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Case C-294/20

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:

1 July 2020

Referring court:

Audiencia Nacional (Spain)

Date of the decision to refer:

5 March 2020

Applicant:

GE AUTO SERVICE LEASING GMBH

Defendant:

Tribunal Económico Administrativo Central

Subject matter of the main proceedings

This request for a preliminary ruling concerns the determination of the deadline by which a taxable person must establish fulfilment of the conditions for entitlement to a refund of value added tax ('VAT') and of the time when, as a consequence of any negligence or abuse on his part, a taxable person loses the right to such a refund.

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

The present request for a preliminary ruling concerns the determination of whether a court must examine documents submitted out of time by a non-established taxable person to substantiate its right to a refund of VAT, contrary to the requirements laid down in Articles 3 and 7 of Directive 79/1072 and the annexes thereto, and in Articles 15, 8 and 9 of Directive 2008/9, and in contravention of the case-law of the Court of Justice in that regard.

If those documents must be examined, it would mean that the non-established taxable person (and, consequently, any taxable person) would not be subject to

any time limit for establishing compliance with the conditions for entitlement to a refund and would be able to furnish the supporting evidence whenever and however it wished, even where it had failed to furnish such evidence after having been required to do so by the administrative authority, as long as there is no allegation of bad faith or abuse of rights against that taxable person.

That would make it impossible to administer VAT, thereby infringing the principle of neutrality of the tax system and affecting the uniform nature of VAT throughout the EU.

Questions referred for a preliminary ruling

l. Must it be accepted as lawful for a taxable person, following repeated requests from the tax authority that it establish compliance with the conditions for entitlement to a refund, to fail to comply with those requests without any reasonable justification and, after it has been refused a refund, for that person to defer the submission of documents until the review procedure or legal action?

2. Can a situation where a taxable person does not provide the tax authority with the necessary information on which it bases its right when it has been permitted and formally required to do so, and that taxable person fails to provide that information without reasonable justification and the information is instead submitted voluntarily at a later date to a review body or a court, be regarded as an abuse of rights?

3. Does a non-established taxable person, either on the ground that it failed to submit the relevant information for establishing its right to a refund on time and without reasonable justification, or on the ground that it engaged in abusive practices, lose its right to a refund once the period stipulated or granted for that purpose has elapsed and the tax authority has issued a decision refusing the refund?

Provisions of EU law cited

Article 267 TFEU.

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: in particular, Article 5, second paragraph, and Articles 8, 9 and 15.

Eighth Council Directive 79/1072/EEC of 6 December 1979 on the harmonization of the laws of the Member States relating to turnover taxes — Arrangements for the refund of value added tax to taxable persons not established in the territory of the country (now repealed): in particular, Articles 3 and 7 and Annexes A and C.

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Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax: Article 170.

Case-law of the Court of Justice.

Provisions of national law cited

Article 119 of Ley 37/1992 del Impuesto sobre el Valor Añadido (Law 37/1992 on Value Added Tax; 'LIVA') of 28 December 1992: in particular, paragraphs 2, 3, 4 and 9.

Article 57 of Reglamento General de desarrollo de la Ley General Tributaria en materia de revisión en vía administrativa (General Regulations for the implementation of the General Tax Law in relation to administrative review; 'RGRT') (Real Decreto (Royal Decree) 520/2005).

Brief summary of the facts and procedure

1 On 30 June 2006 and 29 June 2007, GE AUTO SERVICE LEASING GMBH filed applications for a refund of input VAT paid by traders or professional practitioners not established in the territory of application of the tax for the 2005 and 2006 financial years in the amount of EUR 407 396.469.

2 On 19 March 2008, the department dealing with VAT for non-established taxable persons of the Oficina Nacional de Gestión Tributaria (National Tax Administration Office) issued two formal requests for the company to provide documents.

3 On 12 December 2008, the company expressed its intention to comply with the requests but indicated that, since those requests concerned a non-resident company and in the light of the difficulty in presenting the required documents, it was unable to comply with those requests even though it had expressed its intention to do so.

4 On 18 February 2009, the Oficina Nacional de Gestión Tributaria gave decisions refusing the applications for a refund; those decisions were essentially based on the applicant's failure to comply with the requests for documents and were notified to the company on 21 April 2009.

5 On 20 February 2009 (after the refusal decisions were adopted but before those decisions were notified), the company submitted two documents, one for each financial year, in which it stated that the company concerned was German, that its activity was the supply of cars to Spanish undertakings through leasing contracts and occasional sales of cars on the Spanish used car market, that it operated in the territory of application of the tax without a permanent establishment and that it

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paid input VAT on purchases of vehicles, in which connection it provided a number of supporting invoices.

6 GE AUTO SERVICE LEASING GMBH filed a request for review of the decisions refusing to grant the refunds. Whilst acknowledging the delay, GE AUTO SERVICE LEASING GMBH argued that it had replied to the requests of 20 February 2009 before notification of the decisions refusing its request for a refund. In addition, it lodged with the applications initiating the review proceedings a sample of invoices issued in respect of the leasing services supplied, emphasising the company's operations in relation to the provision in Spain of that category of services.

7 Before deciding on the review proceedings, the Oficina Nacional de Gestión Tributaria issued a fresh request to the company on 13 July 2009 for clarification of a number of matters. No reply was ever received to that request, which was notified to GE AUTO SERVICE LEASING GMBH on 21 July 2009.

8 On 1 February 2010, the Oficina Nacional de Gestión Tributaria adopted a decision dismissing the review proceedings and confirming the refusal to grant the refund in the light of failure by the company to establish compliance with the conditions laid down by law and submit documents in that connection.

9 The applicant disagreed with that decision and lodged administrative complaints with the Tribunal Económico-Administrativo Central (Central Tax Tribunal, Spain; 'TEAC'), annexing to those complaints a number of documents: invoices for the provision of services and financial leasing contracts, official certificates issued by the German authorities confirming its status as a taxable person with a right of deduction, and a number of periodic VAT returns. The TEAC joined the complaints.

10 On 24 January 2013, the TEAC gave judgment dismissing the administrative complaints. The TEAC upheld the view of the administrative body and stated that the relevant evidence for proper regularisation of the tax situation had to be submitted to the competent administrative body, expressing the view that the administrative complaint procedure is not the appropriate time for that task, and stating that the evidence should be submitted as part of the tax collection procedure.

11 On 24 January 2013, GE AUTO SERVICE LEASING GMBH brought an action before the Sala de lo Contencioso-Administrativo (Chamber for Contentious Administrative Proceedings) of the Audiencia Nacional (National High Court, Spain), against the judgment given against it by the TEAC and arguing that: (i) the restrictive approach of the review body undermined the applicant's rights of defence; (ii) the evidence in the case file and the evidence adduced with the application establish the applicant's right to obtain a refund of input VAT paid; (iii) the principle of neutrality of the tax has been breached; and (iv) if the disputed restrictive approach is upheld, the clock should be turned back to the

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proceedings before the administrative body in order to give the company the opportunity to rectify its failure to submit evidence.

12 The legal action was dismissed in full by judgment of 22 September 2016, which essentially reiterated the TEAC's approach regarding the burden of proof. The judgment stressed that non-established businesses or professional persons are entitled to assert the right to a refund of VAT but the burden of proof in relation to the conditions required for application of that right lies with them. Non-compliance with requests at the procedural stage cannot be rectified before the courts or at the administrative review stage.

13 The company brought an appeal on a point of law against that judgment.

14 The appeal was upheld in full by judgment of the Tribunal Supremo (Supreme Court, Spain) of 10 September 2018, which set aside the judgment of the TEAC of 24 January 2013 dismissing the (joined) administrative complaints lodged against the unfavourable decisions on the requests for review filed against the two decisions of 18 February 2009, which were adopted by the Oficina Nacional de Gestión Tributaria and in which the company concerned was refused the right to the refund claimed. The Tribunal Supremo (Supreme Court) also ordered that the clock be turned back to the time when the judgment under appeal was given so that another judgment could be given in which, in the light of the evidence admitted in the proceedings, the Audiencia Nacional (National High Court) would rule on compliance with the substantive conditions for entitlement to the refund requested by GE AUTO SERVICE LEASING GMBH and, in the event of compliance, would expressly grant that refund.

Main arguments of the parties to the main proceedings

15 Despite their quasi-judicial nature, the Tribunales Económico-Administrativos (Tax Tribunals; 'TEAs') are administrative bodies and recourse must be had to them before an action can be brought before the contentious administrative courts. Although TEAs are administrative bodies, administrative complaint proceedings are similar to court proceedings. TEAs have important powers in relation to the right to adduce evidence, dealing with submissions and the obligation to resolve all the issues whether or not these were raised by the parties.

16 As regards evidence, Article 57 of the RGRT provides that TEAs may refuse to hear evidence requested or adduced only where that evidence relates to facts which have no bearing on the decision concerning the forms of order sought in the complaint, and it also provides that TEAs may order the submission of evidence which was previously refused and authorises them to request as many reports as they consider to be necessary or appropriate for ruling on the complaint.

17 In line with its earlier rulings, the Tribunal Supremo found in its judgment on the appeal that 'there is absolutely no reason why a taxpayer who failed to submit certain evidence forming the basis for his claim during the inspection procedure

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should not submit that evidence later in court proceedings …' and that the claimant may present before the tax tribunals evidence that it did not present before the tax administration bodies, provided that rights are asserted in accordance with the requirements of good faith, while the law does not protect the abuse of rights. Abusive or malicious conduct must be duly identified in the relevant proceedings and be of such an intensity that it justifies a penalty consisting of refusal to examine the merits of the claim brought, but there is not the slightest allegation in these proceedings that the appellant acted in bad faith or committed an abuse of rights. The Tribunal Supremo acknowledged that it is the person seeking the refund who must establish that the substantive conditions of the right claimed have been met. In any event, the requirements of the administrative authority for holding that the right to a refund has been established may not be disproportionate, excessive or unnecessary.

18 Since the Tribunal Supremo upheld the appeal, the judgment under appeal — in so far as it dismissed the legal action on the sole ground that it was not possible, in the administrative review proceedings, to adduce or rely on evidence not adduced or relied on in the procedure for collection of the taxes concerned — was set aside, along with the decision of the TEAC.

Brief summary of the reasoning in the request for a preliminary ruling

19 In compliance with the operative part of the judgment of the Tribunal Supremo of 10 September 2018, the Audiencia Nacional (National High Court) must give another, fresh judgment, replacing the judgment set aside, in which all the documents filed by the company, both at the review stage before the TEAC and the documents adduced as evidence before the court, must be examined in order to determine whether the company is entitled to a refund of input tax paid as an entity not established in the territory of application of the tax in the financial years 2005 and 2006, in the amount of EUR 407 396.469.

20 The core reason on which the Tribunal Supremo based its decision concerns the importance of TEAs as administrative review bodies, which requires them to examine all the evidence that they have deemed relevant, whether or not that evidence was presented by taxpayers to the administrative body and irrespective of the fact that the tax collection procedure requires them to fulfil that obligation vis-à-vis the administrative body of the tax authority. However, even though the breach of law lies in the first instance in the decision of the TEAC, the Tribunal Supremo also held that the judgment of the Audiencia Nacional confirming the approach of the TEAC was not lawful. The Tribunal Supremo found that all the documents submitted to the TEAC and the chamber of the Audiencia Nacional must be examined, despite the failure to comply with the formal requests sent by the tax authority to the undertaking when it commenced its claim for a refund.

21 In that examination of evidence, there is a presumption that all the documents provided by GE AUTO SERVICE LEASING GMBH in the proceedings before

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the TEAC and in the contentious administrative action are compatible with the refund mechanism laid down in respect of VAT. However, the Audiencia Nacional takes the view that, if it proceeds to comply strictly with the terms of the judgment of the Tribunal Supremo, it is highly likely to infringe the requirements, conditions or limits laid down for the refund of input tax paid by non-established persons in Article 7 of Directive 79/1072/EEC, a very similar provision to Article 15(1) of the current Directive 2008/9, and to diverge from the case-law of the Court of Justice on that subject. The Audiencia Nacional considers that the company did not adduce evidence or establish that the substantive requirements for its entitlement to a refund were met when it should have done so in accordance with the provisions in force of the directive, and, in particular, when it was required to do so and was given the opportunity to do so repeatedly by the tax authority. The Audiencia Nacional cannot disregard the EU legislative provisions or the case-law of the Court of Justice when complying with the judgment of the Tribunal Supremo.

22 The Audiencia Nacional describes the tax authority's conduct as beyond reproach. Faced with an incomplete application, it allowed the taxable person to furnish all the documents required for its claim for a refund to proceed. There was compliance with both the General Tax Law and Article 41(2) of the Charter of Fundamental Rights of the European Union, now enshrined in Article 6(1) of the Treaty on European Union. The incomplete supporting documents submitted by the applicant made it impossible for the tax authority to check that the full amount sought by way of a refund was reflected in the invoices, types of transaction and persons for whom the transactions from which it derived its right to a refund were carried out. The Audiencia Nacional points out that the tax authority adopted the refusal decision on the basis of the information available to it and was unable to confirm that all the conditions for entitlement to a refund had been fulfilled.

23 The case-law of the Court of Justice has pointed out, in essence, that the right of taxable persons to deduct input VAT owed by them constitutes a fundamental principle of the common system of VAT. A deduction system, and consequently a refund system, must be set up for the purpose of completely releasing businesses from the burden of VAT due or paid on all their economic activities. The common system of VAT must guarantee neutrality with respect to the tax burden on all economic activities, whatever their aim or outcome, where those activities are subject to VAT.

24 The right of a taxable person established in a Member State to obtain a refund of VAT paid in another Member State, in the manner governed by Directive 2008/9 and Directive 79/1072/EEC, is the counterpart of such a person's right established by Directive 2006/112 to deduct input VAT in his own Member State, as is clear from the judgments of the Court of Justice of 25 October 2012, *Daimler and Widex*, C-318/11 and C-319/11, EU:C2012:666, paragraph 41, and of 21 March 2018, C-533/16, paragraph 36.

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25 The fact that there is no substantive difference between the right of deduction of non-established persons and that of taxable persons within their own Member State makes the reply which the Court gives more important. Since the same rationale underlies the right to a refund of an established taxable person and that of a non-established taxable person, the only differences are procedural differences; if the approach of the Tribunal Supremo is correct, it must be accepted that it is possible for a taxable person to produce documents substantiating his right at any time, including after the administrative body has adopted its decision, without any temporal limit and irrespective of the actions of the authority and the individual.

26 In general terms, for the right to a refund to arise, a taxable person must hold an invoice drawn up in accordance with Articles 220 to 236 and Articles 238 to 240 of Directive 2006/112 (judgment of the Court of Justice of 19 October 2017, *Paper Consult*, C-101/16, EU:C:2017:775, paragraph 40).

27 In principle, the procedural requirements may not constitute an impediment to the full deduction of tax. Whilst it is the case that, under Article 22(8) of the Sixth Directive, the Member States may lay down other provisions for the correct levying and collection of tax and the prevention of fraud, they must not go beyond what is necessary to attain those objectives by systematically undermining the right to deduct VAT, which is a fundamental principle of the common system of VAT established by the relevant EU legislation, in accordance with the judgment of 18 December 1997, *Molenheide and Others*, C-286/94, C-340/95, C-401/95 and C-47/96, EU:C:1997:623, paragraph 47.

28 The Audiencia National believes that, contrary to the judgment of the Tribunal Supremo, the Court of Justice has already resolved the issue, putting an end to the possibility of that right being asserted without any time limit. The judgments of 21 June 2012, C-294/11, paragraph 29, of 21 March 2018, C-533/16, paragraph 46 and of 28 July 2016, *Astone*, C-332/15, EU:C:2016:614, paragraph 33, stated that the possibility of exercising the right to deduct VAT without any temporal limit would be contrary to the principle of legal certainty, which requires the tax position of the taxable person, having regard to his rights and obligations vis-à-vis the tax authority, not to be open to challenge indefinitely. Another solution, like that arising from the implementation of the judgment of the Tribunal Supremo, may result in the debate remaining open indefinitely.

29 As regards the time of submission of the information necessary for completion of the supporting invoices, in its judgment of 8 May 2013, C-271/12, paragraph 35, the Court held that invoices cannot be completed after the tax authority has adopted its decision refusing to grant the right to deduct VAT because that makes it impossible to ensure the correct collection and supervision of VAT. That was confirmed by the Court of Justice in the judgment of 26 April 2018, C-81/17, paragraph 38.

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30 As regards any negligent or abusive conduct on the part of the defendant, the Audiencia Nacional recalls, in relation to VAT, the judgment of the Court of Justice of 26 April 2018, C-81/17, paragraph 49, in accordance with which ‘an administrative fine could, inter alia, be imposed on a negligent taxable person …’ Similarly, refusal of a right or an advantage on account of abusive or fraudulent acts is simply the consequence of the finding that, in the event of fraud or abuse of rights, the objective conditions required in order to obtain the advantage sought are not in fact met and, accordingly, such a refusal does not require a specific legal basis (judgment of the Court of Justice of 14 December 2000, *Emsland-Stárke*, C-110/99, EU:C:2000:695, paragraph 56; *Halifax*, paragraph 93; judgment of 4 June 2009, *Pometon*, C-158/08, EU:C:2009:349, paragraph 28; and judgment of 22 November 2017, C-251/16, paragraph 32).

31 Therefore, the reference of this matter by the Audiencia Nacional is justified by the fact that the Audiencia Nacional finds itself in the position of having to implement the operative part of a judgment of the Tribunal Supremo which appears to conflict with EU legislation and case-law. The Audiencia Nacional states that a similar situation arose in Spanish procedural law in relation to the way in which the Sala de lo Civil (Civil Chamber) of the Tribunal Supremo applied and interpreted in its case-law the limitation of the effects of termination linked to a declaration that a contract concluded with a consumer by a seller or supplier was unfair under Article 6(1) of Council Directive 93/13/EEC of 5 April 1993. The case-law of the Tribunal Supremo was amended by the judgment of the Court of Justice of 21 December 2016, C-154/15 and C-307/15.

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