Case C-746/22

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:

6 December 2022

Referring court:

Fővárosi Törvényszék (Budapest High Court, Hungary)

Date of the decision to refer:

18 November 2022

Applicant:

Slovenské Energetické Strojárne A. S.

Defendant:

Nemzeti Adó— és Vámhivatal Fellebbviteli Igazgatósága (Appeals Directorate of the National Tax and Customs Administration, Hungary)

Subject matter of the main proceedings

Administrative proceedings in a tax matter.

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

First, to establish whether national legislation which, for the purposes of the examination of an application for a refund of value added tax (VAT), does not allow an applicant, at the appeal stage, to plead new facts or to adduce new evidence which it was aware of before the adoption of the first-tier decision but which it did not present, even though it was requested to do so by the tax authority, or which it did not adduce, creates a material constraint which exceeds the requirements laid down for appeals in Article 23(2) of Council Directive 2008/9/EC.

Second to establish whether the period of one month indicated in Article 20(2) of Council Directive 2008/9/EC is mandatory and, if it is, whether that is compatible with the relevant EU principles and provisions.

Third, to establish whether national legislation, pursuant to which the tax authority is to bring the proceedings to a close if the applicant taxable person does not respond to a request from the tax authority or comply with its obligation of rectification, failing which it is not possible to examine its application, is compatible with Article 23(1) of Council Directive 2008/9/EC.

Legal basis: Article 267 TFEU

Questions referred for a preliminary ruling

1. Is Article 23(2) of Council Directive 2008/9/EC 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 (‘Directive 2008/9’) to be construed as meaning that national legislation – to be specific, Paragraph 124(3) of the az adóigazgatási rendtartásról szóló 2017. évi CLI. törvény (Law CLI of 2017 governing tax administration; ‘the Law on tax administration’) – which, for the purposes of the examination of applications for a refund of value added tax pursuant to Council Directive 2006/112/EC on the common system of value added tax (‘the VAT Directive’), does not allow, at the appeal stage, new facts to be pleaded or new evidence to be relied on or produced, where the applicant was aware of that evidence before the adoption of the first-tier decision but did not present it, even though it was requested to do so by the tax authority, or did not rely on it, thereby creating a material constraint which exceeds the requirements as to form and time limits laid down by Directive 2008/9, is compatible with the requirements laid down in that Directive with regard to appeals?

2. Does an affirmative answer to the first question mean that the one-month period indicated in Article 20(2) of Directive 2008/9 is to be considered mandatory? Is the foregoing compatible with the right to an effective remedy and to a fair trial enshrined in Article 47 of the Charter of Fundamental Rights of the European Union (‘the Charter’), with Articles 167, 169, 170 and 171(1) of the VAT Directive, and with the fundamental principles of fiscal neutrality, effectiveness and proportionality developed by the Court of Justice of the European Union?

3. Is Article 23(1) of Directive 2008/9, which relates to the refusal of a refund application in whole or in part, to be interpreted as meaning that national legislation – specifically, Paragraph 49(1) of the Law on tax administration – pursuant to which the tax authority is to bring the proceedings to a close if the applicant taxable person does not respond to a request from the tax authority or comply with its obligation of rectification, failing which it is not

possible to examine the application without the proceedings continuing ex officio, is compatible with that provision?

Provisions of EU law relied on

– Charter of Fundamental Rights of the European Union (OJ 2012 C 326, p. 391) (the Charter): Article 47

– Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1; corrigenda in OJ 2007 L 335, p. 60, and OJ 2015 L 323, p. 31) (the VAT Directive): Articles 167, 169, 170 and 171(1)

– 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 (OJ 2008 L 44, p. 23) (Directive 2008/9): Articles 1, 20(1) and (2), 21, 23(1) and (2), 26, and 29(1) and (2)

– Case-law of the Court of Justice: inter alia, judgments of 10 April 1984, *von Colson and Kamann*, 14/83, EU:C:1984:153, and of 2 May 2019, *Sea Chefs Cruise Services*, C-133/18, EU:C:2019:354

Provisions of national law relied on

– Az általános forgalmi adóról szóló 2007. évi CXXVII. törvény (Law CXXVII of 2007 on value added tax; 'the VAT Law'): Paragraphs 251/C(2), 251/E(1) and (2), 251/F(1) to (4), 251/G(1) and (2), 251/H(1) and (2), and 251/I(1) and (4)

– Az adóigazgatási rendtartásról szóló 2017. évi CLI. törvény (Law CLI of 2017 governing tax administration) (Law on tax administration): Paragraphs 9, 49(1)(b) and 124

– A közigazgatási perrendtartásról szóló 2017. évi I. törvény (Law I of 2017 on administrative court procedure; 'Law on administrative court procedure'): Paragraph 78(4)

Succinct presentation of the facts and procedure in the main proceedings

1 The applicant is a commercial company governed by Slovakian law which operates in the energy sector, manufacturing heating systems and selling those systems and their components; it also performs engineering services in relation to power stations. In June 2020, the applicant began to carry out installation and assembly works in Hungary under a contract concluded with the company Budapesti Erőmű Zrt. For that purpose, it purchased various goods and services in

Hungary. In that connection, by letter of 18 February 2021, the applicant, in its capacity as a taxable person established in another Member State of the Union, specifically Slovakia, applied under Paragraph 244 of the VAT Law, on the basis of 19 invoices, for a refund of the amount of HUF 37 013 654 in respect of input tax paid on the purchase of goods and services in Hungary during the period 1 January to 31 December 2020.

2 By administrative act of 22 February 2021, the Nemzeti Adó— és Vámhivatal Kiemelt Adó— és Vámigazgatósága (Tax and Customs Directorate for Large Taxpayers of the National Tax and Customs Authority, Hungary; 'the first-tier tax authority'), taking the view that it was unable to adopt a decision based on the information that it had at its disposal, requested the applicant to provide information pursuant to Paragraph 251/F(1) of the VAT Law. Inter alia, it requested the applicant to provide, within one month of notification of the administrative act, invoices, together with the contracts and orders on which those invoices were based, which had not been attached to the initial application but which were necessary in order to examine that application, and also to submit a statement declaring for what purpose and for whom it had purchased the services referred to in the invoices and what connection they had to its economic activity. The first-tier tax authority sent the administrative act to the applicant's postal address and assumed that the applicant had received it.

3 By decision of 6 May 2021, the first-tier tax authority, in accordance with Paragraph 49(1)(b) of the Law on tax administration, brought to a close the proceedings commenced as a result of the applicant's application, stating that the applicant had failed to comply with its obligation to provide information, despite having been requested to do so, and that, as a consequence, it was not possible to establish the precise factual background using the information which that authority had at its disposal.

4 The applicant appealed against the first-tier decision and, at the same time, complied with the first-tier tax authority's request that it provide information, sending the documents requested in the administrative act.

5 The defendant, which dealt with that appeal, confirmed the first-tier decision by decision of 20 July 2021. The defendant stated that the applicant had not responded to the request for rectification before the first-tier decision was notified to it, nor had it provided the requested documents on time, and therefore it had not been possible to determine whether the applicant was entitled to a tax refund. The defendant pointed out that Paragraph 124(3) of the Law on tax administration provides that 'unless there is a ground for invalidity, it will not be possible, in the appeal and in the proceedings commenced as a result of the appeal, to plead new facts or rely on new evidence which the person with the right of appeal was aware of before the adoption of the first-tier decision while nevertheless failing to produce the evidence, despite having been requested to do so by the tax authority, or to state the facts'. In the administrative act requesting the provision of information, the first-tier tax authority advised the applicant about that prohibition

of new facts and evidence. In the light of this and having regard to Paragraph 124(3) of the Law on tax administration, the defendant found that, in the appeal proceedings, it was no longer possible for it to take into consideration the documents and information sent by the applicant.

6 The applicant has appealed against the defendant's decision to the Fővárosi Törvényszék (Budapest High Court, Hungary).

The essential arguments of the parties in the main proceedings

7 The **applicant** claims that Paragraph 124(3) of the Law on tax administration is not applicable to the procedure for a VAT refund. In its submission, Directive 2008/9 exhaustively lays down substantive and procedural rules governing the VAT refund procedure and, therefore, Paragraph 124(3) of the Law on tax administration, in prohibiting the production of new evidence at the appeal stage and in the proceedings commenced as a result of the appeal ('prohibition of new facts and evidence') constitutes a material constraint.

8 The applicant submits that Article 23(2) of Directive 2008/9, which lays down the right of appeal, provides that conditions as to form and time limits for appeals brought in VAT refund proceedings are governed by the measures adopted by the Member State of refund. In addition to that, Directive 2008/9 does not support any material constraint in respect of appeals either expressly or by means of a reference provision, such that it is not possible to apply as against the applicant the material constraint imposed by the Hungarian legislation, pursuant to which it is not possible in an appeal to plead new facts or to adduce new evidence which the applicant was aware of before the first-tier decision was adopted.

9 The applicant argues that the non-mandatory character of the one-month rectification period is undermined by the restriction of the appeal laid down by the Hungarian legislation, since, after the adoption of the first-tier decision but before the adoption of the final decision, the refund applicant is unable to make known to the Hungarian tax authority, in such a way that the tax authority takes these into account, any new facts or circumstances or new evidence which, although they existed during the first-tier proceedings, were not presented by the applicant for any reason based on its own fault. On the other hand, Article 26 of Directive 2008/9 and Paragraph 251/I(4) of the VAT Law provide only, as a legal consequence of failure to comply with the rectification period by the applicant, that, where the applicant fails to comply with a request for rectification on time, the applicant will not be entitled to claim the payment of interest on the amount to be refunded to it by the Member State of refund, even if the authorities are in arrears.

10 The applicant further pleads that neither Article 20(2) of Directive 2008/9 nor the provision which transposes it into Hungarian law, Paragraph 251/F(4) of the VAT Law, describe the one-month period as mandatory, from which it follows that failure to comply with that period cannot lead to the definitive loss by the

applicant of its right to a refund of tax. In that connection, the applicant asserts that, following the expiry of that period, it continues to be entitled to provide, in the context of the appeal, the documents on which its application for a VAT refund is based and which the tax authority has stated are necessary.

11 Lastly, the applicant claims that, in those circumstances, the defendant was not authorised to bring the proceedings to a close.

12 The **defendant** argues that Paragraph 124(3) of the Law on tax administration is also applicable to the assessment of applications for a VAT refund. The defendant submits that that provision does not make it impossible in practice or excessively difficult to exercise the rights conferred by EU law, since it merely seeks to prevent the duration of appeal proceedings from being extended.

13 In the defendant's submission, the principles of equivalence and effectiveness have not been infringed. The defendant argues that, contrary to what the applicant maintains, the final part of the first-tier decision does not draw a distinction between the procedural and substantive rules on the bringing of an appeal but rather refers to the rules relating to the way in which an appeal is lodged and the limits on the right to appeal. In the light of all this, the defendant submits that the Hungarian legislation is compatible with EU law and with the legal principles developed by the Court of Justice and that, as a consequence, it does not breach the principles of fiscal neutrality and proportionality.

14 The defendant maintains that the one-month period laid down in Article 20(2) of Directive 2008/9 for the provision of additional information is not mandatory since, in relation to non-compliance with that period, the applicant could have lodged an application for waiver of the preclusion.

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

15 By the request for a preliminary ruling, the referring court asks the Court of Justice to determine whether the prohibition of new facts and evidence laid down in Paragraph 124(3) of the Law on tax administration is contrary to Article 23(2) of Directive 2008/9 and whether that prohibition breaches the principles established by EU case-law in connection with appeals, regard being had to the fact that EU law permits the submission of evidence at any time until the adoption of a final decision.

16 The referring court also asks whether, in combination with the application of the prohibition of new facts and evidence laid down in Paragraph 124(3) of the Law on tax administration, the rectification period of one month acquires the status of mandatory, in so far as any statements, documents and other evidence which may be submitted additionally at the same time as the appeal are not taken into consideration by the Hungarian tax authority.

17 Lastly, the referring court asks for clarification of whether, in VAT refund proceedings, the tax authority is authorised to bring to a close the proceedings in the circumstances referred to.

18 As regards the **first question**, the referring court states that, in the instant case, the applicant did not comply with the tax authority's request that it provide information during the first-tier proceedings but, following notification of the first-tier decision, it attached the information and documents requested as an annex to the appeal which it lodged against that decision with the second-tier tax authority. However, the second-tier tax authority refused to take that information and those documents into consideration, relying in that connection on Paragraph 124(3) of the Law on tax administration. Nevertheless, as the referring court indicates, Directive 2008/9 does not provide that, where the one-month period indicated for delivery of the additional information requested by the Member State of refund is exceeded, it is possible to disregard the information submitted. That court adds that the provisions of Directive 2008/9 relating to appeals do not refer to the prohibition of new facts and evidence, as laid down in Paragraph 124(3) of the Law on tax administration, either.

19 The referring court refers to *Sea Chefs Cruise Services* (Case C-133/18), stating that the only difference between the facts of that case and those of this case is that the Hungarian administrative procedure comprises two stages and, in Hungarian law, the prohibition of new facts and evidence laid down in Paragraph 124(3) of the Law on tax administration is already expressly applicable in the second-tier administrative proceedings.

20 The referring court takes the view that, when it comes to examining VAT refund applications under the VAT Directive, it is necessary to respect the rights of applicants laid down in Directive 2008/9, the personal scope of which encompasses the applicant.

21 In that respect, the referring court questions whether there should be a finding that the right to an effective remedy and to a fair trial, enshrined in Article 47 of the Charter, has been breached, because, in Hungarian law, as a result of the prohibition of new facts and evidence applicable in appeal proceedings, there is a limitation of the right to evidence and to produce evidence which is available to the parties to proceedings. As a result of the prohibition of new facts and evidence, there is no possibility of presenting new facts or evidence, which clearly has a bearing on the decision of the second-tier tax authority seised of the appeal proceedings and on the final outcome of any judicial proceedings brought as a result of the administrative appeal which may be lodged against that decision.

22 In that connection, the referring court also considers it significant that Paragraph 78(4) of the Law on administrative court procedure, which governs administrative proceedings in Hungary, also lays down a provision pursuant to which 'the applicant or person concerned may put forward facts or circumstances which, although they existed when the prior administrative proceedings were

conducted, were not examined in those proceedings, in the event that the administrative body did not take those facts or circumstances into account in the prior administrative proceedings even though they were put forward and in the event that the applicant or person concerned was not aware of those facts, through no fault of their own, or was unable to plead those facts or circumstances, through no fault of their own'. In other words, the prohibition of new facts and evidence also applies to administrative proceedings.

23 In that regard, the referring court also asks whether the prohibition of new facts and evidence is proportionate and compatible with the conditions which guarantee a fair trial, bearing in mind that it may lead to a material limitation of the right of appeal which is available to taxpayers as a fundamental guarantee of the right to bring proceedings.

24 In relation to the **second question**, the referring court also refers to the judgment of the Court of Justice in *Sea Chefs Cruise Services* (C-133/18), the subject matter of which was identical to that of the second question referred for a preliminary ruling in the present case.

25 The referring court explains that the compatibility of Paragraph 124(3) of the Law on tax administration with Directive 2008/9 is in doubt in so far as the application of that national provision in the VAT refund procedure may have the effect of making the one-month period mandatory at the time when the decision of the first-tier tax authority is adopted, since, once that decision has been adopted, no evidence which the applicant, even though it was aware of it, has not brought to the attention of the tax authority by that time, through its own fault, may be produced.

26 As regards the **third question**, the referring court observes that Directive 2008/9 provides merely for the adoption of a decision approving or refusing the refund application, without legislating for the possibility of bringing the procedure to a close. The referring court adds that the VAT Law, which transposes that Directive, does not provide for the possibility of bringing the procedure to a close either. Under Paragraph 251/C(2) of the VAT Law, where an application has been lodged on time, the tax authority will decide on the merits of the application. In other words, both Directive 2008/9 and the VAT Law require the adoption of a decision on the merits.

27 Contrary to that, the Hungarian tax authority applied in the instant case the rule on closure of the procedure laid down in Paragraph 49(1)(b) of the Law on tax administration, which has led the referring court to raise the question of whether the provision of Directive 2008/9 which requires the adoption of a decision approving or refusing the VAT refund application precludes, in relation to VAT refunds, the adoption by the national authority of a decision to bring the procedure to a close.