

Case C-643/20

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:

30 November 2020

Referring court:

Veszprémi Törvényszék (High Court, Veszprém, Hungary)

Date of the decision to refer:

23 November 2020

Applicant:

ENERGOTT Fejlesztő és Vagyonkezelő Kft.

Defendant:

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

Subject matter of the dispute in the main proceedings

Contentious administrative tax proceedings.

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

First, the interpretation of Article 90(1) and (2) of [Council] Directive 2006/112/EC [of 28 November 2006 on the common system of value added tax ('VAT' or 'the tax')], in the light of the relevant case-law of the Court of Justice and of the principles of effectiveness and equivalence, in order to determine, in particular, the moment which may be stipulated by Member States as the starting point of the limitation period for the refund of VAT applicable to debts which are definitively irrecoverable.

Second, the interpretation of Articles 90(1) and (2) and 273 of Directive 2006/112, in the light of the same case-law and of the principles of effectiveness, equivalence and neutrality of VAT, in order to determine, in particular, whether

that case-law and those principles preclude practices of a Member State whereby: i) taxable persons are expected to carry out recovery operations laid down as conditions for the refund of VAT in respect of debts which are definitively irrecoverable; and ii) in the event of non-payment by the recipient of a service, the company providing that service must immediately suspend the service, failing which it will be unable to recover the VAT applicable to debts which are definitively irrecoverable.

Third, the interpretation of Articles 90(1) and (2) and 273 of Directive 2006/112, and of Articles 15 to 17 of the Charter of Fundamental Rights of the European Union, in the light of the abovementioned case-law and principles in order to determine specifically whether that case-law and those principles preclude the above set of conditions which was laid down, in respect of the refund of VAT, as a result of the order of the Court of Justice in *Porr Építési Kft.* (C-292/19, not published, EU:C:2019:901), without any legal basis and without taxable persons being aware of it.

Legal basis: Article 267 TFEU

Questions referred for a preliminary ruling

- 1) Must Article 90(1) and (2) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax ('the VAT Directive') (taking particular account of the judgment in *Enzo Di Maura* (C-246/16) and the order in *Porr Építési Kft.* (C-292/19)), and the fundamental EU law principles of effectiveness and equivalence be interpreted as meaning that Member States may not stipulate that the limitation period for the refund of VAT applicable to debts which are definitively irrecoverable starts to run at a time prior to the moment when the debt on which the VAT to be refunded is based becomes irrecoverable?
- 2) Must Articles 90(1) and (2) and 273 of the VAT Directive (taking particular account of the judgment in *Enzo Di Maura* (C-246/16) and the order in *Porr Építési Kft.* (C-292/19)), and the fundamental EU law principles of effectiveness and equivalence, [in addition to] the principle of neutrality of the tax, be interpreted as precluding the practice of a Member State whereby, in connection with the refund of VAT applicable to a debt which is definitively irrecoverable, taxable persons are, in addition to claiming that debt in liquidation proceedings, expected to take other steps to recover the debt, as a condition for eligibility for a refund of VAT?
- 3) Must Articles 90(1) and (2) and 273 of the VAT Directive (taking particular account of the judgment in *Enzo Di Maura* (C-246/16) and the order in *Porr Építési Kft.* (C-292/19)), and the fundamental EU law principles of effectiveness and equivalence, [in addition to] the principle of neutrality of the tax, be interpreted as [precluding] the practice of a Member State whereby, in the event of non-payment, the undertaking which provides the

service must immediately suspend that service, since, if it fails to do so and continues to provide the service, it will be not be able to claim a refund of the VAT applicable to debts which are definitively irrecoverable either, even though those debts acquired that status at a later time?

- 4) Must Articles 90(1) and (2) and 273 of the VAT Directive and Articles 15 to 17 of the Charter of Fundamental Rights of the European Union (taking particular account of the judgment in *Enzo Di Maura* (C-246/16) and the order in *Porr Építési Kft.* (C-292/19)), and the fundamental EU law principles of effectiveness and equivalence, [in addition to] the principle of neutrality of the tax, be interpreted as meaning that, following the order in *Porr Építési Kft.*, [those provisions and principles preclude] the authorities of a Member State responsible for ensuring enforcement of the law from having laid down, without any legal basis, the conditions referred to in questions 2 to 4, given that that set of conditions was not clear to the taxable person before the debts became definitively irrecoverable?

Provisions of EU law relied on

- Articles 15 to 17 of the Charter of Fundamental Rights of the European Union (OJ 2012 C 326, p. 391).
- Articles 90(1) and (2) and 273 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1).
- Case-law of the Court of Justice of the European Union, in particular: judgment of 23 November 2017, *Di Maura*, (C-246/16, EU:C:2017:887); order of 24 October 2019, *Porr Építési Kft.*, (C-292/19, not published, EU:C:2019:901); judgment of 21 June 2020, *SCT d.d.*, (C-146/19, EU:C:2020:464); judgment of 5 June 2014, *Kone and Others*, (C-557/12, EU:C:2014:1317); judgment of 15 May 2014, *Álmos Agrárkúkereskedelmi* (C-337/13, EU:C:2014:328); judgment of 15 October 2020, *E.* (VAT – Reduction of the taxable amount), C-335/19, EU:C:2020:829, and judgment of 28 March 2019, *Cogeco Communications*, (C-637/17, EU:C:2019:263).
- *FGSZ*, C-507/20, pending before the Court of Justice.

Provisions of national law relied on

- Paragraph 4(3)(b) and Paragraph 164(1), (2), (2a) and (3) of the az adózás rendjéről szóló 2003. évi XCII. törvény (Law XCII of 2003 on General Tax Procedure; ‘the old Law on General Tax Procedure’).
- Paragraph 1(6)(3)(b), Paragraph 65(1), Paragraph 196(1) to (6), Paragraph 202(1) and (2), Paragraph 209(1) and Paragraph 271(2) and (7) of the

az adózás rendjéről szóló 2017. évi CL. törvény (Law CL of 2017 on General Tax Procedure; ‘the Law on General Tax Procedure’).

– Paragraphs 137 and 139(1) and (2) of the az adóigazgatási rendtartásról szóló 2017. évi CLI. törvény (Law CLI of 2017 on the Regulation of the Tax Authority; ‘the Law on the Tax Authority’).

– Paragraphs 55(1) and (2), 56, 58(1) and 77(1) to (10) of the az általános forgalmi adóról szóló 2007. évi CXXVII. törvény (Law CXXVII of 2007 on value added tax; ‘the VAT Law’).

– Paragraph 78(1) of the az adóigazgatási eljárás részletszabályairól szóló 465/2017. (XII. 28.) Korm. rendelet (Government Decree No 465 of 28 December 2017 adopting rules for the implementation of the administrative procedure in relation to taxation; ‘Rules on tax procedure’).

– Paragraph 4(23) of the társasági adóról és osztalékadóról szóló 1996. évi LXXXI. törvény (Law LXXXI of 1996, on corporation tax and dividend tax; ‘Law on corporation tax’).

– Paragraph 3(4)(10) of the számvitelről szóló 2000. évi C. törvény (Law C of 2000 on accounting).

Summary of the facts and procedure in the main proceedings

- 1 The applicant is a member and representative of an association of taxable persons for the purpose of VAT (‘the association of taxable persons’). The Energott group, as a prominent operator in the Hungarian energy sector, provides public services to the population (for example, supplies of drinking water and hot water, electricity generation, district heating, and sanitation and municipal services). The members of the group include the undertaking D-ÉG Zrt., which is a connected company within the meaning of Paragraph 4(23) of the Law on corporation tax.
- 2 A high proportion of the applicant’s trading partners are companies directly or indirectly under municipal ownership, to which Energott supplied services provided for in legislation which did not allow it to suspend supply in the event of non-payment. The applicant association of taxable persons issued invoices for services supplied between April 2007 and December 2016; these were payable by seven debtors which, in the period when the taxable transactions occurred, had valid tax numbers and were not involved in any bankruptcy, liquidation or judicial winding up proceedings.
- 3 The debtors did not pay the invoices and, in the meantime, two of them were dissolved, one was wound up by court order and another three, specifically Dél-Mezőföldi Víziközmű Üzemeltető Kft., Székesfehérvári Fűtőerőmű and D-ÉG Épületgépészeti, Kereskedelmi Zrt. each became the subject of liquidation proceedings. Even though the unpaid claims against those three companies were

in all cases notified in the liquidation proceedings, the majority of those claims were not recovered, or were recovered only as to a minimal amount, due to insufficient resources; the debts therefore became definitively irrecoverable.

- 4 The applicant accounted for and declared the tax due in the assessment periods which were applicable based on the dates of the invoices confirming the provision of the services. The tax returns filed are held by the tax authority.
- 5 Pursuant to Article 196 of the Law on General Tax Procedure, the applicant filed with the Nemzeti Adó és Vámhivatal Fejér Megyei Adó és Vámigazgatósága (Provincial Tax and Customs Directorate, Fejér, Hungary; ‘the first-tier tax authority), on 31 December 2019, an application for a refund of the sum of HUF 76 565 379 in respect of VAT previously paid which was included on the invoices issued in relation to the debts which had become irrecoverable, and for the payment of accrued interest. The company based its application on the judgment of the Court of Justice in *Di Maura* (C-246/16) and the order in *Porr Építési Kft.* (C-292/19). The applicant also requested the *ex officio* calculation of interest on the VAT to be recovered, in so far as the due date for payment of the VAT preceded the date of effective payment of the amount thereof.
- 6 By decision of 13 February 2020, the first-tier tax authority partially upheld that application. It stated, in the legal grounds of its decision, that the five-year limitation period had expired on 31 December 2018.
- 7 According to those grounds, the limitation period is governed by the provisions of the Law on General Tax Procedure in force when the period starts to run. The limitation period for the right to assessment of VAT starts to run from the moment when the tax return is filed (or if no return is filed, from when the time limit for doing so expires), based on the date of each invoice, or, in the case of corrected returns owing to differences in the taxpayer’s favour, from the filing date of such returns.
- 8 The dates of the invoices referred to by the first-tier decision are from the period between April 2007 and November 2013, and therefore the (monthly) VAT return which includes the most recent invoice was filed (or should have been filed) in December 2013, with the limitation period ending on 31 December 2018. As regards the returns relating to those invoices, the taxable person did not file corrected returns resulting in a reduction of its tax liability, and therefore the expiry date of the limitation period did not change. A VAT refund could be claimed in the amount in respect of which the right to an assessment of the tax had not lapsed as at 24 October 2019, the date on which the Court made the order in *Porr Építési Kft.* Accordingly, the first-tier tax authority declared that the right to an assessment of the tax had lapsed in respect of a total VAT amount of HUF 73 208 755, as set out in the annex to its decision.
- 9 In addition, with regard to an invoice including VAT in the amount of HUF 2 882 736, the first-tier tax authority found that, when it came to payment of

that invoice, the taxable person had not properly asserted its right and therefore its application in respect of that sum was also rejected.

- 10 As regards the substance, the first-tier tax authority examined the invoices in respect of which the right to an assessment of the tax had not lapsed and found that the VAT on those invoices was definitively irrecoverable. However, relying on Paragraph 1 of the Law on General Tax Procedure, the first-tier tax authority held, as regards the invoices issued for payment by Székesfehérvári Fűtőerőmű Kft. and D ÉG Épületgépészeti, Kereskedelmi Zrt., that the taxable person had not established that it had taken all the necessary steps for recovery or payment of its claims, meaning that it had not properly asserted its right, and, consequently, the tax authority also rejected the taxable person's application in relation to the refund of VAT in the amount of HUF 3 356 625.
- 11 However, the first-tier tax authority declared that the taxable person was entitled to a VAT refund of HUF 473 889 in respect of the invoice issued for payment by Dél Mezőföldi Víziközmű Üzemeltető Kft.
- 12 The applicant lodged an administrative appeal against that decision.
- 13 The defendant second-tier tax authority, which was seised of that appeal, confirmed the contested decision by decision of 3 April 2020 ('the second-tier decision').
- 14 The reasoning of that decision stated that, according to the order of the Court of Justice in *Porr Építési Kft.*, a Member State must allow reduction of the taxable amount for VAT if the taxable person is able to demonstrate that its claim against the debtor has become definitively irrecoverable.
- 15 The second-tier tax authority stated that reduction of the taxable amount is linked in law to the tax liability incurred by the taxable person and it meets the same legal fate, from which it follows that the provisions governing budget support are not applicable once the limitation period has expired.
- 16 The second-tier tax authority also referred to Paragraph 78(1) of the Rules on tax procedure, pursuant to which the tax authority may carry out inspections within the limitation period for the right to assessment of the tax. Therefore, since limitation had become effective, the scope of the transaction could not be demonstrated and nor was it possible to examine the subsequent impossibility of recovery of the debts, the insolvency or the period of the liquidation proceedings.
- 17 It is not possible to examine the conditions for the refund of the tax in respect of a time-barred period, and therefore it is not lawful to seek a refund of the tax by making a claim or by filing a supplementary return. Therefore, according to the second-tier tax authority, the taxable person's argument that the limitation period starts to run when the debt becomes irrecoverable is baseless.

- 18 It should be noted that the first-tier tax authority did not apply the provisions of the VAT Law which entered into force on 1 January 2020.
- 19 As regards the substance, the second-tier tax authority went on to examine the invoices which were not time-barred. In that connection, during its examination the second-tier tax authority checked, first, whether the taxable person had established that the debts had definitively acquired the status of irrecoverable. In the instances where the taxable person had established that recovery was impossible but had not taken all the steps which could be expected of it to ensure that its trading partner settled the debt or, in the absence of payment, failed to terminate the business relationship, trusting, without any reason to do so, that the debts would be paid, the second-tier tax authority confirmed that the first-tier tax authority had lawfully refused to grant the applicant the VAT refund. The second-tier tax authority stated in that connection that the taxable person was not entitled to pass on to the budget the consequences of its failure to take the steps that it was appropriate to expect.

The second-tier tax authority added that the order of the Court of Justice in *Porr Építési Kft.* guarantees taxable persons the right to recover directly from the tax authority any VAT paid but not due to the Treasury. However, pursuant to Article 90(1) of the VAT Directive, taxable persons must reduce the taxable amount in accordance with the conditions laid down by Member States, which means that that provision of EU law allows Member States a margin of discretion with regard to the conditions and formalities to which the reduction of the taxable amount is made subject. Therefore, the tax authorities of a Member State may examine whether a taxable person did everything possible to prevent his debt from becoming definitively irrecoverable. Given that the taxable person showed signs of passive conduct in that respect, it was not possible to declare that the principles of effectiveness, proportionality and neutrality of the tax had been infringed in the present case.

- 20 During the proceedings before it, the second-tier tax authority found, in relation to unpaid invoices issued for payment by two of the applicant's trading partners, that those invoices did not refer to services which could be linked to the performance of a public service remit, and therefore the applicant had no legal obligation to provide those services or to continue doing so if its trading partner failed to pay for them. The second-tier tax authority also pointed out that the applicant had not sent payment requests to its trading partners despite the fact that that was appropriate even where there was a legal obligation to supply the service.
- 21 Pursuant to the a 112/2012. (VI.4.) Korm. rendelet (Government Decree 112/2012 of 4 June 2012), the Hungarian Government designated the Székesfehérvári Fűtőerőmű Kft. as an economic body of special strategic importance and granted it a temporary payment moratorium with immediate effect from 29 June 2012. The taxable person was the proprietor of Székesfehérvári Fűtőerőmű Kft. with effect from 23 February 2012, and therefore it held information about its operations and its financial position. Moreover, given that the debtor had been its

client for years, the applicant was fully aware that it systematically failed to pay fees for services. For that reason, the taxable person could have suspended the supply of the service, since, before the payment moratorium, it was not under any obligation to supply it.

- 22 However, before the liquidation proceedings, the applicant had not taken steps in respect of those trading partners which would have served to prevent the debts from becoming irrecoverable, from which it follows that the first-tier tax authority acted lawfully in rejecting its claim.
- 23 The applicant contested those decisions in administrative proceedings in which it requested that the decisions be declared unlawful and annulled.

Essential arguments of the parties to the main proceedings

- 24 The applicant submits that the right to obtain a refund of VAT is derived from the fact that it subsequently became impossible to recover the debts – a point which is also confirmed by the order of the Court in *Porr Építési Kft.* – and, therefore, in accordance with the special rule in the second sentence of Paragraph 164(1) of the Law on General Tax Procedure, the limitation period for that right begins on the last day of the year in which the debts became irrecoverable (31 December 2019 in the instant case) and not at the time when the taxable transactions originally took place.
- 25 The applicant contends that it is clear from the Court’s case-law that, at the time when it filed its application for a VAT refund, Hungary, acting unlawfully, had not correctly transposed Article 90 of the VAT Directive into national law, since it had completely excluded any possibility of subsequently reducing the taxable amount for VAT in respect of irrecoverable debts, although the Court does not consider the exception laid down in Article 90(2) of the VAT Directive to be applicable to VAT relating to such debts.
- 26 The applicant proceeds on the basis that the limitation period could not start to run before the right to the VAT refund arose, that is, before the applicant’s specific right to have the tax refunded to it arose.
- 27 The applicant adds that, in the scheme of the Law on General Tax Procedure, the provisions relating to budget support are applicable to a tax refund based on EU law, including as regards the limitation period for such a refund.
- 28 In the applicant’s submission, making that refund subject to a set of conditions which are stricter than envisaged by that legislation infringes the EU law principles of proportionality, neutrality of the tax and effectiveness.
- 29 The applicant argues that, when it filed its claim for a VAT refund, it was unable to rely on Paragraph 77 of the VAT Law in order subsequently to reduce the taxable amount because Hungarian law did not yet provide for that right.

Therefore, it could rely only on EU law to claim a refund of the VAT paid. Accordingly, that claim for a refund was not based on the VAT Law but rather directly on EU law, namely Article 90 of the VAT Directive, and was dealt with under the special procedure governed by Paragraph 124/C of the old Law on General Tax Procedure and Paragraph 196 of the new Law on General Tax Procedure.

- 30 The applicant agrees with the defendant that the limitation rules generally applicable to VAT refunds do not apply to the special procedure governed by Paragraph 196 of the Law on General Tax Procedure and, therefore, nor does the second sentence of Paragraph 202(1) of that Law, which governs limitation by providing that the limitation period for claiming a right starts to run from the time when that right arises.
- 31 The applicant submits that, logically, it is not possible that its right to a VAT refund would have arisen before the debt on which that right is based had become irrecoverable. That is why the applicant does not dispute the possibility that the limitation rules apply but rather disputes the defendant's application of those rules, which infringes the procedural provisions relied on and undermines the practical effect of EU law.
- 32 The applicant maintains that, in accordance with the rules laid down in the Law on General Tax Procedure, the principle pursuant to which a right must be properly asserted can be breached only by a legal transaction which is intended to circumvent the provisions of tax legislation or municipal decrees. In the present case, the applicant was not seeking to divert any tax provisions from their social function. In its opinion, the set of conditions laid down for the reimbursement of VAT is arbitrary and completely lacks any legal foundation.
- 33 The applicant contends that under no circumstances can it be accused of conduct which is intended to circumvent tax legislation; quite the opposite, in fact: it paid VAT in accordance with the applicable tax legislation, including that relating to invoices issued in respect of supplies of services which were subsequently unpaid.
- 34 The applicant describes as incorrect the defendant's practice whereby, for the purposes of a VAT refund, it examines conditions which are not based on the general provisions of the Law on General Tax Procedure or on the relevant case-law of the Court of Justice.
- 35 The applicant submits that, in connection with the examination of the substance of the conditions for the refund of VAT in relation to the invoices concerned, it is possible to take into account only the case-law of the Court of Justice and the general provisions of the Law on General Tax Procedure relating to the refund of the tax and not the provisions of the VAT Law, which entered into force on 1 January 2020.
- 36 The applicant refers to the judgment of the Court of Justice in *SCT d.d* to argue that, in the present case, its conduct went beyond that which, in the Court's view,

may be expected for the purpose of securing recovery, since it notified its claims in the liquidation proceedings, although those claims were not paid (or were only paid as to a minimal amount).

- 37 In its defence, the defendant claims that the administrative action should be dismissed and that the legal criterion set out in the legal grounds of the contested decision should be maintained.
- 38 The defendant states that the general limitation period of five years starting from when the chargeable event occurs designates a point in time known to the parties, which is fixed in advance and which encourages both the performance of the service in accordance with the terms of the contract and the adoption of measures for collection of the fee, without unforeseen events subsequently affecting the tax liability, and is neither advantageous nor detrimental to the taxable person.
- 39 As the applicant has argued, in the proceedings before it, the defendant tax authority only examined the requirement that a right must be properly asserted in so far as it serves the purposes of Article 273 of the VAT Directive. In order to ensure the correct collection of VAT, the taxable person, who acts as tax collector, must take, in good time, the measures which are appropriate for that purpose and for eliminating the risk of loss of tax revenue.

Summary of the reasoning in the request for a preliminary ruling

- 40 The referring court takes the view that it is unable to adjudicate on the dispute between the parties without an interpretation of EU law, specifically Article 90(1) and (2) of the VAT Directive.
- 41 The applicant's right to a tax refund flows from Article 90 of the VAT Directive, as a source of EU law, which the Hungarian legislature has not transposed correctly into national law. It follows from Article 90 of the VAT Directive and from the case-law laid down by the Court of Justice in connection with that article that the Hungarian legislature should have made it possible to obtain a refund of VAT related to irrecoverable debts.
- 42 The applicant has also raised the need for a reference to the Court of Justice of the European Union for a preliminary ruling, relying in that respect on the principle of effectiveness which, in its opinion, precludes the tax authority from considering that the limitation period for the right to a VAT refund commences at a time when that right has still not arisen.
- 43 The principle of equivalence is also relevant to the present case, given that the national tax authority applies to claims for a VAT refund based on EU law stricter rules than those applied to other VAT refunds.
- 44 The applicant has also indicated that the reply to the question regarding the limitation period is necessary but that it is insufficient by itself, since the

defendant's decision dismissed part of the applicant's claim on the basis of additional conditions relating to the requirement that the applicant must properly assert its right.

- 45 The Court has held in a number of judgments that Article 90 of the VAT Directive has direct effect; in other words, litigants are free to rely on it before the courts of the Member States in defence of their rights.
- 46 Accordingly, the question referred for a preliminary ruling in this case does not ask the Court to interpret the Hungarian limitation rules but rather to examine the application of Article 90 of the VAT Directive in the light of two principles of EU law, namely: i) the principle of effectiveness and ii) the principle of equivalence. Although the Court has not yet had the opportunity to examine the relationship between national limitation rules and rights derived from EU law as far as irrecoverable debts are concerned, it has given rulings in relation to other rights conferred by EU law.
- 47 The question arises in this case of whether, based on the Hungarian concept of limitation, it is possible to refuse to grant the applicant a subsequent reduction of its taxable amount pursuant to Article 90 of the VAT Directive and, therefore, a reduction of the tax owed, on the basis that, according to the tax authority's practices, the limitation period commences when taxable persons cannot yet even foresee the impossibility of recovering their claims and the right to a refund which flows from that impossibility. The referring court considers that, for the purpose of adjudicating on the dispute, it is necessary to determine whether, in the absence of national legislation, the practices of the tax authority of a Member State make it possible to lay down *a posteriori* a number of procedural conditions which must be fulfilled in order to exercise the right to a reduction of the taxable amount for VAT; that is, whether it is possible to lay down a set of conditions for establishing the existence of that right.
- 48 The applicant submits that the Court of Justice has not yet dealt with that question in its case-law. The case of *FGSZ*, which is currently pending before the Court, is concerned with the fundamental principles of proportionality, neutrality of the tax and effectiveness, but it differs from the present case in terms of its facts, since that case does not examine the set of conditions linked to the requirement that a right must be properly asserted, from which it follows that it cannot relate to the principle of equivalence either.