

Case C-37/23**Summary of request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

25 January 2023

Referring court:

Corte suprema di cassazione (Italy)

Date of the decision to refer:

16 January 2023

Appellant:

Agenzia delle Entrate (Revenue Agency)

Respondent:

PR

Subject matter of the main proceedings

Tax benefits – VAT – 2009 earthquake – Refund of tax at the rate of 60%.

Subject matter and legal basis of the request

- 1 With reference to the dispute in the main proceedings, in which the Revenue Agency and a taxpayer hold opposing points of view, the referring court raises, of its own motion, the question of the compatibility with the principle of fiscal neutrality of national legislation providing for the refund, at the rate of 60%, of the tax already paid as Value Added Tax (VAT) in the period between April 2009 and December 2010, legislation introduced specifically in response to the earthquake which occurred in the Abruzzo region on 6 April 2009. That provision would result in different treatment, contrary to the principle of fiscal neutrality. In addition, the granting of such a refund is contested, since an injunction has been issued to suspend the unlawful aid granted by Italy in State aid case SA.35083 (2012/NN) – Earthquake in Abruzzo.

Question referred for a preliminary ruling

- 2 ‘Do the principles set out in the order [of 15 July 2015,] *Revenue Agency v Nuova Invincibile srl*, C-82/14, EU:C:2015:510, and in the judgment of 17 July 2008, *Commission v Italy*, C-132/06, EU:C:2008:412, preclude a legislative provision, such as that resulting from Article 33(28) of Legge (Law) No. 183 of 2011, which allows taxpayers to obtain a refund, at the rate of 60%, of the VAT paid in the period between April 2009 and December 2010, in relation to the earthquake which affected the Abruzzo territory on 6 April 2009?’

Provisions of European Union law relied on

- 3 Articles 2, 206 and 273 and recital 45 of Council Directive 2006/112/EC of 28 November 2006 (Sixth VAT Directive); Article 108(3) TFEU; Article 11(1) of Regulation (EC) No 659/1999.

Provisions of national law relied on

- 4 Article 39 of Decreto-Legge (Decree-Law) No 78 of 31 May 2010, converted, with amendments, into Legge (Law) No 122 of 30 July 2010, provides that, the payment of taxes, including VAT, by natural persons holding income arising from their business or through self-employment, as well as subjects other than natural persons with a turnover not exceeding €200,000, is suspended until 20 December 2010, without the right to reimbursement of the amount already paid.
- 5 Article 33(28) of Law No. 183 of 12 November 2011 provides that, in order to facilitate recovery following the emergency resulting from the earthquake that struck the Abruzzo territory on 6 April 2009, the resumption of the payment of taxes referred to in the aforementioned Article 39 of Decree-Law No. 78 of 31 May 2010 must proceed on an instalment basis (payment in 120 monthly instalments), and that the amount due for each tax suspended, net of payments already made, is reduced to 40%.
- 6 As a result of this set of rules, therefore, for the period from 9 April 2009 to 20 December 2010, the payment of taxes, including VAT, by holders of income arising from their business or through self-employment (as well as subjects other than natural persons with a turnover not exceeding €200,000) was first suspended and then resumed with payment by instalments, subject to an overall reduction of 60%.
- 7 Partially analogous provisions had been introduced by Article 9(17) of Legge (Law) No. 289 of 27 December 2002, with respect to subjects affected by the 1990 earthquake in Sicily.

Succinct presentation of the facts and procedure in the main proceedings

- 8 PR, a notary public, requested a refund of the sum of €102,088 as VAT paid for the period from April 2009 to December 2010, since the tax, the payment of which had initially been suspended in response to the earthquake affecting Abruzzo that occurred on 6 April 2009, had then been reduced to 40% of the amounts due, pursuant to Article 33(28) of Law No 183 of 12 November 2011. The Revenue Agency rejected the application on the ground that the provision in question excluded the reimbursement of amounts already paid.
- 9 The taxpayer's appeal against the refusal was rejected by the Provincial Tax Commission, which held that the reduction was to be applied to the amount outstanding, and did not concern payments already made.
- 10 The taxpayer appealed to the Regional Tax Commission, arguing that the situation involving subjects who had not paid the tax, and were eligible for a reduction in the payment due, should be considered analogous to that of subjects who, on the other hand, after making payments, request the reimbursement of the higher sums paid, an argument in line with the interpretation by the Court of Cassation of the analogous provision in Article 9(17) of Law no. 289 of 27 December 2002, referring to the 1990 earthquake in Sicily. The Revenue Agency contested the taxpayer's argument, as it concerned VAT, and requested, in any event, that the case be suspended pending the European Commission's decision C(2012) 7128 *final* of 17 October 2012 initiating the formal investigation procedure under Article 108 TFEU, containing the injunction requiring the suspension of State aid incompatible with EU law.
- 11 The Regional Tax Commission, reversing the judgment at first instance, upheld the taxpayer's appeal and declared unlawful the refusal to grant the VAT refund. The Revenue Agency lodged the present appeal against the judgment with the Court of Cassation, to which the taxpayer responded with a counter-appeal.

The essential arguments of the parties

- 12 **The Revenue Agency, the appellant**, alleges infringement of Article 108(3) TFEU and article 11(1) of Regulation No 659/1999/EC, in that the Regional Tax Commission recognised, despite an injunction to suspend the unlawful aid granted by Italy in State aid case SA.35083 (2012/NN) – Earthquake in Abruzzo, the right to a VAT refund of a subject who carries out an economic activity, in the case in question, a freelance notary public.
- 13 The **taxpayer, the respondent**, claims that the plea is unfounded because, in his view, the European Commission's decision does not apply to the present case, concerning a professional working in a local context.

The relevant case-law from the Court of Justice

- 14 The [o]rder of 15 July 2015, *Revenue Agency v. Nuova Invincibile srl*, C-82/14, EU:C:2015:510, as well as the judgment of 17 July 2008, *Commission v Italy*, C-132/06, EU:C:2008:412, concerning Articles 8 and 9 of Law No. 289 of 2002, are specifically relevant.
- 15 In the aforementioned order, the Court of Justice, after stating that ‘the system of deductions was established in order to ensure the neutrality of VAT [...] that system is intended to fully relieve the taxable person of the burden of VAT due or paid as part of his or her economic activities. The common VAT system thus guarantees the neutrality of taxation for all economic activities’, observed that “the effect of the measure introduced by Article 9(17) of Law no. 289/2002, on the one hand, is not to alleviate, with regard to VAT, the tax burden borne by taxable persons, but to enable certain taxable persons to retain or appropriate sums paid by the final consumer and owed to the tax authorities” and, on the other, creates “a difference in treatment contrary to the principle of fiscal neutrality, in so far as that provision enables certain taxable persons referred to therein, by virtue of the reduction in the VAT normally due – a reduction provided for by the same provision – to retain or appropriate the greater part of the amount of VAT received on the sale of goods or supply of services, while other taxable persons on Italian territory are obliged to pay the full amount of VAT normally due to the tax authorities, on the basis of the same transactions”.

Succinct presentation of the reasoning in the request for a preliminary ruling

- 16 The referring court observes that two circumstances are relevant in the examination of the appeal:
- a) the European Commission’s final decision C(2012) 7128 *final* of 17 October 2012 was issued during the course of the proceedings.
 - b) the request for a refund relates to VAT.
- 17 With regard to the first aspect, the referring court observes that the incompatibility of the measures with which the Member State renounces the correct application and/or collection of the amount due as VAT must be raised by the court of its own motion, irrespective of any specific pleas put forward by each party, since the principle of effectiveness contained in Article 10 of the EC Treaty obliges the national court to apply EU law of its own motion. In the present case, the Commission, in its decision of 14 August 2015, C(2015) 5549 *final* (which the national court must also implement through the non-appliance of conflicting rules) established, in Article 1, that “*State aid measures (...) which reduce taxes and contributions owed by enterprises in areas affected by natural disasters in Italy since 1990, and which Italy has unlawfully put into effect in breach of Article 108(3) of the Treaty on the Functioning of the European Union, are incompatible with the internal market*”.

- 18 According to the referring court, Article 33(28) of Law No 183 of 2011 implements the same mechanism as that already introduced by article 9(17) of Law No 289 of 2002, seeing that, in the case of the latter provision, “*The amount payable in respect of each tax or contribution (...) subject to suspension, net of payments already made, is reduced to 40 per cent*”, thus providing for a reduction of the sums to be paid of 60%.
- 19 It appears, in the first place, that the benefit of the tax reduction does not have the effect of alleviating, with regard to VAT, the tax burden borne by taxable persons, but of enabling a certain number of them to retain or appropriate sums already paid by the final consumer and owed to the tax authorities: in other words, the effect of the legislative provision is to enable certain subjects to be reimbursed a sum which, in reality, has already been paid by others, that is, the final consumers, for whom the possibility of requesting, in turn, a refund of the sum paid from the trader is only hypothetical.
- 20 In the second place, the provision appears to give rise to unequal treatment, directly infringing the principle of fiscal neutrality in that it allows certain taxable persons to retain and appropriate a very significant portion (60%) of the amount of VAT collected on the sale of goods or the supply of services, unlike other taxpayers on the Italian territory who, on the other hand, are obliged to pay the full amount of VAT in relation to the same type of transaction.
- 21 The taxpayer pointed out that the new provision, unlike that of 2002, does not preclude an assessment by the Revenue Agency, that the reduction is only 60% (as opposed to the 90% provided for by the 2002 provision) and that the territorial scope of application is more limited, concluding that the principles confirmed by the Court of Justice in the order [of 15 July 2015], *Revenue Agency v Nuova Invincibile s.r.l.*, do not extend to the case in question.
- 22 In the opinion of the referring court, neither the reduction nor the territorial delimitation appear to be significant elements, just as the non-preclusion of assessment measures is irrelevant, whereas the amount of the sums reduced remains pertinent. The provision in question therefore appears to result in an unjustified infringement of the principle of VAT neutrality.
- 23 The referring court does however consider that, since this is a provision that has never been specifically examined by the Court of Justice, taking into account the party’s observations, the question of the compatibility of Article 33(28) of Law No 183/2011 should be referred to the Court of Justice, in the light of the foregoing.