

Case C-186/20**Summary of a request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

29 April 2020

Referring court:

Najvyšší súd Slovenskej republiky (Supreme Court of the Slovak Republic, Slovak Republic)

Date the decision to refer:

5 March 2020

Appellant:

HYDINA SK s.r.o.

Respondent:

Finančné riaditeľstvo Slovenskej republiky (Financial Directorate of the Slovak Republic)

Subject matter of the proceedings

Appeal on a point of law brought by the company HYDINA SK s.r.o. (‘the appellant’) regarding a review of the lawfulness of the decision of the tax authority refusing the claim for a refund of excess input value added tax (‘VAT’) and assessing the tax.

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

The Najvyšší súd Slovenskej republiky (Supreme Court of the Slovak Republic) submits questions for a preliminary ruling under Article 267 TFEU concerning the nature of the time limits for the provision of information within the framework of the international exchange of information under Regulation No 904/2010 in the context of a tax audit, the legal consequences of a failure to comply with those time limits in connection with the lawfulness of the suspension of a tax audit and

whether failure to comply with those time limits constitutes unlawful interference in the rights of a taxable person.

Questions referred

- Must recital 25 of Council Regulation (EU) No 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax, which states that ‘the time limits laid down in this Regulation for the provision of information are to be understood as maximum periods not to be exceeded’, be interpreted as meaning that those time limits cannot be exceeded and that exceeding them results in the suspension of a tax audit being unlawful?
- Does failure to comply with the time limits for implementing the international exchange of information provided for in Council Regulation (EU) No 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax result in consequences for (sanctions against) the requested authority and the requesting authority?
- Can international exchange of information that does not comply with the time limits laid down in Council Regulation (EU) No 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax be regarded as unlawful interference in the rights of a taxable person?

Provisions of EU law cited

Treaty on the Functioning of the European Union, Article 288

Council Regulation (EU) No 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax (‘Regulation No 904/2010’), recital 25, Articles 10, 11 and 12

Provisions of national law cited

Ústava Slovenskej republiky (Constitution of the Slovak Republic), Articles 2(2) and 7(2)

Zákon č. 563/2009 Z. z. o správe daní (daňový poriadok) a o zmene a doplnení niektorých zákonov (Law No 563/2009 on tax proceedings (the tax code) and amending and supplementing certain acts, ‘the Tax Code’)

Second sentence of Paragraph 3(2)

The tax authority shall be required to deal with each case that is the subject of tax proceedings, examine it promptly and without undue delay and use the most appropriate means in order to correctly determine and assess the tax.

Paragraph 46(10)

The time limit for conducting a tax audit may not exceed one year from the date of its commencement. Paragraph 61 shall apply mutatis mutandis to the suspension of a tax audit.

Paragraph 61(1)(b)

The tax authority may suspend tax proceedings if proceedings have been initiated regarding another circumstance essential to the decision or if information must be obtained under a special provision. 21a)

Paragraph 61(5)

If tax proceedings have been suspended, the time limits provided for in this Law shall not run.

Footnote 21a) to Paragraph 61(1)(b) refers to zákon č. 442/2012 Z. z. o medzinárodnej pomoci a spolupráci pri správe daní (Law No 442/2012 on international assistance and cooperation in tax proceedings) and to Regulation No 904/2010.

Judgment of the Supreme Court of the Slovak Republic, Ref. No 3Sžf/46/2015 of 27 July 2016.

Resolution of the Ústavný súd Slovenskej republiky (Constitutional Court of the Slovak Republic, Slovakia), Ref. No IV. ÚS 116/2013-11 of 28 February 2013.

Brief outline of the facts and procedure

- 1 In the December 2013 tax period, the appellant exercised its right to deduct VAT on meat purchases from Argus Plus spol. s r.o. ('the supplier') for a total amount of EUR 1 048 195.99, including VAT of EUR 174 699.33.
- 2 On 21 March 2014, Daňový úrad Prešov (the Prešov Tax Office, 'the tax authority') initiated a tax audit of the appellant in order to establish the legitimacy of its claim for a refund of excess tax or part thereof for the December 2013 tax period. During that audit, extensive evidence was taken in order to verify the relationship between the appellant and its supplier or its sub-suppliers (foreign companies) and thus to establish whether the taxable transactions declared by the appellant had actually taken place.
- 3 As the supplier had purchased the goods in Poland, the tax authority requested, in the course of taking evidence, an international exchange of information in order to

verify the purchase of goods from another Member State. As a result, the tax authority suspended the tax audit inspection as of 26 August 2014. The final reply to the request for an international exchange of information was delivered to the tax authority on 11 March 2015, and thus the condition for continuing the tax audit was satisfied. On 10 April 2015, the tax authority issued a decision on another suspension of the tax audit as of 20 April 2015. In support of that decision, the tax authority indicated that the supplier's manager was permanently resident in Hungary, and therefore it requested an international exchange of information. Once the reasons for suspending the audit had ceased to exist, the tax audit continued as of 1 July 2015. The tax audit report was drawn up on 16 November 2015, and on 7 December 2015 the tax audit ended when the appellant received the report, which was accompanied by a request for a response.

- 4 On the basis of the findings of the tax audit, the tax authority came to the conclusion that the supplier had not engaged in actual business activity during the tax period subject to the audit, had not in fact acquired the right to dispose of the goods as the owner and no tax liability had arisen on its part for the supply of goods within the meaning of the VAT law, and therefore the appellant had not satisfied the conditions for deducting the tax on the purchase in question.
- 5 In view of the above, the tax authority issued a decision on 30 May 2016 in which it determined in respect of the appellant a VAT difference for the December 2013 tax period amounting to EUR 174 699.33, that is to say, it rejected the claim for a tax refund of EUR 4 780.97 and assessed the tax in the amount of EUR 169 918.36.
- 6 The appellant appealed against that decision to the Finančné riaditeľstvo Slovenskej republiky (Financial Directorate of the Slovak Republic), which, by its decision of 17 October 2016, upheld the decision of the tax authority.
- 7 The appellant lodged an administrative complaint against the decision of the Financial Directorate of the Slovak Republic with the Krajský súd v Prešove (Regional Court in Prešov, Slovakia, 'the regional court'), seeking that the contested decisions of the tax authorities be annulled and that the case be referred back to them for further consideration. By its judgment of 18 January 2018, the regional court dismissed the appellant's complaint.
- 8 The appellant brought an appeal on a point of law against that judgment of the regional court to the Najvyšší súd Slovenskej republiky (Supreme Court of the Slovak Republic, Slovak Republic) ('the court of cassation'), seeking that the contested judgment be set aside and that the case be referred back to the regional court for further consideration or, alternatively, that the contested judgment be amended, the decisions of the tax authorities be annulled and the case be referred back to those authorities for further consideration.

Principal arguments of the parties to the main proceedings

- 9 In its appeal on a point of law, the appellant pleaded, inter alia, infringement of the principle of proportionality and the unlawfulness of the decisions. It submitted that the requirement for a tax audit to be conducted in an appropriate manner (the principle of proportionality in tax law) was laid down by the legislature precisely by establishing time limits on tax audits.
- 10 As regards the alleged infringement of the principle of proportionality, the appellant relied on Paragraph 46(10) of the Tax Code in conjunction with Article 10 of Regulation No 904/2010. The appellant did not agree with the arguments of the regional court that the time limits did not run after the suspension of the tax audit, since the provisions of Regulation No 904/2010, which governs, inter alia, international exchange of information, are provisions of EU law that take precedence in the Slovak Republic. In order to assess whether the maximum duration of the tax audit has been complied with, it is necessary to determine its start date and subsequently its end date, since that duration is at the same time the limit that determines whether the tax audit is lawful. The appellant submitted that, in the tax audit in question, the time limits laid down in Regulation No 904/2010 for the fulfilment by the Member States of their obligation to provide information within the framework of international assistance and cooperation in tax proceedings were not complied with. In that regard, the appellant stressed that pursuant to recital 25 of the regulation, those time limits were to be understood as maximum periods not to be exceeded, and pursuant to Article 10 of the regulation, the information in question was to be provided as quickly as possible, that is, no later than three months after the date of receipt of the request. However, where the requested authority was already in possession of that information, the time limit was reduced to a maximum period of one month.
- 11 In the present case, the tax audit lasted a total of 626 days, including 202 days when it was suspended. The tax authority therefore completed the tax audit after the expiry of the statutory time limit of one year from its start date, including a maximum three-month period of suspension in accordance with Regulation No 904/2010.
- 12 In that regard, the appellant also relied on recital 12 in conjunction with Article 7 of Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC, according to which time limits for the provision of information under that Directive should be laid down in order to ensure that the information exchange is timely and thus effective. In that context, it pointed out that the phrase ‘reasons for the suspension of proceedings have ceased’ in Paragraph 61(4) of the Tax Code must be read in the context of Directive 2011/16/EU, and thus the cessation of the reasons for the suspension of the tax audit is limited by the maximum length of the time limits laid down in the directive for the provision of the information requested.

- 13 The appellant also petitioned the court of cassation to refer a question to the Court of Justice of the European Union in connection with the interpretation of the time limits laid down in EU law for the provision of information (within the framework of international assistance and cooperation in tax proceedings) and to ask for an assessment of the consequences of non-compliance with those time limits for the lawfulness of a tax audit suspension, including due to a possible infringement of the appellant's rights as a taxable person.

Brief statement of the grounds for the reference

- 14 The court of cassation points out that under the constitutional principle of the legality of state power as enshrined in Article 2(2) of the Ústava Slovenskej republiky (Constitution of the Slovak Republic), state authorities are bound by the Constitution and by statute. The tax authority may therefore act in tax proceedings only on the basis and within the limits of the Constitution and within the scope and under the rules set forth in statute. In the legal order of the Slovak Republic, a tax audit is a process provided for in statute that serves primarily to obtain and collect the evidence necessary for a tax authority to issue a decision in proceedings concerning the assessment or determination of tax. One of the conditions affecting the lawfulness of the evidence gathered and ultimately also the lawfulness of the tax authority's decision is strict compliance with the statutory time limit set for the tax audit. A tax audit that lasts for a longer time than that permitted by statute yields results of legal significance that are not compliant with statute, not on account of formal non-compliance, but rather because the intensity of the tax audit amounts to material interference in the individual sphere of the taxable person subject to audit, which sphere consists of that person's fundamental rights and freedoms. Pursuant to the legal rules in force in the Slovak Republic, the tax authority has a limited time to conduct a tax audit within the statutory period of one year. One of the exceptions is the suspension of a tax audit due to a request for an international exchange of information, which is not covered by the statutory time limit for conducting a tax audit, since, under Paragraph 61(5) of the Tax Code, the time limits provided for in the Code are not to run if tax proceedings are suspended. It should also be noted that in the practice of the tax authorities, it cannot be ruled out that it is precisely through the suspension of a tax audit or, more precisely, through the unnecessary and inappropriate suspension of a tax audit in order to establish facts through an international exchange of information that are of crucial relevance for the correct determination of tax, that the statutory period for conducting a tax audit can be in fact extended/bypassed. That would result in legislation being circumvented, since to accept the practice would mean that the duration of a tax audit could be unlimited or at least unreasonably long, extending beyond the timeframe set by statute. The practice described above would also undermine legal certainty for taxable persons. It is therefore necessary to assess whether the tax authority acted in an appropriate manner when requesting information from abroad and suspending the tax audit, observing the principle of proportionality.

- 15 The tax authority is obliged to complete the tax audit within a maximum of one year from its start date, with the proviso that if there is a need to obtain information pursuant to Regulation No 904/2010, the tax authority may suspend the tax audit. In accordance with Regulation No 904/2010, the information — the requesting of which constitutes the reason for suspending the tax audit — should be provided within a maximum period of three months. It should be noted that the provisions of Regulation No 904/2010 are directly applicable provisions of EU law, since EU law takes precedence over national legislation in the Slovak Republic. When requesting information within the framework of an administrative inquiry, the administrative (and therefore also the financial) authorities of each Member State are obliged to comply with the time limits laid down in Regulation No 904/2010. Given the direct applicability of that Regulation and the fact that the financial authorities are bound by the time limits laid down therein, it is clear that the provision of information, that is to say, the international exchange of information, should take place within the time limits laid down in Regulation No 904/2010, despite the fact that the Tax Code neither expressly provides for the time limit nor refers to it in any way.
- 16 When conducting a tax audit, the tax authority should first ensure the application of the regulation, and only in the second place ensure the application of the Tax Code. Paragraph 61(1)(b) of the Tax Code contains footnote 21a), which refers to Law No 442/2012 on International Assistance and Cooperation in Tax Proceedings or to Regulation No 904/2010. In that regard, the court of cassation presumes that the reference in footnote 21a) to the regulation cannot be arbitrarily interpreted in a restrictive manner, only treating the regulation as legitimising the suspension of proceedings, since the footnote refers to the regulation as a whole, that is to say, including the conditions for the international exchange of information and the time limit for implementing that exchange. It is therefore doubtful whether the authority can derive from the regulation a valid reason for suspending the proceedings on the one hand, while disregarding its other provisions, namely Article 10, on the other. An interpretation of the aforementioned provisions that is compliant with EU law supports the conclusion that the suspension of a tax audit within the meaning of the Tax Code is lawful only during the period provided for in Regulation No 904/2010 for the implementation of the international exchange of information in connection with which the tax audit has been suspended. Accepting that interpretation would mean that the suspension of a tax audit for a period exceeding three months, that is, the maximum period permitted by the regulation, cannot have the consequences provided for in statute, namely, such a suspension cannot stop the time limits laid down in the Tax Code from running, and it is ultimately also contrary to the requirements of proportionality and legal certainty of the taxable person subject to the audit.
- 17 In the present case, the tax audit was suspended (twice) precisely because of a request for an international exchange of information under Article 7 of Regulation No 904/2010. In the first instance, the reply from the foreign authority was clearly delivered after the expiry of the three-month time limit provided for in that

Regulation, and non-compliance with the time limit was not remedied by proceedings under Articles 11 and 12 of Regulation No 904/2010, which allow the period for the provision of the information requested to be extended. As the matter in question was the provision of information which, after it had been provided to the tax authority, served as the basis for assessing the legitimacy of the appellant's claim to deduct VAT, the court of cassation takes the view that the issue of interpretation of the nature of the time limits laid down in Regulation No 904/2010 is of fundamental importance for assessing the lawfulness of the tax authorities' decisions (from the point of view of the duration of the tax audit in connection with its suspension).

- 18 While the expiry of the statutory time limit for conducting a tax audit results in the report drawn up after its completion being unlawful or inadmissible as a basis for assessing tax, in the case of the direct application of Regulation No 904/2010, the nature of the resulting time limits and the manner in which an administrative court should conduct a judicial review of the lawfulness of the duration of the tax audit must be determined. Therefore, the court of cassation, which is aware of the importance of the time limits set in Regulation No 904/2010 (facilitating and expediting cooperation in the exchange of information between the Member States of the European Union in the field of taxation), is faced with the question whether, in the context of national legislation that provides for a time limit for conducting a tax audit, and in connection with the suspension of a tax audit because of a request for an international exchange of information, the time limits laid down in that Regulation for financial authorities in connection with a request for an international exchange of information must be understood as time limits that, if not complied with, result in consequences for the tax authority or constitute an unlawful interference in the rights of the taxable person subject to the audit, and also what are the consequences/sanctions under EU law for failure to comply with those time limits.
- 19 The court of cassation has therefore concluded that in the present case, a request for a preliminary ruling must be made to the Court of Justice of the European Union in order to obtain the interpretation of the provisions of EU law at issue.