

JUDGMENT OF THE COURT (Third Chamber)

28 July 2011 *

In Case C-274/10,

ACTION under Article 258 TFEU for failure to fulfil obligations, brought on 1 June 2010,

European Commission, represented by D. Triantafyllou and B. Simon, and by K. Talabér-Ritz, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Republic of Hungary, represented by M. Fehér, K. Szíjjártó and G. Koós, acting as Agents, assisted by K. Magony, szakértő,

defendant,

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, D. Šváby, R. Silva de Lapuerta, E. Juhász and T. von Danwitz (Rapporteur), Judges,

* Language of the case: Hungarian.

Advocate General: Y. Bot,
Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 14 April 2011,

after hearing the Opinion of the Advocate General at the sitting on 26 May 2011,

gives the following

Judgment

- 1 By its application, the European Commission requests the Court to declare that:
 - by requiring taxable persons whose tax declaration for a given tax period records an ‘excess’ within the meaning 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) to carry forward that excess or a part of it to the following tax period where the taxable person has not paid the supplier the full amount for the purchase in question, and
 - because, as a result of that requirement, certain taxable persons whose tax declarations regularly record such an ‘excess’ may be required more than once to carry forward the excess to the following tax period,

the Republic of Hungary has failed to fulfil its obligations under Directive 2006/112.

Legal context

European Union legislation

2 Under Article 62 of Directive 2006/112:

‘For the purposes of this Directive:

(1) “chargeable event” shall mean the occurrence by virtue of which the legal conditions necessary for VAT to become chargeable are fulfilled;

(2) VAT shall become “chargeable” when the tax authority becomes entitled under the law, at a given moment, to claim the tax from the person liable to pay, even though the time of payment may be deferred.’

3 Article 63 of that directive provides that the chargeable event is to occur and VAT is to become chargeable when the goods or the services are supplied.

4 Article 66 of that directive provides:

‘By way of derogation from Articles 63, 64 and 65, Member States may provide that VAT is to become chargeable, in respect of certain transactions or certain categories of taxable person at one of the following times:

(a) no later than the time the invoice is issued;

(b) no later than the time the payment is received;

...’

5 Article 90 of Directive 2006/112 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.’

6 Under Article 167 of Directive 2006/112 in Chapter 1, headed ‘Origin and scope of right of deduction’ of Title X, headed ‘Deductions’, of that directive, ‘[a] right of deduction shall arise at the time the deductible tax becomes chargeable’.

- 7 Council Directive 2010/45/EU of 13 July 2010 amending Directive 2006/112 (OJ 2010 L 189, p. 1), which has to be transposed by 31 December 2012 at the latest, inserted an Article 167a into Directive 2006/112, paragraph 1 of which is worded as follows:

‘Member States may provide within an optional scheme that the right of deduction of a taxable person whose VAT solely becomes chargeable in accordance with Article 66(b) be postponed until the VAT on the goods or services supplied to him has been paid to his supplier.’

- 8 Article 168 of Directive 2006/112 provides:

‘In so far as the goods and services are used for the purposes of the taxed transactions of a taxable person, the taxable person shall be entitled, in the Member State in which he carries out these transactions, to deduct the following from the VAT which he is liable to pay:

- (a) the VAT due or paid in that Member State in respect of supplies to him of goods or services, carried out or to be carried out by another taxable person;

...’

- 9 Article 178 of Directive 2006/112 in Chapter 4, headed ‘Rules governing exercise of the right of deduction’ of Title X of the directive provides:

‘In order to exercise the right of deduction, a taxable person must meet the following conditions:

(a) for the purposes of deductions pursuant to Article 168(a), in respect of the supply of goods or services, he must hold an invoice drawn up in accordance with Articles 220 to 236 and Articles 238, 239 and 240;

...'

¹⁰ Article 179 of the directive provides:

‘The taxable person shall make the deduction by subtracting from the total amount of VAT due for a given tax period the total amount of VAT in respect of which, during the same period, the right of deduction has arisen and is exercised in accordance with Article 178.

However, Member States may require that taxable persons who carry out occasional transactions, as defined in Article 12, exercise their right of deduction only at the time of supply.’

¹¹ Under Article 183 of Directive 2006/112 which is worded in essentially the same terms as Article 18(4) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1):

‘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 excess forward to the following period.

However, Member States may refuse to refund or carry forward if the amount of the excess is insignificant.’

- ¹² Article 184 of Directive 2006/112 in Chapter 5, headed 'Adjustment of deductions' of Title X, provides:

'The initial deduction shall be adjusted where it is higher or lower than that to which the taxable person was entitled.'

- ¹³ Under Article 185 in the same Chapter of the 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.'

National legislation

- 14 Paragraph 55(1) of az általános forgalmi adóról szóló 2007. évi CXXVII törvény (Law CXXVII of 2007 on value added tax (*Magyar Közlöny* 2007/155 (XI. 16.), ‘Law on VAT’) provides:

‘VAT shall become chargeable on the occurrence of the event by which the transaction which gives rise to the tax is objectively completed (“the chargeable event”).’

- 15 Under Paragraph 56(a) of the Law on VAT: ‘[u]nless otherwise provided in this Law, the amount of VAT payable shall be determined at the time the chargeable event occurs.’

- 16 Paragraph 119(1) of that law provides:

‘Unless otherwise provided in this Law, a right of deduction shall arise at the time the amount due in respect of input VAT is determined [Paragraph 120].’

- 17 Paragraph 131 of the Law on VAT provides:

‘(1) A taxable person registered for VAT on national territory may deduct from the total amount of tax for which he is liable for a given tax period the amount of deductible input VAT which has arisen during the same tax period or previous period or periods.’

(2) If the difference calculated according to subparagraph (1) is negative, the person registered for VAT in the national territory:

(a) may treat that difference, during the following tax period, as an entry reducing the total amount of VAT for which he is liable in accordance with subparagraph 1 for that tax period, or

(b) may claim the difference from the state tax authorities under the conditions and according to the procedures set out in Paragraph 186.¹⁸

¹⁸ Article 186 of that law provides:

‘(1) The refund of the amount of the negative difference calculated according to subparagraph 1 of Paragraph 131 – adjusted in accordance with subparagraph 2 – may be claimed as from the due date specified in az adózás rendjéről szóló 2003. évi XCII. törvény (Law XCII of 2003 on the taxation system), if

(a) the taxable person registered for VAT in the national territory applies for such a refund to the tax authorities when he submits his tax return in accordance with Paragraph 184;

...

(2) If the taxable person registered for VAT in the national territory acting in accordance with subparagraph 1(a) does not pay immediately, by the due date specified in subparagraph 1, the amount, inclusive of VAT, payable in respect of the transaction giving rise to the chargeability of VAT, or if his debt is not eliminated in any other way by that date, the total deductible input VAT corresponding to that transaction shall be deducted from the amount, expressed as an absolute value, of the negative difference calculated in accordance with Paragraph 131(1), up to that amount.

(3) Paragraph 131(2)(a) shall apply to the sum that is to be subtracted, pursuant to subparagraph (2), from the amount, expressed as an absolute value, of the negative difference calculated in accordance with Paragraph 131(1), up to that amount.'

¹⁹ It is apparent from Paragraph 37(1) of Law XCII of 2003 on the taxation system that the due date is the time-limit for payment of the tax:

'The tax must be paid by the date indicated in the Annex to the Law or in the Law itself (due date)...'

²⁰ Under Annex II, Part I, point 2(a) of that Law:

'A taxable person liable for [VAT] shall pay the net amount of [VAT] payable

- in the case of monthly tax returns,

- by the 20th day of the month following the current month;

- in the case of quarterly tax returns,

- by the 20th day of the month following the quarter,

- in the case of annual tax returns,

- by 25 February of the year following the tax year

and may claim the refund thereof from that same date.’

Pre-litigation procedure

²¹ Taking the view that the national legislation requiring taxable persons to carry the excess forward within the meaning of Article 183 of Directive 2006/112 to the following tax period, where that excess includes an amount of input VAT corresponding to transactions for which the taxable person has not yet paid consideration, infringed that directive, the Commission decided to initiate the procedure provided for by Article 226 EC and sent a letter of formal notice to the Republic of Hungary on 21 March 2007.

- 22 That Member State replied to the letter of formal notice by letter of 30 May 2007 in which it disputed that any law of the European Union had been infringed.
- 23 As it still took the view, after receiving that reply, that the Republic of Hungary had not fulfilled its obligations under Directive 2006/112, the Commission issued a reasoned opinion on 8 October 2009 calling on that Member State to take the necessary measures to comply with it within two months of receiving it.
- 24 As the Republic of Hungary replied to that reasoned opinion by letter of 16 December 2009 claiming that there had been no infringement of European Union law, the Commission decided to bring the present action.

The action

Arguments of the parties

- 25 The Commission submits that Paragraph 186(2) of the Law on VAT is contrary to European Union law in that it precludes the refund of an excess of input VAT deductible from output VAT where the input VAT arises from transactions for which the consideration due, including VAT, has not yet been paid.

- 26 The Commission claims that, under Articles 62 and 63 of that directive, output VAT becomes chargeable at the moment goods are delivered or services are provided, regardless whether the consideration for the transaction concerned has been paid. A supplier of goods or provider of services is therefore required to pay the VAT to the Treasury even if he has not yet been paid by his customers before the end of the tax period. Given that, in such a situation, Paragraph 186(2) of the Hungarian Law on VAT prevents the customer from applying for the refund of the VAT corresponding to the transaction in question, it enriches the Treasury until payment of the transaction and destabilises the VAT system.
- 27 That exclusion of the refund of the excess of deductible VAT imposes a burden on the operators concerned given that the postponement of payment by the State of the amount owed to the taxable person seeking a refund temporarily reduces the value of the assets of that taxable person, which reduces his liquidity.
- 28 The Commission points out, moreover, that the national legislation at issue contains no temporal restriction on carrying forward the VAT excess. It is therefore possible that the taxable person will have to carry forward such an excess several times. It is clear from the wording of the first paragraph of Article 183 of Directive 2006/112 that an excess must be refunded at the latest during the second tax period after it arises.
- 29 The Commission also submits that that article only provides that the Member States may define the procedural rules governing the refund of excess deductible VAT in order that those rules are properly included in the various legislative provisions governing administrative procedure. On the other hand, that article does not allow that refund to be limited by means of conditions relating to the substance. However, the national legislation at issue does not establish procedural rules, but attempts to fix substantive limits to the refund of VAT.

- 30 The Republic of Hungary considers that the condition laid down by Paragraph 186(2) of the Law on VAT for obtaining a refund of excess deductible VAT, namely the payment of the consideration due for the transaction from which the deductible VAT arises, infringes neither the principle of fiscal neutrality nor Article 183 of Directive 2006/112, which clearly confers on the Member States the power to define the conditions for granting a refund.
- 31 That Member State claims that the deferral of the refund of excess deductible VAT under Paragraph 186(2) of the Law on VAT does not represent a burden for the taxable person which is contrary to the principle of fiscal neutrality. Indeed, 'VAT burden' must be understood only in the sense of the definitive burden, that is to say, a situation in which the taxable person must pay VAT without any right to deduct. In contrast, the fact of having to pay VAT provisionally is only a financial or cash flow burden which has only a temporary effect on the financial situation of the operator concerned and does not infringe the principle of fiscal neutrality. The Republic of Hungary points out, in that regard, that the common VAT system comprises rules which require taxable persons to pay the amount of that tax provisionally.
- 32 Moreover, that condition does not cause the taxable person to run a financial risk, since he has not yet paid his debt. The burden is borne, in fact, only by the seller, and is the result of the European Union rules, in particular Articles 62 and 63 of Directive 2006/112. Since the imposition of that burden complies with the principle of fiscal neutrality, the alleged burden imposed on the purchaser or recipient by the contested national legislation cannot be regarded as unacceptable.
- 33 That legislation, it is argued, is designed to neutralise the advantage enjoyed by the purchaser of the goods or recipient of the services who could benefit from the refund of the tax on a transaction which was not paid for or which will never be paid for to improve his cash-flow situation, in particular to pay his suppliers. However, under the

Commission's interpretation, the State grants an interest-free loan to taxable persons, out of its budget, particularly where the tax period of the provider of the services is longer than that of the recipient.

- 34 Moreover, the Commission's interpretation of the principle of fiscal neutrality unjustifiably limits the discretion conferred on the Member States by Article 183 of Directive 2006/112, rendering that article meaningless.
- 35 The Republic of Hungary also argues that its legislation does not affect a taxable person's opportunity to recover the full amount of VAT by a payment in liquid funds and within a reasonable period of time, if a reasonable period of time has been established for payment relating to the transaction. The Court has recognised that the Member States have a certain freedom to manoeuvre when fixing the refund period for excess deductible VAT.
- 36 As regards the lack of a temporal limit on carrying excess VAT forward to the following tax period, the Republic of Hungary points out that neither the text nor the preamble of Directive 2006/112 states that a VAT excess can be carried forward only once. Moreover, whether or not the condition imposed by the national legislation at issue for obtaining a refund is satisfied depends on the decision of the taxable person concerned.

Findings of the Court

- 37 The Commission essentially complains that the Republic of Hungary has exceeded the limits of the freedom available to the Member States under Article 183 of Directive 2006/112 by providing that a refund is excluded where the taxable person has not yet paid the consideration, including VAT, due for the transaction giving rise to deductible VAT.

- 38 That article provides that, 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 are to determine, either make a refund or carry the excess forward to the following period.
- 39 It follows from the wording itself of that article and, in particular, from the terms ‘in accordance with conditions which they shall determine’ that the Member States have a certain freedom in determining the conditions for the refund of excess VAT (Case C-78/00 *Commission v Italy* [2001] ECR I-8195, paragraph 32; Case C-25/07 *Sosnowska* [2008] ECR I-5129, paragraph 17; and Case C-107/10 *Enel Maritsa Iztok 3* [2011] ECR I-3873, paragraphs 33 and 64).
- 40 However, it cannot be concluded from that fact alone that that provision must be interpreted as meaning that no control may be exercised under European Union law over the procedures established by Member States for the refund of excess VAT (see, to that effect, Case C-472/08 *Alstom Power Hydro* [2010] ECR I-623, paragraph 15, and *Enel Maritsa Iztok 3*, paragraph 28).
- 41 It is necessary to examine to what extent Article 183 of Directive 2006/112, interpreted in the light of the general context and principles governing VAT, contains specific rules to be complied with by the Member States in implementing the right to reimbursement of excess VAT (see *Enel Maritsa Iztok 3*, paragraph 30).
- 42 In that connection, first, it has been consistently held that the right of taxable persons to deduct the VAT due or already paid on goods purchased and services received as inputs from the VAT which they are liable to pay is a fundamental principle of the common system of VAT established by the relevant European Union legislation (see, inter alia, *Commission v Italy*, paragraph 28; *Sosnowska*, paragraph 14; and *Enel Maritsa Iztok 3*, paragraph 31).

- 43 As the Court has consistently held, that right to deduct is an integral part of the VAT scheme and as a general rule may not be limited. In particular, that right is exercisable immediately in respect of all the taxes charged on transactions relating to inputs (see, inter alia, Case C-62/93 *BP Supergas* [1995] ECR I-1883, paragraph 18; Case C-392/09 *Uszodaépítő* [2010] ECR I-8791, paragraph 34, and *Enel Maritsa Iztok 3*, paragraph 32).
- 44 Second, it must be observed that the existence of the right to deduct is covered by Articles 167 to 172 of Directive 2006/112 in the Chapter headed 'Origin and scope of right of deduction', whereas Articles 178 to 183 of the directive relate only to the conditions for the exercise of that right (see, to that effect, Case C-338/98 *Commission v Netherlands* [2001] ECR I-8265, paragraph 71, and Case C-152/02 *Terra Baubedarf-Handel* [2004] ECR I-5583, paragraph 30).
- 45 As regards the possibility, under Article 183 of the VAT Directive, of providing that excess VAT is to be carried forward to the following tax period or refunded, the Court has made it clear that, the conditions for the refund of excess VAT cannot 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 excess VAT. This implies that the refund is made within a reasonable period of time by a payment in liquid funds or equivalent means, and that, in any event, the method of refund adopted must not entail any financial risk for the taxable person (see *Commission v Italy*, paragraphs 33 and 34; *Sosnowska*, paragraph 17, and *Enel Maritsa Iztok 3*, paragraphs 33 and 64).
- 46 As regards, third, the importance attached to payment for transactions giving rise to VAT in the system established by Directive 2006/112, it must be observed that, under Article 63 of that directive, VAT is to become chargeable when the goods or the services are supplied, that is, when the transaction in question takes place, regardless

whether the consideration due for that transaction has already been paid. Accordingly, VAT is due to the Treasury by the supplier of goods or services, even where he has not yet received from his client the payment relating to the transaction carried out.

⁴⁷ Similarly, Article 167 of Directive 2006/112 provides that a right of deduction is to arise at the time the deductible tax becomes chargeable, which is the case, under Article 63, once the transaction has been carried out, regardless whether payment of the consideration due for that transaction has been made. Furthermore, it is expressly stated in Article 168(a) of that directive that the right to deduct input tax which the taxable person enjoys relates not only to the VAT paid but also to the VAT due. It is also apparent from the wording of Article 179 of that directive that the right to deduct is to be exercised, as a rule, by subtracting from the amount of VAT due for a given tax period the amount of VAT in respect of which, during the same period, the right of deduction has arisen (see, to that effect, Joined Cases C-95/07 and C-96/07 *Ecotrade* [2008] ECR I-3457, paragraph 41).

⁴⁸ It follows that, under the system set up by Directive 2006/112, the chargeability of VAT and the creation and exercise of the right to deduct are, in principle, independent of whether or not the consideration, including VAT, due for a transaction has already been paid.

⁴⁹ That analysis is borne out by other provisions of that directive according to which the actual payment of consideration can have an effect on the chargeability or deductibility of the VAT only in the particular circumstances expressly covered by the directive.

- 50 Thus, Article 66(b) of Directive 2006/112 allows Member States to provide, by way of derogation from Article 63 of that directive, that VAT is to become chargeable, in respect of certain transactions or certain categories of taxable person no later than the time the payment is received. However, the Republic of Hungary has not claimed to have made use of that possibility.
- 51 Moreover, Article 66(b) of Directive 2006/112 was supplemented during 2010, that is, after the present action was brought, by the insertion into the directive of an Article 167a under which Member States may provide within an optional scheme that the right of deduction of a taxable person whose VAT solely becomes chargeable in accordance with Article 66(b) be postponed until the VAT on the goods or services supplied to him has been paid to his supplier.
- 52 It follows from a reading of all those provisions that, under Directive 2006/112, the creation of the right to deduct is subject only in certain particular cases covered by that directive to the condition that the consideration due for the transaction on which the deductible VAT arises has already been paid. Apart from in those particular cases, that right to deduct exists independently of that condition. The fact of making the refund of a deductible VAT excess subject to that condition, that refund thus constituting the stage following the creation of that right, is liable to have the same effects on the right to deduct as the application of the same condition when that right arises. Accordingly, it is such as to call into question the useful effect of that right to deduct.
- 53 Consequently, the payment of consideration due for the transaction giving rise to deductible VAT cannot constitute a condition, within the meaning of Article 183 of Directive 2006/112, which the Member States may lay down for the refund of a deductible VAT excess.

54 It follows from all the foregoing considerations that Article 183 of Directive 2006/112 does not permit Member States to impose a condition relating to the payment of the amount due for the transaction in question on the exercise of the right to a refund of a deductible VAT excess. Thus, by precluding the refund of a VAT excess where the consideration, including VAT, due for the transaction on which the deductible VAT arises has not yet been paid, the Republic of Hungary has exceeded the limits of the freedom available to the Member States under Article 183.

55 Moreover, it must be observed that that exclusion of the refund of the deductible VAT excess leads to a situation where certain taxable persons whose tax declarations regularly record such an excess may be required more than once to carry forward the excess to the following tax period. In that regard, it must be borne in mind that the carrying forward of a VAT excess over several tax periods following that in which the excess in question arose is not necessarily irreconcilable with the first paragraph of Article 183 of Directive 2006/112 (see, to that effect *Enel Maritsa Iztok 3*, paragraph 49). However, given that the national legislation at issue provides for tax periods from one month to a year in length, it may create a situation in which certain taxable persons, do not, because of the repeated carry-over of an excess, obtain a refund of that excess within a reasonable period.

56 Consequently, it must be held that the Republic of Hungary,

- by requiring taxable persons whose tax declaration for a given tax period records an ‘excess’ within the meaning of Article 183 of Directive 2006/112 to carry forward that excess or a part of it to the following tax period where the taxable person has not paid the supplier the full amount for the purchase in question, and

- because, as a result of that requirement, certain taxable persons whose tax declarations regularly record such an ‘excess’ may be required more than once to carry forward the excess to the following tax period,

has failed to fulfil its obligations under that directive.

Costs

- ⁵⁷ Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party’s pleadings. Since the Republic of Hungary has been unsuccessful, it must be ordered to pay the costs.

On those grounds, the Court (Third Chamber) hereby:

1. Declares that the Republic of Hungary,

- **by requiring taxable persons whose tax declaration for a given tax period records an ‘excess’ within the meaning of Article 183 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax to carry forward that excess or a part of it to the following tax period where the taxable person has not paid the supplier the full amount for the purchase in question, and**

- **because, as a result of that requirement, certain taxable persons whose tax declarations regularly record such an ‘excess’ may be required more than once to carry forward the excess to the following tax period,**

has failed to fulfil its obligations under that directive.

2. Orders the Republic of Hungary to pay the costs.

[Signatures]