

Case C-258/19

Request for a preliminary ruling

Date lodged:

27 March 2019

Referring court:

Kúria (Supreme Court, Hungary)

Date of the decision to refer:

7 March 2019

Applicant:

EUROVIA Ipari, Kereskedelmi, Szállítmányozási és
Idegenforgalmi Kft.

Defendant:

Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága (Appeals
Directorate of the National Tax and Customs Administration,
Hungary)

Order of the

Kúria (Supreme Court, Hungary)

as court of cassation

...

Applicant: EUROVIA Ipari, Kereskedelmi Szállítmányozási és Idegenforgalmi
Kft. (... Budapest ...)

...

Defendant: Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága (Appeals
Directorate of the National Tax and Customs Administration, Hungary) (...
Budapest ...)

...

Subject matter of the dispute: tax-related administrative appeal

... [procedural matters of domestic law]

Operative part

The Kúria (Supreme Court, Hungary) ... has referred the following questions for a preliminary ruling:

1. Does the practice of a Member State infringe the principle of fiscal neutrality and the formal requirements of the right to deduct VAT where, for the purposes of exercising the right to deduct the tax, it has regard solely to the time the chargeable event occurred, and does not take into account the fact that there was a civil dispute between the parties concerning performance of the contract, which was determined in judicial proceedings, and that the invoice was only issued once a final judgment was delivered?
2. If the answer to that question is in the affirmative, is it possible to exceed the limitation period for exercising the right to deduct VAT, set by the legislation of the Member State has at five years from the time when the services were supplied?
3. If the answer to that question is in the affirmative, is the exercise of the right to deduct VAT affected by the conduct of the recipient of the invoice in the present case, which did not pay the contractor's remuneration determined by a final judgment until the contractor had brought enforcement proceedings, for which reason the invoice was not issued until after the limitation period had expired?

Relevant [legislation]

EU provisions in force when the services were supplied:

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 ('the Sixth Directive')

'Article 10

1.

(a) "Chargeable event" shall mean the occurrence by virtue of which the legal conditions necessary for tax to become chargeable are fulfilled.

(b) The tax becomes “chargeable” when the tax authority becomes entitled under the law at a given moment to claim the tax from the person liable to pay, notwithstanding that the time of payment may be deferred.

2. The chargeable event shall occur and the tax shall become chargeable when the goods are delivered or the services are performed. ...

...

By way of derogation from the above provisions, Member States may provide that the tax shall become chargeable, for certain transactions or for certain categories of taxable person, either:

- no later than the issue of the invoice or of the document serving as invoice, or
- no later than receipt of the price, or
- where an invoice or document serving as invoice is not issued, or is issued late, within a specified period from the date of the chargeable event.

...’.

‘Article 17

Origin and scope of right to deduct

1. The right to deduct shall arise at the time when the deductible tax becomes chargeable.

2. In so far as the goods and services are used for the purposes of his taxable transactions, the taxable person shall be entitled to deduct from the tax which he is liable to pay:

- (a) value added tax due or paid in respect of goods or services supplied or to be supplied to him by another taxable person;

...’.

‘Article 18

Rules governing the exercise of the right to deduct

1. To exercise his right to deduct, the taxable person must:

- (a) in respect of deductions under Article 17(2)(a), hold an invoice, drawn up in accordance with Article 22(3);

...’.

EU provisions in force when the invoice was issued:

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax ('the VAT Directive')

'Article 62

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.'

'Article 63

The chargeable event shall occur and VAT shall become chargeable when the goods or the services are supplied.'

'Origin and scope of right of deduction

Article 167

A right of deduction shall arise at the time the deductible tax becomes chargeable.'

'Article 168

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;

... ?

'Rules governing exercise of the right of deduction

Article 178

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 Sections 3 to 6 of Chapter 3 of Title XI;

...’.

Hungarian provisions relevant at the time the services were supplied:

The általános forgalmi adóról szóló 1992. évi LXXIV. törvény (Law LXXIV of 1992 on value added tax, ‘the previous VAT Law’)

‘Paragraph 16

1) The tax becomes chargeable, on supplies of goods and of services – without prejudice to Paragraphs 17 and 18 – at the time of performance or, if applicable, partial performance (collectively, “performance”).

2) Unless otherwise provided, the time of performance will be determined in accordance with the Polgári Törvénykönyv (Civil Code)’

‘Paragraph 32

1. A taxable person under Paragraph 34 shall have the right to deduct from the tax which he is required to pay:

a) the amount of tax which another taxable person has passed on to him in connection with the supply of goods or the performance of services – including, in the case of a corporate restructuring, the legal predecessor of that taxable person – or a taxable person by virtue of the Simplified Corporation Tax Law; ...’

‘Paragraph 35

1. – Unless otherwise prescribed by the General Taxation Procedure Law , the right of deduction may only be exercised by persons who hold documentation reliably attesting to the amount of the input tax. The following documents issued on behalf of the taxable person shall be considered to be such documentation:

a) invoices and simplified invoices [in the case of Paragraph 32(1)(a) and (g)];
...’.

Hungarian provisions relevant at the time the invoice was issued:

The általános forgalmi adóról szóló 2007. évi CXXVII. törvény (Law CXXVII of 2007 on value added tax, ‘the Law on VAT’)

‘Paragraph 55

1. The tax shall become chargeable on the occurrence of the event by which the taxable transaction is actually effected (“performance”).’

‘Paragraph 119

1. 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).’

‘Paragraph 120

In so far as the taxable person, acting as such, uses or otherwise exploits goods or services in order to carry out a taxable supply of goods or services, he shall be entitled to deduct from the tax that he is liable to pay:

(a) the amount of tax passed on to him, in connection with the purchase of goods or services, by another taxable person — including any person or entity subject to simplified corporation tax. ...’

‘Paragraph 127

1. Exercise of the right of deduction shall be subject to the substantive condition that the taxable person is himself in possession:

(a) in the situation referred to in Paragraph 120(a), of an invoice issued in his name which attests to the performance of the transaction; ...’

Hungarian procedural provisions on the exercise of the right of deduction:

The adózás rendjéről szóló 2003. évi XCII. törvény (Law XCII of 2003 on General Taxation Procedure, ‘the Taxation Procedure Law’)

‘Paragraph 164

1. The right to charge the tax will become time-barred on expiry of five years from the last day of the calendar year in which the declaration or notification of the tax should have been submitted or, where there is no declaration or notification, in which the tax should have been paid. The right to apply for public grants and the right to apply to be refunded amounts paid in excess will become time-barred – unless otherwise provided by statute – on expiry of five years from the last day of the calendar year in which those rights arose.

Factual background

1 On 12 November 1996 and 17 September 1997, the applicant concluded a number of works contracts with a commercial company for work relating to an overhead telecommunications network. Under the contracts, the contractor could not request consideration in respect of items which the developer had not authorised. The

applicant only paid the contractor part of the remuneration, a dispute having arisen between the parties as to the amount of that remuneration. The contractor claimed payment of the remuneration to which it was entitled and brought proceedings to that end, as a result of which the Fővárosi Ítéltábla (Budapest Regional Court of Appeal, Hungary), in its judgment No 3.Pf.20.756/2004/5 of 17 September 2004, ordered the applicant to pay HUF 19 703 394 plus interest. The applicant lodged an application for revision against that decision, but the Legfelsőbb Bíróság (Supreme Court, Hungary [name by which the Kúria was known until 2012]), by judgment No Pfv.VII.21.212/2010/6 of 5 October 2010, confirmed the judgment made against the applicant by the Fővárosi Ítéltábla (Budapest Regional Court of Appeal). The applicant paid the contractor's remuneration following enforcement proceedings and, at the applicant's request, the contractor issued an invoice on 15 June 2011, indicating the date of performance as 6 June 2011.

- 2 The applicant deducted the value added tax ('VAT') shown on the invoice, HUF 3 940 679, in its VAT declaration for the second quarter of 2011. The tax authorities carried out a pre-payment check, as a result of which they found that the applicant had submitted an application for an undue refund and issued it with a tax penalty of HUF 394 000. According to those authorities, under Paragraph 36(1)(a) and Paragraph 16(15) of the previous VAT Law, the limitation period began to run on 31 December 2004, and the right to claim a refund of the VAT had therefore become time-barred on 31 December 2009. The applicant contested the position adopted by the tax authorities and accordingly brought an administrative appeal, which was dismissed by the first instance court. Subsequently, by judgment No Kfv.V.35.490/2014/5, the Kúria (Supreme Court) set aside both the defendant's decision and the decision made by the first tier tax authority, and ordered that tax authority to commence a new procedure. The Kúria (Supreme Court) held, contrary to the tax authorities' view, that Paragraph 16(15) of the previous VAT Law did not apply, and the time of performance should instead be determined in accordance with the general provisions of the law.
- 3 Rehearing the administrative procedure, the tax authority, relying on the judgment of the Fővárosi Ítéltábla (Budapest Regional Court of Appeal), set the date of performance as 16 November 1998 and, accordingly, denied the right to deduct VAT on the grounds that it was time-barred. According to the grounds in the administrative decision, under the previous VAT Law the right of deduction clearly arose at the time the tax due was charged. The right to deduct the input tax on an acquisition therefore arose at the time the tax, on that same transaction, became payable by the supplier. According to the tax authorities, the invoice issued by the contractor gave an incorrect date of performance because, in actual fact, performance had already occurred on 16 November 1998, and the applicant's right to deduct VAT had therefore likewise arisen on that date. They emphasised that the time of performance in relation to an invoice relates not to its payment but to performance of the economic transaction between the parties.
- 4 In its administrative appeal, the applicant argued that the provisions relating to the right to charge the tax and to the limitation period for that right do not apply to the

limitation period relating to the applicant's claim. Referring to Paragraph 326(1) and (2) of the Polgári törvénykönyvről szóló 1959. évi IV. törvény (Law IV of 1959 establishing the Civil Code), it claimed that the limitation period had not even begun, but was instead latent. The right to deduct VAT did not arise until the applicant was in possession of the correctly issued invoice. According to Paragraph 35 of the previous VAT Law, exercising the right to deduct VAT presupposes that the taxable person is in possession of an invoice for the transaction issued in the taxable person's name. Thus, until 2011 the applicant did not have in its possession any such invoice. According to the applicant, for the purpose of exercising the right to deduct VAT, the crucial element was the payment which it had made. It had paid the contractor's invoice in the second quarter of 2011, and therefore until that time the requirement that the other taxable person must have passed on the VAT payable to the applicant had not been satisfied. The position taken in the administrative decision meant that the contractor had paid to the Treasury the VAT due and passed on to the applicant, but the applicant could neither deduct nor offset that VAT.

- 5 The first instance court dismissed the applicant's administrative appeal.
- 6 It is common ground that in 1998 the contractor performed its obligations under the works contracts entered into with the applicant. It is apparent from the civil judgment issued in the proceedings between the parties that the applicant's conduct prevented the contractor from issuing the invoice for its remuneration, given that the applicant did not pay the contractor the sum to which it was entitled until the enforcement proceedings and that the contractor issued the invoice once it received payment. The date of performance according to the invoice was 6 June 2011 but, according to the first instance court, the defendant had correctly observed that performance by the contractor could not have taken place in 2011 because it had, in actual fact, already occurred in 1998. That court also concurred with the defendant that the time of performance should not relate to payment in respect of the economic transaction shown in the invoice, in the same way that the applicant's right to deduct VAT does not arise on the basis of payment, but relates to effective performance of the economic transaction.
- 7 It is apparent from the limitation rule established in Paragraph 164 of the General Taxation Procedure Law that the right to apply for a tax refund becomes time-barred on expiry of five years from the last day of the calendar year in which that right arose. The first instance court stated, as the Fővárosi Ítéltábla (Budapest Regional Court of Appeal) had likewise found in its decision, that the fact that the contractor was unable to issue the invoice within the time limit had to be attributed to the applicant's conduct. According to the first instance court, the defendant had legitimately determined the time of compliance, which was different from what was indicated in the invoice, and that the defendant was therefore correct to object to the applicant claiming a refund of the tax, since the right to deduct VAT had become time-barred on expiry of five years from the time at which it arose.

- 8 The applicant brought an appeal on a point of law against the final judgment, seeking that it be set aside and a new decision be made in accordance with the law. According to the applicant, both the first instance court and the defendant have incorrectly interpreted the limitation of the right to charge the tax, since the limitation in question does not relate to the applicant but to the taxable person which issues the invoice and collects the tax. The applicant also asserts that the right of deduction did not arise until the correctly issued invoice was made available to it. In the absence of an invoice, therefore, the applicant was not in a position to exercise its right to deduct VAT. It argues that the limitation period cannot run during the period when the requirements for the right to deduct are not satisfied. The applicant denies that the fact that the invoice was not issued can be attributed to its behaviour, stating that the issuer of the invoice could have issued it at any time, but that the uncertainty as to the amount of the sum owed prevented it from complying with its invoicing obligation. It emerges from a grammatical interpretation of Paragraph 32 of the previous VAT Law that, until the tax was passed on, the applicant had no right of deduction, nor could the limitation period begin to run. The applicant also asserts that performance of the contract means that both parties must perform, not just one of them.
- 9 In its defence to the appeal on a point of law, the defendant requests that the final judgment be confirmed, stating that the time of performance in respect of an invoice does not relate to payment, but to the date on which the economic transaction between the parties takes place. Accordingly, it argues that the final judgment correctly determines the time of performance and, therefore, the time at which the right became time-barred.

The position of the Kúria (Supreme Court)

- 10 In the circumstances of the proceedings described above, in which a dispute arises between the parties as to the amount of the remuneration for a service, and that amount is determined by a court decision, but the invoice is not issued until payment is actually made, the Kúria (Supreme Court) wonders whether it is appropriate to ignore the provisions of the Sixth Directive and of the VAT Directive as regards compliance and, therefore, as regards the passing on of the tax and whether, if there is no invoice, which is a formal requirement of the right to deduct VAT, it is possible to act outside the parameters of the Member State's legislation on limitation periods. The Kúria (Supreme Court) also wonders whether the exercise of the right of deduction is affected by the fact that the applicant did not voluntarily comply with its obligation to pay following the final judgment, but did so in enforcement proceedings brought by the contractor, which then resulted in a situation in which the invoice, which is a formal requirement of the right of deduction, was only issued once the applicant had complied with its obligation and requested the invoice from the contractor, making it necessary to determine the time at which the time limit for exercising that right begins to run.

- 11 The Court of Justice of the European Union ('the Court of Justice') has ruled many times on the substantive and formal requirements for deducting VAT. As regards substantive requirements, it has held that a right of deduction arises at the time the tax becomes chargeable, that is to say, when the services are provided. In paragraph 43 of its judgment of 21 March 2018 (*Volkswagen*, C-533/16, EU:C:2018:204), examining the time limit for compliance, the Court of Justice, referring to the Opinion of the Advocate General, held that, although under Article 167 of the VAT Directive the right to deduct VAT arises on the date on which the tax becomes chargeable, Article 178 of that directive provides that, in principle, it can be exercised only at the point when the taxable person holds an invoice.
- 12 Given that, because of the dispute between the parties as to the amount of the remuneration, the invoice was not issued until payment was made in 2011, the applicant's right to deduct VAT could only have arisen at that time. It is necessary to bear in mind the important fact that until that time the contractor which issued the invoice had not received the tax due, and that this was when it paid the tax to the Treasury. The Kúria (Supreme Court) believes that the time limit for exercising the right to deduct VAT should run from the time at which, once the service has been provided, the VAT due has been passed on and paid to the Treasury and the invoice has been issued in accordance with the Directive.
- 13 The defendant tax authorities backdate the exercise of the right to deduct VAT to the moment of initial performance and, given the five-year limitation period, argue that the claim for a tax refund is time-barred. However, in the view of the Kúria (Supreme Court), that approach contravenes the principle of fiscal neutrality. The purpose of the provisions on deduction and – therefore – on the refunding of the tax is to relieve business owners entirely of any burden relating to the VAT due or paid in the course of their economic activities. The common system of VAT therefore ensures neutrality in relation to any tax burden on economic activities, whatever their purpose or results, provided that those activities are in turn, as a general rule, subject to VAT. That principle would be infringed if the exercise of the right to deduct the VAT shown in an invoice issued in the circumstances described were to be denied as a result of a restrictive interpretation of the time of performance, without taking into account the specific features of the particular case.
- 14 The Court of Justice has also made revealing decisions on the Member States' legislation on limitation periods (for example, judgments of 12 April 2018, Case C-8/17, *Biosafe — Indústria de Reciclagens*, EU:C:2018:249, and of 21 March 2018, *Volkswagen*, C-533/16, EU:C:2018:204). Accordingly, in *Volkswagen*, cited above, it held that EU law must be interpreted as meaning that it precludes legislation of a Member State under which, in circumstances such as those at issue in the main proceedings in which the VAT was charged to the taxable person and paid by it several years after delivery of the goods in question, the benefit of the right to claim a refund of VAT is denied on the grounds that the limitation period

provided for by that legislation for the exercise of that right began to run from the date of supply and expired before the application for a refund was submitted.

- 15 The Court of Justice has stated in various rulings that the tax authorities can refuse a taxable person the right to deduct VAT when it is established that that person has fraudulently failed to fulfil most of the formal obligations incumbent upon him in order to be able to benefit from that right (judgment of 28 July 2016, *Astone*, C-332/15, EU:C:2016:614, paragraph 59), and in *Volkswagen* it also referred to the need for the taxable person to act diligently. That reasoning was confirmed in the judgment in *Biosafe — Indústria de Reciclagens* (paragraph 44), which allowed a claim outside an identical limitation period.
- 16 Given the circumstances of the case, it is quite clear that the parties did not act with abusive or fraudulent intent in relation to VAT, but nevertheless, there was a form of conduct ‘in bad faith’ on the part of the applicant when, notwithstanding the final judgment, it did not voluntarily comply with its payment obligation. The Kúria (Supreme Court) therefore also asks whether bad faith of that nature on the part of the taxable person as regards actual payment, which caused the other contracting party to delay issuing the invoice, affects the exercise of the right of deduction.

Budapest, 7 March 2019

... [signatures]

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