24 January 2020, the first tier tax authority refused to grant that request, on the ground that the limitation period of five years provided for by national law had expired on 31 December 2016.

12 FGSZ lodged a complaint against that rejection decision before the Appeals Department, which was dismissed on 3 March 2020. The Appeals Directorate pointed out that, although Article 90(1) of the VAT Directive provides that the taxable amount is to be reduced where, as in the main proceedings, the VAT relating to invoices has not been paid, it is, however, for the Member States to determine the conditions under which that reduction is to be made. On that basis, it took the view that Member States could provide that the right to obtain a reduction of the taxable amount was subject to a limitation period. According to the Appeals Division, that period should start to run from the date on which the payment obligation is to be performed, that is the date mentioned in the invoices.

13 FGSZ brought an action against the decision of 3 March 2020 before the referring court. It argued, essentially, on the basis of the judgments of 21 March 2018, *Volkswagen* (C-533/16, EU:C:2018:204), and of 12 April 2018, *Biosafe – Indústria de Reciclagens* (C-8/17, EU:C:2018:249), that the limitation period should begin to run, not from the date on which the payment obligation originally provided for was to be fulfilled, but from the date on which the debt became irrecoverable.

14 Taking the view that the case before it raised questions concerning the interpretation of EU law, the Pécsi Törvényszék (Pécs High Court) decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'Does the practice of a Member State, pursuant to which the latter, relying on the *ex tunc* effects of the reduction applicable to the taxable amount in the event of definitive non-payment in accordance with Article 90(1) of the [VAT] Directive, calculates the general limitation period of five years during which the reduction may be applied to the taxable amount, laid down by that Member State, from the time of the initial supply of goods and not from the time when the debt concerned has become irrecoverable and, relying on the expiry of that limitation period, deprives the taxable person acting in good faith of its right to a reduction of the taxable amount in the case of debts which have become definitively irrecoverable, in circumstances in which a number of years may have elapsed between the time the goods were supplied and the time when the debt became definitively irrecoverable and in which, at the time when the debt became definitively irrecoverable, the Member State's legislation, unlike EU law, did not permit the reduction of the taxable amount in the case of debts that had become definitively irrecoverable, comply with the fundamental principles of proportionality, fiscal neutrality and effectiveness, particularly in the light of point 63 of the Opinion of Advocate General Kokott in *Biosafe – Indústria de Reciclagens* [(C-8/17, EU:C:2017:927)], paragraph 27 of the judgment [of 23 November 2017, *Di Maura* (C-246/16, EU:C:2017:887)] and paragraph 36 of the judgment [of 22 February 2018, *T-2* (C-396/16, EU:C:2018:109)], and having regard to the fact that a Member State may not charge an amount of VAT exceeding that paid by the supplier of goods or services in respect of the goods or services supplied?'

Consideration of the question referred

15 By its question, the national court asks, in essence, whether Article 90 of the VAT Directive, read in conjunction with the principles of fiscal neutrality, effectiveness and proportionality, must be interpreted as meaning that, where a Member State provides for a limitation period at the end of which the taxable person, who has a debt which has become definitively irrecoverable, can no longer assert his right to a reduction of the tax base, that period must begin to run from the date of performance of the payment obligation initially provided for or from the date on which the debt has become definitively irrecoverable.

16 Pursuant to Article 99 of its Rules of Procedure, where the answer to a question referred to the Court for a preliminary ruling may be clearly deduced from existing case-law, the Court may at any time, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, give its decision by reasoned order.

17 In the present case, that provision must be applied.

18 First of all, it should be recalled that Article 90(1) of the VAT Directive refers to cases of cancellation, termination, rescission, total or partial non-payment or price reduction after the time when the transaction which gave rise to the payment of the tax is carried out. That provision requires the Member States to reduce the taxable amount and, consequently, the amount of VAT payable by the taxable person whenever, after a transaction has been concluded, part or all of the consideration has not been received by the taxable person. That provision embodies one of the fundamental principles of that Directive, the principle of fiscal neutrality, according to which the taxable amount is the consideration actually received and the corollary of

which is that the tax authorities may not collect an amount of VAT exceeding the tax which the taxable person received (order of 24 October 2019, *Porr Építési Kft*, C-292/19, unpublished, EU:C:2019:901, paragraph 19 and the case-law cited, as well as judgment of 15 October 2020, *E. (VAT – Reduction of the taxable amount)*, C-335/19, EU:C:2020:829, paragraph 21 and the case-law cited).

19 Having regard to the wording of Article 90(1) of the VAT Directive, read in conjunction with that of Article 273 thereof, and the principle of fiscal neutrality, the formalities to be complied with by taxable persons in order to exercise, vis-à-vis the tax authorities, the right to reduce the taxable amount for VAT must be limited to those which make it possible to provide proof that, after the transaction has been concluded, part or all of the consideration will definitively not be received (see, to that effect, judgment of 15 October 2020, *E. (VAT – Reduction of the taxable amount)*, C-335/19, EU:C:2020:829, paragraphs 22 to 25 and the case-law cited).

20 Second, Article 90(2) of the VAT Directive allows Member States to derogate from the rule referred to in Article 90(1) thereof in situations of total or partial non-payment of the transaction price. In that regard, the Court has had the opportunity to clarify that the exercise of that power to derogate cannot allow Member States to exclude altogether reduction of the taxable amount of VAT in the event of non-payment. That power is only intended to enable the Member States to counteract the uncertainty as to the non-payment of an invoice or the definitive nature of that non-payment, and does not resolve the issue of whether a reduction of the taxable amount might not be carried out in the case of non-payment (see, to that effect, judgment of 15 October 2020, *E. (VAT – Reduction of the taxable amount)*, C-335/19, EU:C:2020:829, paragraphs 29 and 30 and the case-law cited).

21 In the present case, on 13 December 2019, the irrecoverable nature of the debt held by FGSZ as a result of the total non-payment of the invoices by the debtor company was established. On 19 December 2019, FGSZ filed an application for VAT recovery in respect of those invoices.

22 It follows that, at the date on which the application was made, the debt was established as being definitively irrecoverable.

23 Secondly, it follows from the case-law of the Court that the possibility of applying for the refund of VAT without any temporal limit would be contrary to the principle of legal certainty, which requires that the tax position of the taxable person, having regard to his rights and obligations vis-à-vis the tax authority, not be open to challenge indefinitely. While the existence of a limitation period, the expiry of which results in a creditor no longer being able to apply for a reduction of the taxable amount of VAT in respect of certain claims, cannot be regarded as incompatible with the VAT Directive, the determination of the date from which that period begins to run is a matter for national law, subject to compliance with the principles of equivalence and effectiveness (see, to that effect, judgments of 21 January 2010, *Alstom Power Hydro*, C-472/08, EU:C:2010:32, paragraphs 16 and 17 and the case-law cited, and of 12 April 2018, *Biosafe – Indústria de Reciclagens*, C-8/17, EU:C:2018:249, paragraphs 36 and 37 and the case-law cited).

24 As regards the principle of equivalence, the Court does not have before it any evidence which might raise doubts as to the compatibility of the legislation at issue in the main proceedings with that principle.

25 With regard to the principle of effectiveness, the Court ruled, with regard to Article 185 of the VAT Directive, which the Court held must be interpreted consistently with Article 90 thereof (judgment of 22 February 2018, *T-2*, C-396/16, EU:C:2018:109, paragraph 35), that, in so far as the taxable person has not shown a lack of diligence, and in the absence of abuse or fraudulent collusion, a time limit which began to run from the date of issue of the initial invoices and, for certain transactions, expired before that adjustment, cannot validly preclude the exercise of the right to reduce VAT (see, to that effect, judgment of 12 April 2018, *Biosafe – Indústria de Reciclagens*, C-8/17, EU:C:2018:249, paragraph 43, and the case-law cited).

26 A condition relating to the detailed rules for calculating the time limit from the date of issue of the initial invoices cannot be justified by the need to take account of the uncertainty as to whether the debt is definitively irrecoverable (see, to that effect, judgment of 15 October 2020, *E. (VAT – Reduction of the taxable amount)*, C-335/19, EU:C:2020:829, paragraphs 33 to 35 and 44).

27 It must be recalled, in that regard, that the Court has already ruled that Union law precludes legislation of a Member State under which the benefit of the right to reimbursement of VAT to a taxable person is refused on the ground that the limitation period provided for in that legislation for the exercise of that right began to run from the date of supply of the goods and expired before the application for reimbursement was submitted (judgment of 21 March 2018, *Volkswagen*, C-533/16, EU:C:2018:204, paragraph 51), or that that period began to run from the date of issue of the initial invoices and then expired (judgment of 12 April 2018, *Biosafe – Indústria de Reciclagens*, C-8/17, EU:C:2018:249, paragraph 44).

28 It follows that, where a Member State has provided that the right of a creditor to obtain the reduction of the taxable amount referred to in Article 90 of the VAT Directive is subject to a limitation period, that period must begin to run not from the date of performance of the payment obligation originally provided for, but from the date on which the debt has become definitively irrecoverable.

29 In the present case, although the national legislation at issue in the main proceedings provides for a five-year limitation period, starting from the year in which the right to bring such an action arose, it is apparent from the information provided by the national court that FGSZ brought an action for recovery of VAT on 19 December 2019, that is six days after the liquidator of the debtor company established that the debt at issue was irrecoverable.

30 It follows that, by lodging its application within such a period, it must be held that the taxable person has acted diligently and that it cannot be deprived of its right to a reduction of the taxable amount.

31 Finally, it should also be recalled that, first, Article 90(1) of the VAT Directive fulfils the conditions for producing direct effect and, second, the principle of primacy of Union law implies that any national court seised within the framework of its jurisdiction has, as an organ of a Member State, an obligation to disapply any national provision contrary to a provision of Union law which has direct effect in the dispute before it. Thus, where a taxable person such as FGSZ does not satisfy the conditions laid down by the national legislation, which do not comply with that provision, that taxable person may rely on that provision before the national courts against the Member State concerned in order to obtain a reduction in its taxable amount (judgment of 15 October 2020, *E.* (*VAT – Reduction of the taxable amount*), C-335/19, EU:C:2020:829, paragraphs 51 and 52 and the case-law cited).

32 In the light of the foregoing considerations, the answer to the question referred is that Article 90 of the VAT Directive, read in conjunction with the principles of fiscal neutrality and effectiveness, must be interpreted as meaning that, where a Member State lays down a limitation period after which a taxable person, who has a debt which has become definitively irrecoverable, can no longer assert his right to obtain a reduction in the taxable amount, that limitation period must begin to run not from the date of performance of the payment obligation initially provided for, but from the date on which the debt became definitively irrecoverable.

Costs

33 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 (Sixth Chamber) hereby orders:

Article 90 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, read in conjunction with the principles of fiscal neutrality and effectiveness, must be interpreted as meaning that, where a Member State lays down a limitation period after which a taxable person, who has a debt which has become definitively irrecoverable, can no longer assert his right to obtain a reduction in the taxable amount, that limitation period must begin to run not from the date of performance of the payment obligation initially provided for, but from the date on which the debt became definitively irrecoverable.

[Signatures]