Case C-656/19

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

4 September 2019

Referring court:

Szegedi Közigazgatási és Munkaügyi Bíróság (Administrative and Social Court, Szeged, Hungary)

Date of the decision to refer:

22 August 2019

Applicant:

BAKATI PLUS Kereskedelmi és Szolgáltató Kft.

Defendant:

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

Subject matter of the main proceedings

Administrative-law action in tax matters.

Subject matter and legal basis of the request for a preliminary ruling

In the first place, this request for a preliminary ruling seeks, on the one hand, to determine whether it is compatible with Article 147 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax ('the VAT Directive') for a Member State to operate a practice whereby the concept of 'personal luggage' within the meaning of the VAT Directive is treated in the same way as the concept of luggage in other legal provisions. On the other hand, in the event that that question is answered in the negative, it asks for a clarification of the definition to be given to the concept of 'personal luggage' in Article 147 of the VAT Directive and, in that regard, whether a practice whereby

the tax authorities of a Member State take into account only the 'normal meaning of terms' is compatible with EU law.

In the second place, this request for a preliminary ruling is also concerned, on the one hand, with an interpretation of Articles 146 and 147 of the VAT Directive to the effect that, where a taxable person does not qualify for exemption under Article 147 of that directive, it must be examined whether the exemption for the supply of goods for export under Article 146 of that directive is applicable, even if the customs procedures provided for by law have not been carried out. On the other hand, the request for a preliminary ruling seeks to ascertain whether a legal transaction may be classified as a supply of goods for export exempt from VAT contrary to the express intention of the customer.

In the third place, the request for a preliminary ruling seeks to determine whether, in the circumstances of the main proceedings, it is compatible with Articles 146 and 147 of the VAT Directive and the EU law principles of fiscal neutrality and proportionality for a Member State to operate a practice whereby the tax authority refuses to refund tax incorrectly declared and paid on supplies of goods to foreign travellers without classifying such transactions as supplies of goods for export.

Questions referred

1. Is it compatible with Article 147 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax ('the VAT Directive') for a Member State to operate a practice whereby the concept of 'personal luggage', established as forming part of the concept of the supply of goods to foreign travellers, which is exempt from value added tax, is treated in the same way as both the concept of personal effects used in the Convention concerning Customs Facilities for Touring, done at New York on 4 June 1954, and the Additional Protocol thereto, and the concept of 'luggage' defined in Article 1(5) of Commission Delegated Regulation (EU) 2015/2446 supplementing Regulation (EU) No 952/2013 of the European Parliament and of the Council as regards detailed rules concerning certain provisions of the Union Customs Code?

2. In the event of a negative answer to the previous question, how is the concept of 'personal luggage' in Article 147 of the VAT Directive to be defined, given that that directive does not define it? Is the national practice whereby the tax authorities of a Member State take into account only the 'normal meaning of terms' compatible with the provisions of Community law?

3. Must Articles 146 and 147 of the VAT Directive be interpreted as meaning that, where a taxable person does not qualify for the exemption for the supply of goods to foreign travellers under Article 147 of that directive, it must be examined, where appropriate, whether the exemption for the supply of goods for export under Article 146 of that directive is applicable, even if

the customs procedures laid down in the Union Customs Code and in delegated legislation have not been carried out?

4. If the answer given to the previous question is that, where the exemption for foreign travellers is not applicable, the transaction qualifies for a VAT exemption on the ground that the goods are for export, can the legal transaction be classified as a supply of goods for export that is exempt from VAT contrary to the intention expressed by the customer at the time of placing the order.

5. In the event of an affirmative answer to the third and fourth questions, in a situation such as that in the case at issue, in which the issuer of the invoice knew at the time of supplying the goods that they had been purchased for the purposes of resale but the foreign buyer nonetheless wished to remove them from the territory under the scheme applicable to foreign travellers, with the result that the issuer of the invoice acted in bad faith in issuing the tax refund application form available for that purpose under that scheme, and in refunding the output VAT pursuant to the exemption for foreign travellers, is it compatible with Articles 146 and 147 of the VAT Directive and the EU law principles of fiscal neutrality and proportionality for a Member State to operate a practice whereby the tax authority refuses to refund tax incorrectly declared and paid on supplies of goods to foreign travellers without classifying such transactions as supplies for goods for export and without making a correction to that effect, notwithstanding that it is indisputable that the goods left Hungary as traveller's luggage?

Provisions of EU law and international law relied on

– Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 200 L 347, p. 1; corrigenda in OJ 2007 L 335, p. 60, and OJ 2015 L 323, p. 31): Articles 146, 147 and 273.

– Commission Delegated Regulation (EU) 2015/2446 of 28 July 2015 supplementing Regulation (EU) No 952/2013 of the European Parliament and of the Council as regards detailed rules concerning certain provisions of the Union Customs Code (OJ 2015 L 343, p. 1; corrigenda in OJ 2016 L 87, p. 35, OJ 2016 L 264, p. 43, and OJ 2017 L 101, p. 164).

– Case-law of the Court of Justice of the European Union, in particular: judgment of 21 February 2008, *Netto Supermarkt*, C-271/06, EU:C:2008:105, paragraph 29; judgment of 17 May 2018, *Vámos*, C-566/16, EU:C:2018:321; judgment of 21 October 2010, *Nidera Handelscompagnie*, C-385/09, EU:C:2010:627.

Provisions of national law relied on

– Az általános forgalmi adóról szóló 2007. évi CXXVII. törvény (Law CXXVII of 2007 on Value Added Tax; 'the VAT Law'): Articles 98, 99, 153/A(1) and 259, point 10.

– Az adózás rendjéről szóló 2003. évi XCII. törvény (Law XCII of 2003 on General Taxation Procedure): Article 170.

– A Nemzeti Adó- és Vámhivatalról szóló 2010. évi CXXII. törvény (Law CXXII of 2010 on the National Tax and Customs Administration; 'the Law on the National Tax and Customs Administration'): Article 12/A.

– A turistaforgalom vámkönnyítéseiről szóló, New Yorkban 1954. június 4-én kelt Egyezmény, valamint az Egyezmény Kiegészítő Jegyzőkönyvének kihirdetéséről szóló 1964. évi 2. törvényerejű rendelet (Decree-law No 2 of 1964 enacting the Convention concerning Customs Facilities for Touring, done at New York on 4 June 1954, and the Additional Protocol to that Convention; 'the New York Convention'): Article 2.

– Judgment No KfV.1.35 502/2016/6 of the Kúria (Supreme Court, Hungary) of 8 December 2016.

Brief presentation of the facts and the main proceedings

1 The applicant's main business, until April 2015, was the wholesale trade in ornamental plants and, since then, has been other non-store retailing. Since 2015, the applicant's annual turnover has risen from the previous 50 million Hungarian forints ('HUF') to HUF one billion.

2 During 2016, the year to which the main proceedings relate, almost all of the applicant's business (some 95%) consisted in the sale to twenty private individuals of various food, cosmetic and cleaning products intended for a non-Community territory, in this instance Serbia. The applicant was aware that the Serbian buyers, who had purchased large quantities of goods from it on hundreds of occasions, belonged to three families and that the goods left Hungary for Serbia as the buyers' traveller's luggage.

3 The applicant's representative would issue the supporting documentation for the supplies of goods on the basis of the information which the buyers provided by telephone when placing their orders. An agent of the applicant would transport the goods from the applicant's warehouse in Szeged (Hungary) to a warehouse which the Serbian private buyers rented at a location in the vicinity of the border between Hungary and Serbia, on the Hungarian side, namely Tompa. There, the driver providing the transportation would hand over to the buyers, along with the goods, the invoices issued by the applicant's representative and the tax refund application forms used under the scheme for foreign travellers, in return for the

payment in cash of the purchase price. The goods would be transported onwards, as traveller's luggage, by private car from Tompa to Serbia.

4 There is no question that the applicant knew that its customers were buying the goods at issue not for personal or family use but in order to resell them on Serbian markets. The applicant was also aware that the family members' participation served to ensure that the value of each supply did not exceed HUF 1 million, thus making it easier, under the Hungarian customs authorities' internal rules on customs procedure, for the goods to be taken across the border from Hungary to Serbia unhindered.

5 As regards those goods, the buyers would avail themselves of the exemption from value added tax ('VAT') for foreign travellers in the following way: the applicant would complete the VAT refund application form, which would subsequently be endorsed and stamped by the customs office of exit of the goods, in some cases with the wording 'Exit from Community territory: Tompa', following which a second copy of the form would be returned to the applicant and the latter would refund the VAT in cash to the buyers.

6 The buyers requested that a tax refund application form be issued to them on every occasion as foreign travellers, without at any point proposing that the goods in question should be removed from the territory not as traveller's luggage but as part of a supply of goods for export.

7 In keeping with the foregoing, the applicant refunded the VAT to the buyers — HUF 339 788 000 in total (some EUR 1 038 000) — in accordance with Article 99(9) of the VAT Law, according to which, if VAT has been charged at the time of the supply of goods and the supplier of the goods has refunded the tax charged to the foreign traveller, and if, moreover, the supplier has previously assessed and declared that VAT to be tax owed, he is to be entitled, at the earliest in the VAT assessment period in which the refund to the foreign traveller took place, to deduct from his assessment of the tax owed the amount of tax refunded. The supporting documentation for the application for a tax refund for foreign travellers shows that, in any event, the goods in question left Hungarian territory.

8 The Nemzeti Adó- és Vámhivatal Csongrád Megyei Adó- és Vámigazgatósága (Tax and Customs Directorate for the province of Csongrád (Hungary), which forms part of the National Tax and Customs Administration; 'the first-tier tax authority), by decision of 27 June 2018, adopted following an inspection of the tax year at issue, required the applicant to pay differences in VAT in the amount of HUF 340 598 000 (approximately EUR 1 041 000), a fine of HUF 163 261 000 (approximately EUR 499 000) and a late-payment surcharge of HUF 7 184 000 (some EUR 22 000). It found that the purchases exceeded the scope of personal needs and family use and had been made for the purposes of resale, which ruled out their classification as traveller's luggage. It stated that the applicant did not qualify for the exemption for goods for export either, since nobody had requested export customs clearance in connection with those transactions and the applicant

did not have the documentation necessary for that purpose. Neither does the applicant satisfy the definition of exporter, since it was no longer in possession of the goods once it had supplied them to the buyers in the latter's warehouse, that is to say a warehouse situated on the Hungarian side of the border between Serbia and Hungary, and was therefore unable to arrange for the goods to be transported to a place of destination situated outside the Community customs territory.

9 By decision of 31 October 2018, the defendant confirmed the first-tier decision, which had been challenged before it by the applicant. In the grounds of its decision, the defendant stated that, following its inspection, the tax authority had found that, since the transactions could not be classified as supplies to foreign travellers, it had examined whether the conditions applicable to supplies of goods for export were met, and concluded that they were not. It referred to the applicant's statements, according to which the applicant had taken the view, in the light of the buyers' intentions, that these were supplies of goods for foreign travellers.

According to the defendant, the Kúria (Supreme Court) pointed out in its judgment KfV.1.35.502/2016/6 of 8 December 2016, in connection with the definition of the concept of traveller's luggage, that both the quantity of the goods and the frequency of the purchases are relevant in this regard. Neither the VAT Law nor the VAT Directive define the concept of personal luggage, EU customs law provides no guidance in this respect either and the New York Convention defines the concept of 'personal effects'. According to national practice, traveller's luggage is to be regarded as the goods which a traveller purchases for his own personal needs or as a gift, and must under no circumstances serve commercial purposes. Regular supplies and large quantities of goods preclude the classification of those goods as traveller's luggage, and it is for this reason that Article 99 of the VAT Law does not allow commercial quantities of goods to be removed from the territory as traveller's luggage. That provision thus states that, if the buyer is a foreign traveller and the goods purchased by him form part of his personal luggage or his traveller's luggage, the exemption provided for in Article 98(1) of the VAT Law may apply, provided that:

– the total value of the supply of goods (including VAT) is greater than an amount equal to EUR 175;

– the traveller can prove his legal status by means of a travel document;

– the customs office of exit of the goods from Community territory certifies the departure of the goods from that territory by endorsing and stamping the tax refund application form. At the request of the foreign traveller, the supplier of the goods must arrange for the tax refund application form to be completed.

A further condition of the applicability of the exemption, pursuant to Article 99 of the VAT Law, is that the supplier must be in possession of the first endorsed and stamped copy of the tax refund application form, and that, if tax was charged at

the time of supply of the goods, the supplier of those goods must refund the tax charged to the foreign traveller. The latter is to be entitled to a tax refund by payment in HUF and in cash, although the parties may also agree on another currency or method of payment.

If tax has been charged in accordance with paragraph 4(b) of the VAT Law and the supplier has previously assessed and declared that tax as tax owed, the supplier is to be entitled, at the earliest in the tax assessment period in which the refund to the foreign traveller took place, to deduct from his assessment of the tax owed the amount of the tax refunded.

According to national practice, in so far as it is established that the goods have left Community territory, the tax authority must examine whether the conditions for exempting a supply of goods on another legal basis are met, in particular whether the applicant qualifies for the exemption under Article 98 of the VAT Law, whereby supplies of goods dispatched by post or transported from national territory to another country situated outside the Community are to be exempt from tax.

The national practice takes into account the case-law of the Court of Justice to the effect that, although the VAT Directive allows the Member States to lay down the formal requirements relating to the rules on exercising the right of deduction, such requirements must not go beyond what is necessary to ensure the proper levying and collection of tax and to prevent tax evasion.

10 The defendant stated that, account being taken of the aforementioned judgment of the Kúria, the applicant does not qualify for the exemption for goods for export either, since it did not request export customs clearance in connection with the transactions in question and, according to the applicant's statements, no consideration was given to processing the transactions as exports because the buyers expressly asked for the exemption for foreign travellers to be applied.

Main arguments of the parties in the main proceedings

Applicant's arguments

11 In its application, the applicant seeks the annulment of the defendant's decision and the first-tier decision. It submits that neither Community law nor the VAT Law contain a definition of personal luggage or traveller's luggage. In the absence of a definition in tax law, the tax authority cannot differentiate between goods crossing the border and, therefore, cannot refuse to endorse a tax refund application form for goods leaving the territory on the ground of an alleged intention to resell such goods. Neither is the applicant attempting to avoid tax, since the taxable person would also qualify for the exemption for goods for export, pursuant to Article 98 of the VAT Law. The applicant also refers to the judgment delivered by the Court of Justice in *Netto Supermarkt*, C-271/06,

according to which the case-law laid down by the Court of Justice in the field of customs law cannot be relied on in tax disputes, which supports the inference that the tax mechanism used by the applicant cannot be assessed on the basis of customs legislation either.

12 In addition, the applicant refutes the tax authority's legal interpretation to the effect that, in accordance with Article 12/A of the Law on the National Tax and Customs Administration, the mere fact that the customs authority of exit acts within the framework of the tax authority does not mean that it performs all of the tax administration tasks laid down by law, with the result that the customs authority certifies only that the goods have left the territory of the European Union, but not that the goods were removed from the territory as part of personal luggage or traveller's luggage in accordance with Article 99 of the VAT Law, or that that provision was complied with.

Defendant's arguments

13 The defendant contends that the action should be dismissed, and reiterates the grounds of law set out in its decision.

Brief statement of the grounds on which the request for a preliminary ruling is made

14 This court relies on a judgment of the Kúria in which the latter held, in a case with a similar factual background (departure from the territory of commercial quantities of goods under the scheme for foreign travellers), that, first, it must be examined whether the conditions laid down in Article 99 of the VAT Law are met, and then, in the light of the fact that the goods actually left Community territory, it must be analysed whether any other provision of the VAT Law is applicable. Although neither the VAT Law nor the VAT Directive define the concept of traveller's luggage and Community customs law and international law do not provide an unequivocal definition of that concept either, it is safe to say that traveller's luggage is to be regarded as the goods which a traveller purchases for his own personal needs or as a gift and may not under any circumstances have commercial purposes. In that judgment, it was held that Article 99 of the VAT Law does not allow commercial quantities of goods to be removed from the territory as traveller's luggage, with the result that neither the exemption from, nor the deduction of, that tax as provided for under that scheme can be authorised. The Kúria went on to say that, since supplies of goods must be taxed in the country in which the goods supplied are ultimately used, it is necessary to examine whether the exemption provided for in Article 98 of the VAT Law is applicable. The conditions governing the application of that article include in particular certification by the customs office of exit that, at the time of the supply, or, at the latest, within ninety days thereafter, the goods left Community territory. It is for the customs authority to determine to what extent the applicant qualifies for exemption under Article 98 of the VAT Law.

15 This court points out that, since Articles 98 and 99 of the VAT Law are consistent with Articles 146 and 147 of the VAT Directive for the purposes of the present case, the latter articles of the VAT Directive must be interpreted and applied.

16 This court is of the view that, in order to define the concept of personal luggage and traveller's luggage, it is important to start from its everyday meaning, with reference to the provisions of the Community Customs Code, the Union Customs Code and the New York Convention. That approach is also supported by the case-law of the national courts. Decisive in the assessment of the concept of traveller's luggage, according to this court, is the purpose of removing the goods from the territory. The concept of traveller's luggage does not include goods — irrespective of their quantity or mode of transportation — that were purchased not in order to satisfy personal or family needs or as a gift but with a view to their resale. However, in the absence of an authentic interpretation in the legislation, the definition of that concept calls for a reference for a preliminary ruling.

17 In the present administrative-law proceedings, the rules on the exemption for foreign travellers being inapplicable, the defendant examined whether the conditions for exempting goods for export were met and found that the applicant knew that it was selling goods to persons who later resold them on Serbian markets. Since the applicant has had to recognise that the legal conditions governing the exemption for foreign travellers are not met, it cannot reasonably claim in the present dispute to have exercised due commercial care. The defendant referred in this regard to paragraph 29 of the judgment delivered by the Court of Justice in *Netto Supermarkt*. The defendant further observed that, contrary to what the applicant had submitted, the VAT Law contains no specific provision which, in circumstances similar to those of this case, compels the seller, when so requested by the buyer, to issue a tax refund application form.

18 This court also considers, however, that, at the time of supply of the goods, the seller could not disregard the stated intention of the buyers to remove the goods from the country as foreign travellers, which rules out the possibility of invoicing without VAT on the ground that the goods were for export. The rules governing the exemption for foreign travellers are different from and stricter than those governing the supply of goods for export (the exemption covers a limited selection of goods, eligibility for it is subject to a quantitative threshold and the invoice cannot be issued *ab initio* without VAT), the logical consequence of this being that the invoice issuer could not unilaterally apply the exemption for supplies of goods for export to buyers who defined themselves as foreign travellers and were, as such, subject to a stricter VAT exemption scheme, since it was reasonable for it to expect those buyers to remove the goods from the country as foreign travellers. Consequently, the invoice issuer acted properly in including VAT on its invoices. If the foreign buyers had changed their original intention and had ultimately removed the goods from the country under the single customs procedure, the applicant might have contemplated correcting the invoice. In this instance, however, the foreign buyers did not change their original intention, it being common ground in the present dispute that they transported the goods to Serbia as

foreign travellers. Since the invoices were therefore correct at the time of their issue and there was no later change on account of which they should have been corrected, the tax authority was not required to reclassify their content afterwards.

19 In this case, the parties do not question the fact that the invoice issuer's foreign customers removed commercial quantities of goods via the border between Hungary and Serbia for the purposes of resale but as foreign travellers. Neither is it a matter of any dispute that those customers saw to it that the value of the invoiced goods did not exceed a certain amount on each occasion, thus evading customs control. The invoice issuer knew of the fraudulent activities of its customers and was aware that the conditions for exempting foreign travellers were not met, and it should not therefore have issued the tax refund application form which triggered that exemption. This court considers it to be irrelevant what specific Serbian legislation the foreign buyers sought to circumvent and what advantages they secured by bringing the goods into Serbian territory as foreign travellers. For the purposes of reviewing the tax authority's decision, what matters is that the invoice issuer knew of its customers' intention to resell and should not therefore have provided them with the exemption for foreign travellers. In collaborating with its foreign customers to circumvent the Hungarian tax legislation and, even though it knew that it was the intention of those customers to resell the goods, and, therefore, that the essential conditions for exempting foreign travellers were not met, in refunding the VAT and including it in its returns for the financial year at issue as a deductible item of tax owed, the applicant obtained a significant competitive advantage over its competitors acting in accordance with that legislation.

20 As a consequence of the conscious actions of the invoice issuer and the buyers, indicative of a concurrence of wills, the goods were not exhibited or subjected to close scrutiny at the Serbian customs office, their traceability was lost and customs duties and other customs clearance costs – not determined in the present dispute – could not be paid; in addition, the buyers were given the opportunity, by circumventing Serbian tax legislation, to resell the goods brought into that country as individuals. From the point of view of the facts of the case at issue, it is irrelevant whether or not the Serbian buyers actually went on to take up that opportunity, since the fiscal and other consequences in Serbia fall outside the framework of analysis in this dispute, in which it is also not appropriate to examine which specific costs were not incurred because the customs procedure was circumvented. The only relevant point is that, by its actions, the invoice issuer knowingly collaborated in the fraudulent activities of the Serbian buyers and knowingly infringed the provisions of the VAT Law relating to supplies of goods in issuing the invoices and completing forms under the scheme for foreign travellers, as well as in improperly reducing its tax base to reflect the tax refund made to foreign travellers.

21 If, in the case where tax cannot be refunded under the exemption for foreign travellers, the tax authority were required to grant a tax exemption on another legal basis, the fact that the invoice issuer acted in bad faith would effectively

have no legal consequences, in particular given that, if there is no improper application for a refund, the conditions for imposing a tax fine are not met either. Because of the competitive advantage improperly secured by the invoice issuer, that situation would not only fail to comply with the principle of fiscal neutrality but would also be contrary to the obligation on Member States to take action against tax evasion and avoidance.

22 The Court of Justice has already looked at the principle of fiscal neutrality in the context of eligibility for tax exemptions, and has held that that principle is intended by the EU legislature to reflect, in matters relating to VAT, the general principle of equal treatment. The measures that Member States may adopt in order to ensure the correct collection of VAT and prevent evasion may not be used in such a way as to undermine the neutrality of VAT. To allow taxable persons to opt for an exemption scheme after the time limit set would confer on them an undue competitive advantage, to the detriment of operators who duly complied with the procedural obligations laid down in the national legislation at issue in the main proceedings. Those taxable persons would be in a position to choose after the event, and, consequently, on the basis of the actual results of their activity, the tax arrangements which seem most advantageous to them (judgment of 17 May 2018, *Vámos*, C-566/16).

23 In the opinion of this court, the findings in the judgment in *Vámos* are also applicable to this case. After all, the invoice issuer, acting in breach of the VAT legislation, applied to its tax base a reduction to which it was not entitled; later, when the tax authority detected the error, the invoice issuer sought to benefit after the event from another exemption for exports. If the tax authority authorised the retrospective application of the tax exemption for exports, the invoice issuer would secure an undue competitive advantage over its competitors, in breach of the principle of fiscal neutrality.

24 According to the settled case-law of the Court of Justice, the measures which the Member States may adopt under Article 273 of the VAT Directive in order to ensure the correct levying and collection of the tax and for the prevention of fraud must not go further than is necessary to attain such objectives and must not undermine the neutrality of VAT (judgment in *Nidera Handelscompagnie*, C-385/09).

25 Consequently, a failure to comply with the formal conditions may lead to the loss of the right of deduction only where it makes it impossible to verify compliance with the material requirements. This court considers that this is precisely the case in this instance, where the invoice issuer and the buyers not only failed to comply with the formal conditions but also, acting in breach of the rules on the relevant formalities, knowingly concealed their true economic activity from the tax and customs authorities.

26 In the opinion of this court, the principle of fiscal neutrality will be observed only if, in the face of a reduction of the tax base by the tax refund made to foreign

travellers, the tax authority does not reclassify the transactions in question as supplies of goods for export, this being the only practice that also satisfies the requirement of proportionality.

27 On the basis of the differences in the concept of exportation under tax law and customs law respectively, the applicant criticises the fact that the tax authority requires it to bear responsibility for the fact that it could have removed the goods from the territory as an exporter. However, there is nothing in the documents before this court to show that the applicant or anybody else sought customs clearance as an exporter of the goods in question, and, according to the statements made by the applicant's legal representative, the possibility of processing the transactions as exports was not even considered.

28 Contrary to what the applicant has submitted, it is not sufficient, when it comes to classifying the facts for tax purposes, to show that the goods have left the territory, since, as has been explained previously, the exemption for foreign travellers is special vis-à-vis the exemption for supplies of goods for export and applies to a defined group of persons, which makes it necessary to specify on what basis the buyer qualifies for a refund. Consequently, the applicant is wrong to argue that the endorsement affixed by the customs authority to the tax refund application form, which shows that the goods have left the territory as part of traveller's luggage, also serves to justify the tax exemption for supplies of goods for export.

29 Account being taken of the foregoing considerations, this court also has doubts about the fact that, where the tax exemption for foreign travellers is found to be unlawful, there is a requirement to examine in tandem whether the conditions applicable to the supply of goods for export are met, in all cases where the goods have left the territory as traveller's luggage.

30 At the same time, this court regards as decisive in the case at issue the fact that the applicant clearly acted in bad faith in the discharge of its tax obligations, for which reason it is appropriate, on the basis of the EU law principles of fiscal neutrality and proportionality, not only to refuse the reduction of the tax base but also to rule out the possibility of reclassification as a supply of goods for export, even if the tax authority were also required to examine whether the conditions applicable to the supply of goods for export are met.

31 This court considers it necessary to refer the foregoing questions for a preliminary ruling and is aware that other administrative-law proceedings relating to similar matters are currently pending before Hungarian courts.