Case C-415/19

Request for a preliminary ruling

Date lodged:

28 May 2019

Referring court:

Corte Suprema di Cassazione (Italy)

Date of the decision to refer:

4 December 2018

Appellant:

Blumar SpA

Respondent:

Agenzia delle Entrate

Subject matter

TAX

THE CORTE SUPREMA DI CASSAZIONE (SUPREME COURT OF CASSATION)

CIVIL TAX SECTION

[...]

has made the following

INTERLOCUTORY ORDER

in Appeal No 18635-2012 brought by:

BLUMAR SPA [...];

– appellant –

v

[...]

AGENZIA DELLE ENTRATE (The Revenue Agency) [...], **[Or.2]** [...];

– cross-appellant –

against Judgment No 501/2011 of the COMMISSIONE TRIBUTARIA REGIONALE, (Regional Tax Court) PESCARA DISTRICT SECTION, filed on 8 June 2011;

[...]

[Or.3]

WHEREAS:

– by Decision C(2008) 380 (corrigendum) of 25 January 2008, the European Commission approved the tax relief measure provided for in Article 1(271) to (279) of Law No 296 of [27 December] 2006;

– the relief measure consists in the grant of a tax credit, in accordance with the Guidelines on Regional State Aid for 2007-2013, in respect of the purchase of new plant and equipment in connection with an initial investment project for production facilities located in disadvantaged areas of Southern Italy; the tax credit may be applied against [corporate] income tax;

– subsequently, by Article 2 of Legislative Decree No 97 of 3 June 2008, converted, with amendments, by Law No 129 of 2 August 2008, the Italian legislature laid down provisions governing the procedure for obtaining the tax credit; it provided, in Article 2(1)(a) thereof, that, '*in the case of investment projects which are shown by means of deeds or documents of certain date to have commenced prior to the date of entry into force of this decree, applicants shall send by electronic means to the Revenue Agency, within thirty days of the commencement of the procedure referred to in paragraph 4 — failing which the relief shall not be available — a completed form in the model approved by the Director of the Revenue Agency; the submission of the form shall constitute a valid application for entitlement to the tax credit*';

– within the period prescribed by Legislative Decree No 97/08, Blumar SpA submitted to the Pescara office of the Revenue Agency, by electronic means, form number FAS08, in order to obtain entitlement to the tax credit;

– the Pescara office nevertheless found that that company had failed to append to the form the declaration in lieu of a notarised document required by Article 1(1223) of Law No 296 of 27 December 2006 (now Article 16a(11) of Law No 11 of 4 February 2005); that declaration certifies that the applicant has not benefitted from State aid that has been declared incompatible by the European [Commission]; **[Or.4]** on 31 July 2008, after having invited Blumar to comply

with that obligation, without success, the Pescara office informed that company that authorisation had been refused;

– Blumar challenged that refusal decision before the Commissione Provinciale di Pescara (Provincial Tax Court, Pescara); its action was dismissed;

– Blumar brought an appeal against the decision at first instance before the Commissione Tributaria Regionale dell'Abruzzo, (Regional Tax Court, Abruzzo), sitting in Pescara; the appeal was dismissed by judgment of 8 June 2011;

– in the grounds of its decision, the Regional Tax Court held that '*... it is important to have regard to the "Deggendorf undertaking", the purpose of which is to ensure that the grant of State aid is conditional upon verification that the applicant has not received and subsequently failed to repay aid that the European Commission has declared incompatible and in respect of which it has ordered recovery. The Italian Government has identified the self-certification form as the appropriate means of ensuring compliance with that undertaking. Where the self-certification form is not provided — and, in practice, the local offices of the Revenue Authority may request it and allow a further period of ten days for its submission — the application for entitlement may validly be refused*';

– Blumar SpA has brought an appeal on a point of law against that ruling, based on four grounds of appeal which it explains in its pleading; the Revenue Agency, as respondent, has brought a cross-appeal.

WHEREAS:

– by its first ground of appeal, entitled 'Infringement and misapplication of Article 108 TFEU and Commission Decision C(2008) 380 and failure to observe the Community-law principle of proportionality (Article 360(1)(3) of the Code of Civil Procedure)', the appellant submits that the Regional Tax Court was wrong to find that the refusal decision was lawful;

– in support of that complaint, the appellant claims that Article 1(1223) of Law No 296/06 (now Article 16a(11) of Law No 11/05), which provides that '*recipients of State aid as referred to in Article 87 of the Treaty may* **[Or.5]** *benefit from such relief measures only if they declare ... that they are not among those who have received and subsequently failed to repay, or deposit in a blocked account, aid that has been declared illegal or incompatible by the European Commission*', is unlawful in that it is clearly at odds with Article 108(3) TFEU, Commission Decision C(2008) 380 and the Community-law principle of proportionality, and that the national court is therefore required to disapply it;

– with reference to the issue raised in the grounds of this decision, which appears to be central to the resolution of the dispute, this court has decided to request a preliminary ruling of the Court of Justice of the European Union providing the necessary interpretation, on the basis of the considerations set out below.

1. The tax credit at issue — Italian legislation

– It is worth pointing out that the tax credit in respect of investments in disadvantaged areas of Italy was introduced by Article 8 of the Finance Law for 2001 (Law No 388/2000).

– The tax credit was offered to undertakings which, before the end of the tax year ending on 31 December 2006, had made new investments in disadvantaged areas, that is to say, areas receiving regional aid to which the State aid derogations laid down in Article 87(3)(a) and (c) of the Treaty applied, as identified in the Italian regional aid map for the period 2000 to 2006.

[...]

[...] **[Or.6]** [...]

[...] [description of the procedure laid down in the previous Italian legislation for granting the relief in question]

– When the original provisions expired, the Finance Law for 2007 (Law No 296/06) introduced, in Article 1(271) to (279) thereof, a new version of the relief measure, establishing entitlement to a tax credit subsequent to that ending on 31 December 2006, that new tax credit being available until the end of the tax year ending on 31 December 2013.

– Article 1(279) of that law made the measure subject to authorisation by the European Commission, in accordance with Article 88(3) of the Treaty establishing the European Community.

– As has already been mentioned above, on 25 January 2008 the European Commission, by Decision C(2008) 380, considered that the aid scheme was compatible with the common market pursuant to Article 87(3)(a) and (c) of the EC Treaty.

[Or.7]

– Law No 296/06 also transposed into national law, in Article 1(1223) thereof, the undertaking which the European Commission requested of the Member States to make the grant of State aid conditional on verification that potential beneficiaries are not among those who have received and failed to repay aid that has been declared incompatible; Article 1(1223) provides that: '*recipients of State aid as referred to in Article 87 of the Treaty establishing the European Community may benefit from such relief measures only if they declare, in accordance with Article 47 of the consolidated law referred to in Presidential Decree No 445 of 28 December 2000 and following the procedure laid down by decree of the President of the Council of Ministers, to be published in the Official Journal, that they are not among those who have received and subsequently failed to repay, or deposit in a blocked account, aid that has been declared illegal or*

incompatible by the European Commission, as identified in the decree referred to in this paragraph'.

– The Italian legislature thus identified as the appropriate means of implementing the '*Deggendorf* undertaking' the declaration in lieu of a notarised document (Article 47 of the consolidated statutory and regulatory provisions relating to administrative documents, referred to in Presidential Decree No 445/00), by which recipients of new aid certify, under their own responsibility, that they are not among those who have received and subsequently failed to repay previous aid '*rejected*' by the Commission.

– The provisions of Article 1(1223) of Law No 296/06 were repealed by Article 6(2) of Law No 34 of 25 February 2008; however, Article 6 of Law No 34/08 inserted the same provisions, in identical form, into Law No 11/05, as Article 16a[(11)] thereof, which is currently in force.

– Subsequently, the Decree of the President of the Council of Ministers of 23 May 2007 laid down the procedure for making the declaration in lieu of a notarised document, making specific reference, in Article 4(1) thereof, to aid in respect of which the European Commission has ordered recovery.

[Or.8]

– Lastly, the national legislature issued Legislative Decree No 97/08 (converted, with amendments, by Law No 129/08), fixing, in Article 2 thereof, the upper limits for the resources available annually and laying down the procedure for obtaining the tax credit, which stipulates that applicants must send by electronic means to the Revenue Agency a form setting out the details of the eligible investment project, which serves as the application for entitlement to the relief.

– In particular, in Article 2(1)(a) and (b) of that legislative decree, a distinction is drawn between applicants that have already commenced their investment project by the date of entry into force of the legislative decree and those that have not; the former (who must send in the form within 30 days of approval being given by the Director of the Agency, failing which the relief shall not be available) are given priority in their applications for entitlement over the latter.

– Article 2(2) thereof provides that, on the basis of the information obtained from the forms sent in, which must be examined in strict chronological order of receipt, the Revenue Agency is to communicate to applicants, by electronic means, (a) in so far as concerns applications under Article 2(1)(a), authorisation solely for the purposes of financial cover, (b) in so far as concerns applications under Article 2(1)(b), a confirmation of receipt of the form and acknowledgment of the application and, within 30 days, authorisation, as under point (a).

2. EU law

– Article 87(1) of the Treaty establishing the European Economic Community of 25 March 1957 provides that '*any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market*'.

– The European Commission has identified four essential cumulative criteria which must be fulfilled in order for a measure to constitute State aid: (1) the resources **[Or.9]** must come from the State: the aid must in fact be granted by the State or through State resources; (2) an economic advantage must be conferred, irrespective of the form which it may take (e.g. contributions, tax credits and/or other tax relief measures, preferential rates); (3) selectivity (which is a more difficult criterion to establish): the aid must constitute a derogation from the normal legal regime or from the nature or structure of the regime which applies to the field to which the aid relates; (4) an effect on trade between Member States: the Commission has clarified this point, stating that, '*when the State confers even a limited advantage on an undertaking which is active in a sector characterised by competition, there is a distortion or risk of distortion of competition. In order to establish that such distortion affects trade between Member States, it is sufficient that the beneficiary pursues, even partially, activities involving trade between Member States*'.

– Under Article 88(3) of the Treaty, the Member States must inform the Commission of any plans to grant or alter State aid before putting the proposed measures into effect.

– The Commission may, however, remove from the scope of the general prohibition laid down in Article 87(1) of the Treaty certain categories of State aid, under the conditions set out in Article 87(3)(d) thereof.

3. The precedent in *Deggendorf* and its transposition into national law

– The principle known as the '*Deggendorf undertaking*' was expressed by the Court of Justice of the European Union in its judgment of 15 May 1997, *Textilwerke Deggendorf GmbH (TWD)* v *Commission* (C-355/95 P, EU:C:1997:241).

– In that judgment, the Court held that the European Commission has the power to order the suspension of new State aid until the beneficiary has repaid to the Member State granting the aid other benefits that it has unduly previously received, since the '*cumulative effect of the aids*' **[Or.10]** could distort competition in the common market to a significant extent.

– According to the Court, the Commission enjoys '*a wide discretion, and the exercise of that discretion involves assessments of an economic and social nature which must be made within a Community context*'; in particular, when assessing the compatibility of State aid with the common market, the Commission must take into account, as an '*essential criterion*', any failure to repay benefits that have been declared illegal.

– In the Court's view, therefore, by suspending the payment of any new aid until the beneficiary of aid that has been declared illegal has repaid that aid, the Commission is not exceeding its discretion, given that it is tasked with implementing '*a special procedure involving the constant review and monitoring of aid which Member States intend to introduce*', subject to review by the Court.

4. The question of interpretation

– As the appellant has observed, it appears to follow from *Deggendorf* that, in principle, (i) where previous State aid has been granted unlawfully and an order has been made for its recovery, (ii) subsequent aid may be authorised, but (iii) payment of that aid must be suspended until the previous aid has been recovered.

– In line with that precedent, Commission Decision C(2008) 380 stated verbatim that '*beneficiaries which are subject to an outstanding recovery order following a previous Commission decision declaring the aid illegal and incompatible with the common market and which have not reimbursed or paid into [a] blocked account the incompatible aid with recovery interest are excluded from the scheme*'.

– The principle set out in the *Deggendorf* undertaking has been incorporated into Commission Regulation (EC) No 800/2008 of 6 August 2008 (the General block exemption Regulation); that regulation, in declaring certain categories of aid compatible with the common market **[Or.11]** in application of Articles 87 and 88 of the Treaty, excludes from the categories of aid to which it applies, inter alia, '*aid schemes which do not explicitly exclude the payment of individual aid in favour of an undertaking which is subject to an outstanding recovery order following a previous Commission Decision declaring an aid illegal and incompatible with the common market*' (Article 1(6)(a)).

– In the present case, the following facts have been established: Blumar SpA submitted the form referred to in Article 2(1)(a) of Legislative Decree No 97/08 (converted, with amendments, by Law No 129/08) within the 30-day period prescribed by that legislative decree; it was refused authorisation because it failed to submit the declaration in lieu of a notarised document required by Article 1(1223) of Law No 296/06 (now Article 16a[(11)] of Law No 11/05); that company was not the subject of an order for recovery of one of the types of State aid listed in Article 4(1) of the Decree of the President of the Council of Ministers of 23 May 2007, either at the time when it submitted the form or at the time when it brought its action.

– The issue of the compatibility with EU law of Article 1(1223) of Law No 296/06, by which the Italian legislature has provided that '*recipients of State aid as referred to in Article 87 of the Treaty may benefit from such relief measures*' only '*if they declare … that they are not among those who have received and subsequently failed to repay, or deposit in a blocked [current] account, aid that has been declared illegal or incompatible by the European Commission*', therefore appears to be twofold.

– First, it is necessary to question whether the conflict arises from the fact that, under the provision in question, it is sufficient, in order for an applicant to be refused entitlement to benefit from aid, that that undertaking has received one of the types of State aid listed in Article 4(1) of the Decree of the President of the Council of Ministers of 23 May 2007, and, in addition, the burden is on the applicant to submit a statement (which may, if false, entail criminal sanctions) declaring that it has not done so, rather than the undertaking being required simply to provide self-certification that it is not the subject of an outstanding recovery order **[Or.12]** for failing to repay such State aid or deposit it into a blocked current account.

– Second, it is necessary to establish whether the conflict arises from the fact that the provision precludes outright any entitlement to benefit on the part of an undertaking which has, in theory, received illegal State aid, rather than simply providing for the suspension of the grant of aid: by rejecting an application, rather than granting it and then suspending it if necessary, the authority definitively decides to exclude from the allocation of resources an undertaking which could subsequently be found to be eligible to benefit from those resources, either because it has never been the subject of a recovery order or because it has subsequently repaid any illegal State aid previously received.

– With regard to that second aspect (which this court regards as the more significant of the two), the national legislation also seems to be at odds with the principle of proportionality, which requires that measures adopted by Community institutions should not exceed the limits of what is appropriate and necessary in order to attain the legitimate objectives pursued by the legislation in question, it being understood that, when there is a choice between several appropriate measures, recourse should be had to the least onerous and that the disadvantages caused should not be disproportionate to the objective pursued.

– For all the foregoing reasons, this court considers that it must refer the following question to the Court of Justice of the European Union for a preliminary ruling under Article 267 TFEU:

– 'Are Article 1(1223) of Law No 296 of 27 December 2006 (now Article 16a(11) of Law No 11 of 4 February 2005) and the Decree of the President of the Council of Ministers of 23 May 2007 compatible with EU law, with reference to Article 108(3) TFEU as interpreted in *Deggendorf*, Commission Decision C(2008) 380, and the Community-law principle of proportionality?'

– As a result of the reference for a preliminary ruling, the present proceedings are stayed.

[...]

[Or.13]

[...]

Rome, [...] 4 December 2018

[...]

(procedural formalities and signatures)