

Anonymised version

Translation

C-844/19 — 1

Case C-844/19

Request for a preliminary ruling

Date lodged:

15 November 2019

Referring court:

Verwaltungsgerichtshof (Austria)

Date of the decision to refer:

24 October 2019

Appellants on a point of law:

CS

Finanzamt Graz-Stadt

[OMISSIS]

Verwaltungsgerichtshof (Supreme Administrative Court, Austria)

[OMISSIS]

24 October 2019

The Supreme Administrative Court [OMISSIS] (1) in the appeal on a point of law bearing the reference Ro 2017/15/0035 brought by CS, residing in ... [OMISSIS], against the judgment of the Bundesfinanzgericht (Federal Finance Court, Austria) of 29 May 2017 [OMISSIS] concerning the rejection of an application for the award of appeal-related interest, and (2) in the appeal on a point of law bearing the reference Ro 2018/15/0026 brought by the Finanzamt Graz-Stadt (City of Graz Tax Office, Austria), established in Graz, [OMISSIS] against the judgment of the Federal Finance Court of 7 September 2018 [OMISSIS] concerning the fixing of interest (intervener: technoRent International GmbH, established in Gräfelfing (Federal Republic of Germany) [OMISSIS]) made the following

Order:

The following questions are referred to the Court of Justice of the European Union for a preliminary ruling pursuant to Article 267 TFEU:

1. Is there a rule with direct effect under EU law that grants a taxpayer to whom the tax office, in circumstances such as those in the main proceedings, has not refunded a turnover tax credit in good time entitlement to interest for late payment, with the result that he can claim that entitlement before the tax office or before the administrative courts, even though national law does not provide for such a rule on interest?

If Question 1 is answered in the affirmative:

2. Is it permissible also in the case of a turnover tax claim made by the taxable person as a result of a subsequent reduction of consideration under Article 90(1) of Council Directive 2006/112/EC of 28 [Or. 2] November 2006 on the common system of value added tax that interest begins to accrue only after expiry of a reasonable period for the tax office to assess the lawfulness of the entitlement claimed by the taxable person?
3. Does the fact that the national law of a Member State does not provide for any rule on interest in respect of the late crediting of turnover tax credits mean that the national courts must, when calculating interest, apply the legal consequence laid down by the second subparagraph of Article 27(2) of Council Directive 2008/9/EC of 12 February 2008 laying down detailed rules for the refund of value added tax, provided for in Directive 2006/112/EC, to taxable persons not established in the Member State of refund but established in another Member State, even though the main proceedings do not fall within the scope of that directive?

Grounds:

- 1 A. Facts and proceedings to date:
- 2 1. Appeal on a point of law Ro 2017/15/0035
- 3 On 13 September 2007, in his turnover tax return for August 2007, the appellant on a point of law, residing in Austria, claimed an input tax surplus in the amount of EUR 60 689.28.
- 4 The tax office did not register that surplus in the tax account of the appellant on a point of law, but carried out a turnover tax assessment. A dispute thereby arose over the extent of the input tax deduction from the construction of an extension to the hotel business run by the appellant on a point of law. The tax office therefore fixed the input tax surplus by decision of 18 October 2007 at EUR 46 000 lower, that is, in the amount of EUR 14 689.28.

- 5 The appellant on a point of law brought an appeal against that decision. **[Or. 3]**
- 6 By decision of the Unabhängiger Finanzsenat (Independent Finance Tribunal, Austria) of 15 May 2013, the appeal was upheld and the turnover tax was fixed as claimed by the appellant on a point of law. The input tax amount was credited to the tax account of the appellant on a point of law on 22 May 2013.
- 7 By application of 30 May 2013, the appellant on a point of law claimed appeal-related interest under Paragraph 205a of the Bundesabgabenordnung (Federal Tax Code, Austria; BAO) in respect of the tax credit for the period from 1 January 2012, on the ground that the rule in Paragraph 205a of the BAO entered into force on 1 January 2012 and the interpretation of that provision in accordance with EU law also gives rise to an entitlement to interest for late payment on input tax credits.
- 8 The tax office rejected that application by decision of 10 June 2013.
- 9 By the judgment under appeal before the Supreme Administrative Court, the Federal Finance Court dismissed the appeal brought against the rejection decision.
- 10 As reasoning for its decision, the Federal Finance Court stated, in essence, that while the provision of Paragraph 205a of the BAO does provide for interest where an initially disputed tax liability paid by the taxable person to the tax office is reduced as a result of an appeal, it does not so provide for the present case of an award of a tax credit in appeal proceedings.
- 11 The appellant on a point of law challenges the Federal Finance Court's decision by appeal on a point of law to the Supreme Administrative Court.
- 12 The Supreme Administrative Court held a hearing in relation to the appeal on a point of law. At the hearing, the appellant on a point of law claimed that EU law grants him entitlement to interest for late payment on the input tax credit. The tax authority contended that no entitlement to interest for late payment with direct effect arises under EU law and that the case-law of the Court of Justice had to date always applied in cases in which the national legal order already had a system of interest for late payment. **[Or. 4]**
- 13 2. Appeal on a point of law Ro 2018/15/0026
- 14 The intervener, a limited liability company with its seat in Germany, sold machines in Austria in 2003 and 2004 and paid turnover tax on those transactions in Austria. In 2005, in its turnover tax return for the month of May 2005, it claimed a turnover tax credit in the amount of EUR 367 081.58 on the ground that a reduction of consideration (Paragraph 16 of the UStG 1994) had subsequently occurred.
- 15 The turnover tax credit was assessed in the course of an assessment by the tax authority that began in July 2006 and ended in June 2008 and was credited to the

intervener's tax account during the assessment procedure on 10 March 2008. In view of a previously existing debt of EUR 18 000 in the tax account, the intervener ended up with a credit of around EUR 345 000.

- 16 However, at the end of the assessment, the tax office took the view that the adjustment of consideration was not necessary and that the intervener was not entitled to turnover tax refund. By decision of 13 October 2008 the tax office therefore fixed the turnover tax for 2005 at EUR 2 734.36, which resulted in an additional assessment in the amount of EUR 367 081.58. That additional assessment was paid by the intervener in part from the existing credit in its tax account and in part through a payment to the tax office.
- 17 An appeal brought by the intervener against the turnover tax notice of 13 October 2008 was upheld by the Independent Finance Tribunal by appeal decision of 8 April 2013. The amount of EUR 367 081.58 was credited to the intervener on 10 May 2013.
- 18 By application of 21 October 2013 the intervener claimed interest on the sum of EUR 367 081.58, referring to decisions of the Court of Justice of the European Union (inter alia the judgment of 19 July 2012, *Littlewoods Retail Ltd*, C-591/10). **[Or. 5]**
- 19 In respect of that claim, the tax office decided by decision of 4 February 2014 that a claim for interest (in the amount of EUR 10 021.32) arose only for the period from 1 January 2012 to 8 April 2013. The additional assessment in the amount of EUR 367 081.58 fixed by the turnover tax notice of 13 October 2008 was paid to the tax office by the intervener. Paragraph 205a of the BAO grants appeal-related interest on the tax paid to the tax office during the legal proceedings; Paragraph 205a of the BAO entered into force on 1 January 2012.
- 20 An appeal brought against the decision of 4 February 2014 was upheld in part by the Federal Finance Court by judgment of 29 May 2017, in so far as it awarded the intervener interest for late payment also for the period from 2 September 2005 to 9 March 2008, as a result of which the interest for late payment increased to a total of EUR 51 170.02.
- 21 For the period from 2 September 2005 to 9 March 2008, the Federal Finance Court did not cite Paragraph 205a of the BAO as the basis for its decision on the ground that, with regard to that period, none of the taxes paid by the intervener to the tax office were available. The Federal Finance Court states EU law and in particular the judgment of the Court of Justice of 19 July 2012, *Littlewoods Retail Ltd*, C-591/10 as the basis for entitlement to interest for late payment. The Federal Finance Court states that the intervener had no access to the amount of EUR 367 081.58 from the date of notice until the credit received on 10 March 2008. In accordance with the case-law of the Court of Justice, interest applies to that period, as a result of which interest began to accrue on the forty-sixth day after the filing of the turnover tax return, that is, on 2 September 2005 (judgment

of the Court of Justice of 12 May 2011, *Enel Maritsa Iztok 3*, C-107/10, paragraph 61). The fact that the tax authorities carried out an assessment of the turnover tax credit does not preclude entitlement to interest.

- 22 The intervener had access to the amount of EUR 367 081.58 from 10 March 2008. The yearly turnover tax notice for 2005 of 13 October 2008 does not alter the foregoing, because the intervener brought an appeal against that notice, with the result that, on application, [Or. 6] the payment of the additional assessment of EUR 367 081.58 resulting from that notice is suspended under national law (Paragraph 212a of the BAO) until delivery of the decision on the appeal and that sum of money may be accessed.
- 23 The appeal on a point of law brought by the tax office against the decision of the Federal Finance Court of 29 May 2017 is directed exclusively against the award of interest for late payment for the period from 2 September 2005 to 9 March 2008.
- 24 The Supreme Administrative Court held a hearing in relation to the appeal on a point of law. At the hearing, the tax authority contended that no entitlement to interest for late payment with direct effect arises under EU law. The national legal order in Austria does not lay down — in contrast to the legal order in the main proceedings underlying the judgment in *Littlewoods Retail Ltd*, in which the Court of Justice ruled on interest for late payment applying to turnover tax credits in the light of EU law — any basis for entitlement to interest for late payment on the tax credits at issue in the present case. It may also be inferred from Article 27 of Directive 2008/9 that it cannot be challenged under EU law where a Member State does not recognise interest on tax credits.
- 25 B. Relevant provisions of national law:
- 26 As a preliminary point, it should be pointed out that Austrian tax law does not provide for any general rules regarding interest on tax debts or tax credits. Paragraph 205 of the BAO lays down (for a maximum period of 48 months from the October following the tax year) ‘interest on additional assessments’ (granted to the tax creditor) and ‘interest on credits’ (granted to the taxable person), which may arise on the basis of the difference between the established advance payments and the tax amount established in the yearly tax notice, only in the field of income tax and corporation tax. In the event that the imposition of a tax leads to an additional assessment and the taxable person challenges that additional assessment through an appeal, but already [Or. 7] pays it to the tax office during the appeal period, and that additional tax assessment is ultimately reduced through disposal of the appeal, Paragraph 205a of the BAO provides for appeal-related interest for the period from payment until notification of the disposal of the appeal that reduces the tax.
- 27 The Austrian Umsatzsteuergesetz (Law on turnover tax; ‘UStG 1994’) provides, inter alia, in Paragraph 21(1) that a surplus (in input tax compared with turnover

tax) notified in advance within the advance notification period (one calendar month) is — generally — to be credited promptly to the taxable person's tax account, as a result of which the credit takes effect from the date of lodging the advance notification, at the earliest from the date following expiry of the advance notification period, and immediately extinguishes tax debts declared in the tax account or is available for payments to the taxable person. Interest on any credit in the tax account stemming from the credit entry is not provided for.

- 28 Paragraph 217 of the Federal Tax Code provides for late payment surcharges in the event that a tax is not paid at the latest on the due date. The first late payment surcharge amounts to 2% of the tax amount not paid in due time; a second and third late payment surcharge (each in the amount of 1%) must be paid after a further three months in each case.
- 29 In respect of operators not established in the territory of the country and also not generating any turnover in the territory of the country, the Verordnung des Bundesministers für Finanzen (Regulation of the Austrian Federal Minister for Finance), BGBl. No 279/1995 (in the version under BGBl. II No 158/2014), which transposes Council Directive 2008/9/EC of 12 February 2008 laying down detailed rules for the refund of value added tax, provided for in Directive 2006/112/EC, to taxable persons not established in the Member State of refund but established in another Member State, provides for the refund of input tax in a separate procedure. As regards operators established elsewhere in the territory of the Community, Paragraph 3 of that regulation provides for late payment compensation: if no payment of the amount to be refunded is made by the tax office upon expiry of a period of four months and ten working days from the date of [Or. 8] receipt of the refund application by the tax authorities, late payment compensation is to be fixed in the amount of 2% for the tax amount not refunded in due time. If the tax authority requests additional information, entitlement to late payment compensation exists, where a single request is made, at the earliest ten working days after expiry of a period of six months and, where two requests are made, at the earliest ten working days after expiry of a period of eight months from the date of receipt of the refund application. Secondary and tertiary awards of late payment compensation (each amounting to 1% of the non-refunded tax amount) are to be fixed in so far as the tax amount is not refunded at the latest after three further months in each case.
- 30 C. Explanation of the questions referred:
- 31 1. Principles governing entitlement to interest for late payment with direct effect under EU law
- 32 The pending appeal on a point of law bearing the reference Ro 2017/15/0035 concerns a late refund of an input tax surplus.
- 33 In the judgments of 12 May 2011, *Enel Maritsa Iztok 3*, C-107/10; 24 October 2013, *Rafinăria Steaua Română*, C-431/12; of 6 July 2017, *Glencore Agriculture*,

C-254/16; and of 28 February 2018, *Nidera BV*, C-387/16, the Court of Justice ruled, regarding the interpretation of Article 183 of the VAT Directive in cases of input tax surpluses, that the taxable person is to be paid interest for late payment if a VAT surplus is not paid to him within a reasonable period. A common feature of the main proceedings underlying the judgments of the Court of Justice cited is that the respective legal orders provide for rules according to which the State was under an obligation to pay interest for late payment to the taxable person in the event of an unlawfully late tax refund. There is no such provision in Austrian national law. There are no legislative provisions that award the taxable person interest for late payment for the late refund of turnover tax claims. The provisions of Paragraph 205 and Paragraph 205a of the BAO occasionally referred to in the literature are not applicable **[Or. 9]** in such a case. Both the wording of those provisions and their objective and general scheme exclude their application to late turnover tax refunds (see the judgment of the Supreme Administrative Court of 31 March 2017, Ra 2016/13/0034).

- 34 Given that national law grants no entitlement to interest, the question arises as to whether EU law, in particular Article 183 of the VAT Directive, provides for a rule with direct effect on which the taxable person may rely before the tax office and before the courts in order to receive interest for late payment on account of late refunds of input tax surpluses.
- 35 In that regard, it must be borne in mind that Article 27 of Directive 2008/9 (see, to that effect, section 3 below) lays down rules in the event that the national law of a Member State does not recognise such interest. Accordingly, Article 27 of Directive 2008/9 does not operate on the assumption that the taxable person must necessarily be granted entitlement to interest for late payment under EU law. If, in any event, EU law already provided for entitlement to interest for late payment, the second subparagraph of Article 27(2) of Directive 2008/9 would be rendered meaningless (see, albeit concerning Article 26(2) of that directive, judgment of the Court of Justice of 2 May 2019, *Sea Chefs Cruise*, C-133/18, paragraph 45).
- 36 The pending appeal on a point of law bearing the reference Ro 2018/15/0026 does not concern an input tax surplus and cannot be ruled upon under Article 183 of the VAT Directive. The proceedings concern a turnover tax claim made by the taxable person against the tax office that arose from a subsequent reduction of consideration. Under the provisions of Paragraph 16(1) and (3) of the UStG 1994 which transpose Article 90(1) of the VAT Directive, the operator that generated turnover in the past must reduce the tax amount owed for that turnover if the agreed purchase price is subsequently reduced or becomes irrecoverable. Under Paragraph 16(1) of the UStG 1994, the adjustment is to be made for the taxable period in which the change in consideration occurred; thus, in the present case, in the taxable period in which the claim for the purchase price became irrecoverable (May 2005). **[Or. 10]**
- 37 As far as can be seen, the Court of Justice has addressed the question of interest for late payment in respect of turnover tax claims made by the operator that are

not based on an input tax surplus but on other circumstances only in the judgment of 19 July 2012, *Littlewoods Retail Ltd*, C-591/10, in which it is also significant for the main proceedings underlying that judgment that national law already provided for rules on interest for late payment for corresponding tax credits. That judgment concerns a turnover tax claim based on consideration (purchase prices for goods) that was wrongly calculated too high in the past. In that judgment, the Court of Justice based entitlement to interest for late payment from its case-law on the refund of ‘charges levied in breach of EU law’ (see the judgment in *Littlewoods Retail Ltd*, paragraph 24).

- 38 In the appeal on a point of law Ro 2018/15/0026 the question arises whether a subsequently occurring reduction of consideration, here in the form of claims for the purchase price subsequently being declared irrecoverable, may be deemed a case of a ‘charge levied in breach of EU law’. Should the Court of Justice’s case-law on ‘taxes levied in breach of EU law’ be applicable to such a case, the further question arises as to whether there is a rule of EU law with direct effect that grants a taxable person to whom the tax office, in circumstances such as those in the main proceedings, has not refunded a turnover tax credit in good time entitlement to interest for late payment, with the result that he can claim that entitlement before the tax office or before the administrative courts, even though national law does not recognise interest for late payment for comparable tax credits.
- 39 2. Point from which interest begins to accrue
- 40 Should the taxable person be entitled with direct effect under EU law to interest for late payment by the tax office, the question arises as to the point in time from which interest is to be calculated. In the judgments in *Enel Maritsa Iztok 3*, *Rafinăria Steaua Română*, *Glencore Agriculture* and *Nidera BV*, which concern interest for late payment in relation to the late crediting of input tax surpluses and, accordingly, the interpretation of Article 183 of the [Or. 11] VAT Directive, the Court of Justice ruled that interest begins to accrue only after expiry of a reasonable period, which is provided to the tax office for the purposes of assessing the lawfulness of the input tax claim.
- 41 Concerning interest for late payment on turnover tax claims made by the taxable person that are not based on input tax surpluses, there is only the Court of Justice’s judgment in *Littlewoods Retail Ltd*. That judgment sheds no light as to when interest begins to accrue. The judgment refers — as previously mentioned — to the Court of Justice’s case-law on ‘taxes levied in breach of EU law’, which — as far as can be ascertained — does not state that interest should begin to accrue only after expiry of a reasonable period. In the Supreme Administrative Court’s view, it would, however, be appropriate to apply the Court of Justice’s statements on the point from which interest begins to accrue in respect of input tax surpluses under Article 183 of the VAT Directive also to cases in which the turnover tax claim made by the taxable person against the tax office is not based on input tax surpluses. In those cases too, a reasonable period must be

available to the tax office for assessing the lawfulness of the claim made by the taxable person in order to ensure the proper implementation of the VAT Directive.

- 42 Also in connection with the point from which interest begins to accrue, the relationship with Directive 2008/9 (see, to that effect, section 3) has not yet been sufficiently clarified.
- 43 3. Relationship with Council Directive 2008/9/EC of 12 February 2008
- 44 Should the Court of Justice come to the conclusion that entitlement to interest for late payment arises with direct effect under EU law, the referring court will need to determine how that entitlement is to be implemented. In that regard, various legal principles under national law can be taken into account, as a result of which the relationship with Directive 2008/9 is unclear.
- 45 Article 27 of Directive 2008/9 does not provide for any rules on interest for late payment in the event of a late refund of input tax. In that regard, the second subparagraph of Article 27(2) **[Or. 12]** provides: ‘If no interest is payable under national law in respect of refunds to established taxable persons’, the rules provided for by the Member State for late payments of VAT by taxable persons are to be applied accordingly.
- 46 It follows from Article 27 of Directive 2008/9 that the EU legislature provides for the possibility that the national law of the Member State does not lay down a system of interest. The EU legislature therefore does not consider such a legal situation to be contrary to EU law *a priori*, but provides that in such a situation, the Member State’s system for late payment is to be applied *mutatis mutandis*. In any event, the EU legislature proceeds on the basis that, without the rule in Article 27 of Directive 2008/9, the taxable person established in another Member State has no entitlement to interest for late payment, if national law does not already grant such entitlement.
- 47 Austrian national law does not lay down any rules on interest regarding the late crediting of turnover tax credits. The question therefore arises whether that means that the national courts should apply the legal consequence laid down by the second subparagraph of Article 27(2) of Directive 2008/9 even though the main proceedings do not fall within the scope of that directive. The application of the second subparagraph of Article 27(2) would mean for Austria that interest would accrue at a flat rate with a first late payment surcharge of 2% and a second and third late payment surcharge of 1% each time, but no additional interest.
- 48 Directive 2008/9 also sets out, in Articles 19, 21 and 22, periods that are granted to the tax office to assess the lawfulness of the input tax claimed. Under Article 27 of the directive, the period in which interest is payable begins only after those periods have expired. The referring court harbours doubts as to whether the periods provided for in that directive are also to be applied to cases such as the main proceedings, that is, to cases that are not directly covered by the directive. **[Or. 13]**

- 49 Overall, the interpretation of EU law in relation to the questions set out above does not appear to be so obvious as to leave no scope for doubt within the meaning of the judgment in *CILFIT* (Court of Justice, 6 October 1982, 283/81).
- 50 The questions are therefore referred to the Court of Justice for a preliminary ruling pursuant to Article 267 TFEU.

[OMISSIS]

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