Case C-355/22

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:

1 June 2022

Referring court:

Rechtbank van eerste aanleg Oost-Vlaanderen, afdeling Gent (Belgium)

Date of the decision to refer:

30 May 2022

Applicant:

BV Osteopathie Van Hauwermeiren

Defendant:

Belgische Staat

Subject matter of the main proceedings

The dispute concerns a refusal to refund the VAT charged on the services of osteopaths on the basis of a provision of national law which has since been partially annulled because it was found to be contrary to European Union law.

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

The request concerns the question of the possibility of the national court maintaining, of its own motion and without a prior reference for a preliminary ruling, the effects, as regards the past, of a provision of national law under which the services of osteopaths are not eligible for the VAT exemption, a provision which that court partially annulled on the ground that it was contrary to EU law.

Article 267 TFEU

Questions referred for a preliminary ruling

‘I Should the judgment of the Court of Justice of 8 April 1976 in Case 43/75 *Defrenne* v *SABENA* be interpreted as granting the national court autonomous power – *sua sponte* and without submitting a request for a preliminary ruling under Article 267 TFEU – to maintain, on the basis of a purely internal legal provision, the effects, as regards the past, of national legislation concerning the VAT exemption for medical and paramedical services in respect of which the same court (having previously, in the same dispute, submitted three requests for a preliminary ruling under Article 267 TFEU to the Court of Justice, which the Court answered by judgment of 27 June 2019 in Case C-597/17) subsequently found that the contested provision is contrary to European Union law and partially annulled that contested provision of national law, while maintaining the effects, as regards the past, of that provision of national law found to be contrary to EU law, thereby completely denying taxable persons liable for VAT the right to a refund of VAT levied in breach of EU law?

II Is the national court entitled to maintain – autonomously and without submitting a request for a preliminary ruling under Article 267 TFEU – the effects, as regards the past, of a national provision held to be contrary to the VAT Directive, on the basis of a general reference to ‘important considerations of legal certainty affecting all the interests involved, both public and private’ and an alleged ‘practical impossibility of refunding unduly collected VAT to the recipients of the supplies or services provided by the taxable person or of claiming payment from them in the event of an erroneous failure to charge them, particularly where a large number of unidentified persons is involved, or where the taxable persons do not have an accounting system that enables them subsequently to identify the supplies or services in question and their value’ when the taxable persons have not even been given the possibility of demonstrating that such a ‘practical impossibility’ does not exist?’

Provisions of EU law and national law relied on

EU law: Council Directive 2006/112 of 28 November 2006 on the common system of [VAT], Article 132(1)(c)

Belgian law: Wetboek van de btw (the VAT Code; ‘the btw-wetboek’), Articles 2, 4, 26, 28, 44, 70, § 1 bis, and 91, § 1.

Succinct presentation of the facts and procedure in the main proceedings

1 Initially, there was uncertainty as to whether or not osteopathic services were eligible for the VAT exemption. Consequently, the applicant paid VAT on those services and proposed to the tax authorities that the time-barring of its right to a refund of that VAT should be interrupted by means of inclusion in an amended VAT return, an approach which the tax authorities rejected.

2 By judgment No 194/2019 of 5 December 2019, the Grondwettelijk Hof (Constitutional Court) partially annulled certain provisions of Article 44 of the btw-wetboek as being contrary to EU law, with the result that the services of osteopaths fall within the scope of the VAT exemption in so far as the service providers concerned possess the necessary qualifications to provide medical care of a sufficiently high level of quality as to be comparable to the care provided by members of a regulated medical or paramedical profession.

3 However, the Grondwettelijk Hof has maintained the effects of the annulled provisions as regards taxable events that occurred before 1 October 2019. The Grondwettelijk Hof based the limitation of the retroactivity of its ruling on important considerations of legal certainty affecting all the interests involved, both public and private, in particular the practical impossibility of refunding unduly collected VAT to the recipients of the supplies or services provided by the taxable person or of claiming payment from them in the event of an erroneous failure to charge them, particularly where a large number of unidentified persons is involved, or where the taxable persons do not have an accounting system that enables them subsequently to identify the supplies or services in question and their value. In that regard, the Grondwettelijk Hof refers to the judgment of the Court of 8 April 1976, Case 43/75, *Defrenne* v *SABENA*, paragraph 74.

4 On the basis of the above-mentioned judgment of the Grondwettelijk Hof, the tax authorities took the view that the applicant was not entitled to a VAT refund in respect of the period prior to 1 October 2019.

5 However, the applicant continues to contest that tax and to claim a refund of the VAT paid before 1 October 2019. Thus, in its periodic VAT return for the second quarter of 2020, it included a VAT adjustment in its favour in the amount of EUR 45 355.81.

6 Subsequently, the tax authorities imposed a fine on the applicant of 10% of that amount, rounded to EUR 4 530, which they regard as tax due.

7 Following the rejection by the tax authorities of its request for the remission or reduction of that fine, the applicant brought an action before the referring court seeking a declaration that the abovementioned amount and fine, including the interest thereon, are not due.

The essential arguments of the parties in the main proceedings

8 The applicant submits that the restriction by the Grondwettelijk Hof of the retroactive effect of its judgment No 194/2019 of 5 December 2019 is contrary to the principle of effectiveness of EU law, as it amounts to maintaining, as regards the past, a national provision that is potentially contrary to Article 132(1)(c) of Directive 2006/112.

9 In addition, according to the applicant, that judgment is also manifestly contrary to the settled case-law of the Court of Justice on the right to a refund of charges or indirect taxes levied in breach of EU law, the exclusive jurisdiction of that Court to limit retroactivity and the criteria developed by that Court for refusing a refund in very exceptional cases, in which case the matter must, in any event, be brought before the Court and it is incumbent on the Member State concerned to prove that the criteria developed by the Court have been fulfilled, inter alia, as regards any alleged unjust enrichment.

10 Consequently, the applicant asks the referring court to refrain from applying the judgment of the Grondwettelijk Hof of 5 December 2019.

11 The defendant bases its refusal to refund the VAT paid on the aforementioned judgment of the Grondwettelijk Hof.

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

12 The referring court justifies the reference by the fact that it is not satisfied that it has the power to set aside judgment No 194/2019 of the Grondwettelijk Hof of 5 December 2019.