

Case C-397/21**Request for a preliminary ruling****Date lodged:**

29 June 2021

Referring court:

Fővárosi Törvényszék (Hungary)

Date of the decision to refer:

25 May 2021

Applicant:

HUMDA Magyar Autó-Motorsport Fejlesztési Ügynökség Zrt.

Defendant:

Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága

Fővárosi Törvényszék (Budapest High Court, Hungary)

[...]

In the administrative proceedings to resolve a dispute in a tax matter [...] brought by HUMDA Magyar Autó-Motorsport Fejlesztési Ügynökség Zártkörűen Működő Részvénytársaság (before it changed its name, VALOR HUNGARIAE Zártkörűen Működő Részvénytársaság), applicant, [...] against the Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága (Appeals Directorate of the National Tax and Customs Administration, Hungary), ([...] Budapest [...]), defendant, the Budapest High Court has made the following

order:

This court [...] commences preliminary-ruling proceedings before the Court of Justice of the European Union and refers the following questions to the Court of Justice for a preliminary ruling:

1. Must the provisions of the VAT Directive, in the light of the general principles thereof, in particular the principles of effectiveness and fiscal neutrality, be interpreted as precluding national legislation, and national practice based

thereon, pursuant to which, where a taxable person liable for VAT erroneously issues an invoice including VAT in respect of an exempt supply and pays that tax to the Treasury in a provable manner, and the addressee of the invoice pays that VAT to the issuer of the invoice who charged the VAT, the national tax authority does not refund that VAT to either the issuer or the addressee of the invoice?

2. If the Court of Justice of the European Union answers the first question in the affirmative, must the provisions of the VAT Directive, in the light of the general principles thereof, in particular the principles of effectiveness, fiscal neutrality and non-discrimination, be interpreted as precluding national legislation pursuant to which, in the situation described in the previous question, the addressee of the invoice is absolutely prohibited from contacting the national tax authority directly in order to request a refund of the VAT or is permitted to do so only if it is impossible or excessively difficult to claim the amount of VAT in question by using another procedure under civil law, particularly where the issuer of the invoice has gone into liquidation in the meantime?

3. If the above question is answered in the affirmative, is the national tax authority under an obligation in those circumstances to pay interest on the VAT to be refunded? If that obligation does exist, what period of time does it cover? Is that obligation subject to the general rules on refunds of VAT?

[...] [procedural aspects of national law]

REASONING

I. Facts

- 1 The applicant's legal predecessor, Carpathia Nemzeti Gazdaságfejlesztési Innovációs Kft., engaged, as principal, the services of Bíró Hűtéstechnikai és Acélszerkezetgyártó Ipari Kft. ('BHA Kft.') in connection with building work under the project entitled 'Construction of Hungary's pavilion at the Milan World Expo 2015'. In respect of the work carried out, BHA Kft. issued nine invoices for the total amount of HUF 486 620 000, including value added tax, in the name of the applicant's legal predecessor, which paid those invoices. Subsequently, BHA Kft. paid to the Treasury the VAT corresponding to the invoices. As a result of a tax inspection carried out in respect of BHA Kft. in relation to the transaction, the tax authority found that that transaction was outside the territorial scope of the Law on VAT and was, therefore, exempt from VAT even though BHA Kft. had charged it.
- 2 On 19 July 2019, the applicant submitted a claim to the Budapest North Tax and Customs Directorate of the National Tax and Customs Administration, as the first-tier tax authority, in which it requested a refund of value added tax in the amount of HUF 126 248 760, corresponding to the invoices issued to it by BHA Kft., in addition to the calculation and payment of interest on that amount. In support of its request, the applicant argued that it had paid the total amount of the nine

invoices issued by BHA Kft. and that the latter had paid the [VAT] on those invoices to the Treasury. The applicant asserted that the amount of VAT indicated in its claim for a refund could, in the first instance, be claimed from the issuer of the invoice in an action under civil law, since the tax was incorrectly charged on the invoices issued. Following the civil proceedings, the competent tax authority would have to conduct a clearance of accounts in respect of BHA Kft., but in the meantime the latter had been the subject of liquidation proceedings in which the applicant's legal predecessor asked the liquidator to include that claim in the insolvency estate. According to the liquidator, the chances of recovering the claim registered are remote.

- 3 In the proceedings brought by the applicant, the first-tier tax authority refused by decision [...] its claim for a refund of the tax and the calculation and payment of interest. The applicant appealed against that decision, as a result of which the defendant upheld the decision of the first-tier tax authority [...]. Furthermore, the tax authority did not deny that the applicant had paid BHA Kft. the consideration referred to on the invoices issued in accordance with the ordinary tax system, in addition to the relevant amount of VAT, which was entered on BHA Kft's VAT return, held by the Treasury, but it found that, in accordance with Article 39 of the az általános forgalmi adóról szóló 2007. CXXVII. törvény (Law CXXVII of 2007 on value added tax; 'the Law on VAT'), the place where the transactions were carried out was the place where the building was situated, that is to say, Milan, and therefore those transactions were not carried out on national territory, from which it followed that the Law on VAT was not applicable and, in this case, the issuer of the invoices should have issued those invoices without VAT on the basis of a financial transaction performed outside the scope of the Law on VAT.

II. Dispute between the parties

- 4 The applicant brought administrative proceedings against the defendant's decision, in which it seeks, principally, the amendment of that decision in accordance with Article 90(1) of the a közigazgatási perrendtartásról szóló 2017. évi I. törvény (Law I of 2017 on the administrative courts; 'the Law on the administrative courts'), and a declaration that the applicant lawfully claimed a refund of the sum of HUF 126 248 760 indicated on the claim for a tax refund and that the first-tier tax authority must pay interest on that sum in the amount of 5% of the existing central bank annual base rate in accordance with Articles 64(3) and 65(1) of the az adózás rendjéről szóló 2017. évi CL. törvény (Law CL of 2017 on General Taxation Procedure; 'Law on General Taxation Procedure'). In the alternative, the applicant claims that the decision should be annulled or set aside, that new proceedings should be ordered and that the defendant should be required to adopt a decision in line with the matters indicated on the claim for a refund of the tax. In the further alternative, the applicant claims that the first-tier decision should be annulled or set aside and that the first-tier tax authority should be required to give a new decision. The applicant challenges in detail the tax authority's decision relating to its claim for a VAT refund. The applicant claims

that, in its decisions, the tax authority held that it was clear that the applicant was entitled to the amount of VAT which it had paid in error and which had been wrongly paid to the Treasury, that is to say, without a valid legal basis. However, the applicant cannot recover that amount because its claim for a refund was rejected, which is unlawful. In its submission, in the light of the judgments of the Court of Justice on tax refunds, rejection of its claim for a refund is not compatible with the principles of the VAT Directive.

- 5 In its defence, the defendant contends that the action should be dismissed since it is, in the defendant's view, unfounded because the financial transaction was carried out in Milan, in other words, outside national territory, which means that the Law on VAT is not applicable and, in this case, since the transaction was performed outwith the scope the Law on VAT, BHA Kft. should have issued the invoice without VAT. Given that, in this case, the payment of VAT is not appropriate, no national tax liability arose and nor was any right created to deduct the tax on the transactions. In the defendant's submission, the judgments of the Court of Justice of the European Union on which the applicant relies do not reflect the facts of the present case, from which it follows that the judgments cited cannot be applied to the questions of legal interpretation raised in this case in relation to the VAT Directive.
- 6 In the present case, it is not in dispute between the parties that BHA Kft. issued an invoice including VAT for a VAT-exempt transaction, the full amount of which was paid by the defendant to the issuer of the invoice, or that the VAT stated on the invoice in relation to that amount was paid to the Treasury (as a result of the overpayment made by the issuer of the invoice). It is common ground between the parties that the VAT was wrongly paid to the Treasury, and therefore, after the administrative proceedings were brought, the applicant also commenced, on 17 March 2020, a civil legal action for unjust enrichment against the National Tax and Customs Administration, which is pending [...] before the Budapest High Court. At this stage of the proceedings, the civil action [...] between the parties is stayed. However, the applicant submits that, where an invoice including VAT is issued for a VAT-exempt supply, it is necessary to refer to the principles of the VAT Directive, namely, the principle of effectiveness, the principle of fiscal neutrality and the principle of non-discrimination, from which the so-called principle of prohibition of unjust enrichment of the tax authority, which is subject to EU law, also flows. The applicant essentially based its claim for a refund on the judgments of the Court of Justice of the European Union in *Farkas* (C-564/15) and *Porr Építési Kft.* (C-691/17), which were not excluded from the territorial scope of the Law on VAT.

III. Relevant EU law

- 7 In accordance with Article 167 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax ('the VAT

Directive'), a right of deduction is to arise at the time the deductible tax becomes chargeable.

- 8 In accordance with Article 168 of the VAT Directive, in so far as the goods and services are used for the purposes of the taxed transactions of a taxable person, the taxable person is to be entitled, in the Member State in which he carries out these transactions, to deduct the following from the VAT which he is liable to pay: the VAT due or paid in that Member State in respect of supplies to him of goods or services, carried out or to be carried out by another taxable person.
- 9 In accordance with Article 45 of the VAT Directive, the place of supply of services connected with immovable property, including the services of estate agents and experts, and services for the preparation and coordination of construction work, such as the services of architects and of firms providing on-site supervision, is to be the place where the property is located.

IV. Applicable Hungarian law

- 10 Article 2(a) of the Law on VAT: In accordance with this Law, the following transactions shall be taxable: the supply of goods and services for consideration within the national territory by a taxable person acting as such.
- 11 Article 39(1) of the Law on VAT: where services are supplied which are directly connected with immovable property, the place of supply shall be the place where the property is located. Paragraph 2: Services directly connected with immovable property, as referred to in paragraph 1, shall include, inter alia, the services of estate agents and experts, hotel accommodation services, the assignment of rights of use over immovable property, and services for the preparation and coordination of construction work.
- 12 With effect from 1 January 2020, the Law on VAT introduced a special provision on the refund of VAT, which is contained in Article 257/J, the substance and aim of which is to enable taxable persons to apply to the tax authority, no later than six months before the expiry of the limitation period for the right to a tax assessment, for a refund of input tax which has not otherwise been refunded to the taxable person. This Hungarian provision was not included in the Law on VAT at the time when the applicant submitted its claim for a refund.
- 13 Article 64(3) of the Law on General Taxation Procedure. By way of derogation from paragraph 1, provided that the taxable person has not submitted a request for a refund in a tax return which closes the assessment (simplified assessment) or the voluntary assessment (simplified voluntary assessment), the refund of value added tax claimed will take place within a period of 30 days which shall start to run from the date of receipt of the tax return, but under no circumstances from before the due date; that period shall be extended to 45 days where the amount of the tax refund exceeds HUF 1 million, if the taxable person has paid in full on the filing date of the return the amount, including the tax, of the consideration stated on the

invoice corresponding to each of the transactions giving rise to the right to pass on the VAT – exercising his right to deduct the tax in the taxable period in question on the basis of the invoice(s) proving that those transactions were carried out – or if the taxable person's debt has otherwise been discharged in full, and the taxable person indicates on the VAT return that that condition has been met. If, during that period, a tax inspection relating to the taxable person in respect of the budget subsidy sought is commenced or is in progress, the time limit for the grant of a budget subsidy shall start to run from the date on which the decision concerning the findings of the inspection becomes final. For the purposes of the application of this provision, consideration shall be treated as paid if it is retained exclusively pursuant to a performance bond stipulated in advance in the contract.

- 14 Article 65(1): If the tax authority pays an amount late, it shall pay, in respect of each day of late payment, interest in an amount equal to the late-payment penalty. Late payment notwithstanding, interest shall not be payable if the claim (declaration) is without legal basis in respect of more than 30% of the amount claimed (declared) or if payment is precluded by an omission on the part of the taxable person or the person required to furnish information.

V. Reasons why a request for a preliminary ruling is necessary

- 15 In the referring court's view, in the light of Hungarian law and the tax authority's practice based on that law, and, accordingly, of the Hungarian law and practice existing at the time when the applicant filed its claim, the dispute between the parties cannot be resolved without comparing the law to be applied by the national court with EU law and the general principles of the VAT Directive, or without examining whether Hungarian law and the practice of the tax authority based thereon comply with the requirements of the neutrality of VAT, legal certainty, effectiveness and non-discrimination which flow from EU law.
- 16 This action is concerned with the tax authority's practice, resulting from the territorial scope of the Law on VAT as applicable at the time when the applicant's claim was filed in 2019, of not refunding to the addressee of an invoice VAT which can be shown to have been wrongly paid, even though this could have been deducted from the general principles. As regards the practice relating to the right [to deduct the tax] and to the corresponding right to a refund of VAT paid but not due, the tax authority interpreted the national legislation as meaning that the applicant was not entitled to a refund of the VAT stated on the invoices at issue, which the parties do not dispute was paid, even though BHA Kft. paid the VAT to the Treasury without any suspicion of fraud existing, and the tax authority also takes the view that the judgments of the Court of Justice of the European Union in *Porr Építési Kft.* and *Farkas* are not applicable in the present case because we are concerned here with a VAT-exempt transaction – in other words, there is no right to deduct the tax – whereas the cases cited (C-564/15 and C-691/17) concerned invoices which were issued in accordance with the ordinary tax system rather than

being correctly issued, with the inclusion of VAT, in accordance with the reverse charge system.

- 17 The tax authority is of the opinion that the applicant is not entitled to a refund of the tax because the place of performance was not situated on national territory, meaning that it is not possible either to find that a right of deduction exists which the applicant did not seek to exercise, since it based its claim on the right to a refund without, however, demonstrating that it used the service as a taxable person. Contrary to the findings in *Porr Építési Kft.* and *Farkas*, it is not the case that the parties should have applied another form of taxation applicable under national law (reverse charge system) instead of issuing the invoices in accordance with the ordinary tax system but rather that the invoice for the financial transaction should have been drawn up from the outset as referring to a transaction situated outside the scope of the Law on VAT. According to the tax authority, the applicant's right to a refund of the tax does not flow from the judgments of the Court of Justice of the European Union. These proceedings are concerned with the national legislation in force during the period prior to 1 January 2020 and the legal practice based thereon, in accordance with which the tax authority took the view that the applicant's claim for a refund of VAT was unfounded.
- 18 The referring court asks the Court of Justice whether the relevant EU case-law and the principles of effectiveness, fiscal neutrality and non-discrimination preclude the Hungarian legislation relating to the period at issue and the tax authority's practice based on that legislation, pursuant to which, where the addressee of an invoice receives an invoice including VAT in respect of a transaction not subject to VAT, there cannot really be said to be a right to deduct the VAT, and whether it is also possible in that situation to contact the tax authority directly to request a refund where the requirement is met that it is impossible or extremely difficult to claim the amount corresponding to the VAT in question from the issuer of the invoice using another procedure under civil law, particularly taking account of the fact that the issuer of the invoice has since gone into liquidation, that it was not possible to amend the invoice according to a statement by the liquidator, that the issuer of the invoice has not claimed a refund of the tax paid, and that the applicant brought civil proceedings against the tax authority, and where the requirement is also met that there must be no dispute regarding payment of the VAT to the Treasury and that no suspicion of fraud must exist.
- 19 The referring court considers that it is necessary to determine whether, in the instant case, [since it concerns] a supply of services outside national territory, in other words, a transaction which does not come within the scope of the Law on VAT, the principles of fiscal neutrality and effectiveness are breached where the tax authority refuses to refund VAT wrongly paid without first establishing whether the issuers of the invoice are in a position to reimburse to the person for whom the services are carried out the VAT wrongly charged, since those principles require that, where it is impossible or extremely difficult for the person for whom the services are carried out to recover from the service provider VAT which was wrongly charged, in particular where the service provider is insolvent,

the person for whom the services are carried out may request a refund directly from the tax authority.

20 The referring court also asks whether, if the addressee of the invoice is entitled to submit a claim for a refund directly to the tax authority, it may do so under the general rules and whether, when making the refund, the tax authority is required to pay late-payment interest and, if that is the case, what date that interest must be calculated from, and whether the relevant time limits for processing the claim also have to be taken into account.

21 [...]

22 [...]

23 [...]

24 [...] [procedural aspects of national law]

Budapest, 25 May 2021.

[...]

[...] [signatures]

WORKING DOCUMENT