

Anonymised version

Translation

C-669/21 – 1

Case C-669/21

Request for a preliminary ruling

Date lodged:

9 November 2021

Referring court:

Tribunal Judicial da Comarca do Porto – Juízo Central Cível da Póvoa de Varzim (Portugal)

Date of the decision to refer:

21 October 2021

Applicant:

Gencoal S.A.

Defendants:

Conceito Norte – Consultadoria de Gestão, Lda.

BT

Tribunal Judicial da Comarca do Porto
Juízo Central Cível da Póvoa de Varzim – Juiz 5
(District Court, Oporto, Portugal
Central Civil Court No 5, Póvoa de Varzim)

[...] [particulars of referring court]

Reference for a preliminary ruling:

The applicant, Gencoal, S.A., brought proceedings against Conceito Norte – Consultoria de Gestão, Lda. and BT, an accountancy firm and a certified

accountant, respectively, seeking an order that they be held jointly and severally liable for the payment of compensation in the amount of EUR 110 665.47, together with accrued interest from the date on which they were summoned, in relation to the late filing of the application for a refund of Community value added tax ('VAT') for the year 2017; that application was filed with the Spanish Tax Authority in December 2018, whereas the time limit expired on 30 September 2018.

In its defence, the defendant put forward the argument that, by providing that the refund application is to be submitted in the Member State at the latest on 30 September of the calendar year following the refund [period], Article 15(1) of Council Directive 2008/9/EC of 12 February 2008 and Article 8(5) of Decreto-Lei [Decree-Law] No 186/2009 of 12 August conflict with the European Union provisions on VAT laid down in Council Directive 2006/112/EC of 28 November 2006, which replaced the Sixth Directive, in that they lay down a more limited scheme (nine months) for taxable persons liable for VAT who are not established in the Member State of refund than for taxable persons who are established in that Member State (four years).

The following is clear from the evidence submitted:

1. In the course of the industrial preservation of fisheries and aquaculture products in oil and other sauces, for use in the manufacture of preserves, the applicant purchases fish and engages storage services from undertakings established in Spain.
2. In the period 1 January to 31 December 2017, the applicant purchased goods and engaged services on Spanish territory with a total value of EUR 1 103 067.25 and it paid EUR 110 665.47 in respect of VAT.
3. The application for a refund of the VAT referred to above was filed on 31 December 2018 using the website of the Portuguese Tax Authority, which forwarded the application to the Spanish Tax Agency.
4. The Spanish Tax Agency rejected the refund application and stated by way of reasoning that the time limit for filing a refund application starts to run on the day following the last day of each calendar quarter or each calendar year and ends on 30 September of the year following the calendar year in which the tax concerned was levied, as stipulated by Article 31(4) of Royal Decree 1624/1992 approving the VAT Regulations (Real Decreto 1624/1992 por el que se aprueba el Reglamento del IVA) of 29 December 1992.

The question which is referred in connection with the examination of this dispute is whether Article 31(1)¹ and (4)² of Royal Decree 1624/1992 of 29 December

¹ 'Traders or professional practitioners not established within the territory of application of the tax but established within the Community ... may apply for a refund of any [VAT] amounts as referred to in Article 119 of the Law on [VAT] ...'

1992 approving the Spanish VAT Regulations and Article 15(1) of Council Directive 2008/9/EC of 12 February 2008, by providing, in the case of the former, that the period for the filing of an application for a VAT refund by traders or professional practitioners not established in the territory of application of the tax but established within the Community [European Union] starts to run [on the day] following the last day of each calendar quarter or each calendar year and ends on 30 September of the year following the calendar year in which the tax concerned was paid,³ and, in the case of the latter, that the refund application must be submitted to the Member State of establishment not later than 30 September of the calendar year following the refund period, **infringe the principle of fiscal neutrality** (with consequences for **neutrality in the context of competition** and the **principle of equal treatment from the point of view of the prohibition of discrimination**) which flows from the common system of VAT as derived from recitals 4, 5 and 7 and Articles 167, 170, 171 and 178 of Council Directive 2006/112/EC of 28 November 2006, as amended by Council Directive 2008/8/EC of 12 February 2008, and the fundamental right enshrined in Article 41(1) of the Charter of Fundamental Rights of the European Union.

The question is of particular importance in so far as Article 31(4) of Royal Decree 1624/1992 enables the adoption of discriminatory treatment of traders and professional practitioners not established in Spanish territory as compared with traders and professional practitioners who are established in Spanish territory, since the latter benefit from the scheme laid down in Articles 99(3)⁴ and 100⁵ of Law 37/1992 of 28 December 1992, which provide that the right of deduction may be exercised by taxable persons liable for VAT in the return relating to the assessment period in which the person completing the return incurred the deductible VAT or in returns relating to subsequent periods, provided that **four** years have not elapsed from the date on which that right arose; the right will expire if it is not exercised within that period.

Therefore, in accordance with Article 267 of the Treaty on the Functioning of the European Union, in the light of the question raised and since that question requires a preliminary ruling for the purpose of adjudicating on this dispute, the court:

² ‘The period for filing the refund application shall start to run on the day following the last day of each calendar quarter or each calendar year and shall end on 30 September of the year following the calendar year in which the tax concerned was levied.’

³ Similarly, also in the context of refunds to taxable persons not established in national territory, Article 8(5) of Decreto-Lei No 186/2009 of 12 August provides that ‘the refund application must be submitted to the Member State of establishment not later than 30 September of the calendar year following the calendar year in which the tax fell due.’

⁴ ‘The right of deduction may be exercised only in the tax return relating to the assessment period in which the person completing the return incurred the deductible VAT or in returns relating to subsequent periods provided that four years have not elapsed from the date on which that right arose.’

⁵ The right of deduction expires if the holder of that right has not exercised the right within the time limits and in the amounts set out in Article 99 of this Law.

a) Requests the Court of Justice of the European Union to answer the question referred.

b) [...] [procedural aspects of national law] Decides to stay the proceedings until such time as the Court of Justice gives a ruling on the matter.

[...] [procedural aspects of national law]

[...] [procedural aspects of national law]

[...] [explanation relating to the inclusion of untranslated provisions of Spanish national law]

[...] [procedural aspects of national law]

[...]

Póvoa de Varzim, 21 October 2021

[...] [procedural aspects of national law]

The judge

[...] [name]