Request for a preliminary ruling – Case C-664/21

Request for a preliminary ruling

Date lodged:

5 November 2021

Referring court:

Vrhovno sodišče Republike Slovenije (Slovenia)

Date of the decision to refer:

13 October 2021

Appellant:

NEC PLUS ULTRA COSMETICS AG

Respondent:

Republic of Slovenia

[…] REQUEST

FOR A PRELIMINARY RULING

An appeal on a point of law in the administrative-law case brought by **NEC PLUS ULTRA COSMETICS AG,** the appellant, […] Switzerland, […] against the **Republic of Slovenia,** the respondent, represented by the Ministrstvo za finance [Ministry of Finance], […] concerning value added tax, is pending before the Vrhovno sodišče Republike Slovenije (Supreme Court of the Republic of Slovenia).

By order […] of 13 October 2021, the Supreme Court of the Republic of Slovenia […], having decided, in the light of the questions concerning the interpretation of EU law raised before it, that it was necessary to request the Court of Justice of the European Union to give a preliminary ruling pursuant to Article 267 TFEU, has stayed proceedings in the appeal on a point of law.

Succinct presentation of the facts and procedure in the main proceedings

1 The appellant, which is established in Switzerland, supplied goods (cosmetic products) to a purchaser established in Croatia and, in one case, to a purchaser

established in Romania. The appellant submits that the Croatian purchaser, or another person on the purchaser's behalf, removed the goods from a warehouse in Slovenia (EXW clause, [ex factory]) and transported them from Slovenia to another Member State. In relation to those supplies it requested the exemption from value added tax ('VAT') laid down for supplies of goods effected within the European Union ('EU') within the meaning of Article 46(1) – in the version then in force – of the Zakon o davku na dodano vrednost (Law on value added tax) ('the ZDDV-1').

Procedure before the tax authorities

2 The Finančna uprava Republike Slovenije (Tax Administration of the Republic of Slovenia) ('the tax authority of first instance'), carried out, in connection with a VAT inspection procedure for 2017, an inspection at the appellant of the evidence and supporting documentation relating to supplies of goods and services to other EU Member States. By decision of 14 February 2019, that authority requested the appellant to submit all the documentation relating to the supplies in question.

3 In accordance with that request, the appellant produced the invoices and copies of the consignment notes ('the CMRs') by which it demonstrated that the goods (from Slovenia) had been transported to another Member State. However, at that time it did not provide the tax authority of first instance with the delivery notes or other documents mentioned in the CMRs, but stated that it did not possess all the documents and was attempting to obtain them.

4 On 1 April 2019, the tax authority of first instance drew up the report on the tax investigation procedure ('the report') and notified it to the appellant. Within the time limit laid down, the appellant attached to its observations on the report copies of price quotations and delivery notes which (further) demonstrated that the supply of the goods concerned had been effected to another Member State. It advanced, as the reason for the late submission, that its office in Hamburg, which was responsible for supplies to Croatia and ceased its activities in August 2018, had failed to provide all the documentation to it in due time.

5 On 30 May 2019, the tax authority of first instance adopted a decision by which it issued the appellant, in respect of 2017, with an additional VAT assessment notice and ordered it to pay the relevant amount. In the grounds for the decision, that authority stated that appellant had failed to demonstrate, by the invoices and CMRs, that the goods had actually been transported to another Member State. Consequently, it considered that the conditions for the VAT exemption laid down for supplies of goods effected within the EU in Article 46 of the ZDDV-1 and Article 79 of the Pravilnik o izvajanju zakona o davku na dodano vrednost (Regulation implementing the Law on value added tax) ('the PZDDV-1') had not been satisfied. In its decision, the tax authority of first instance did not take account of the supporting documents (price quotations and delivery notes) submitted ex post after the report had been drawn up. It considered that those documents had been submitted out of time by the appellant, within the meaning of

Article 140(2) of the Zakon o davčnem postopku (Law on tax procedure) (‘the ZDavP-2’), without justification. In the view of the tax authority of first instance, the grounds stated for the late submission of the documentation provided by the appellant in its observations on the assessment report merely constitute an indication of its irregular business management.

6 By decision of the Ministry of Finance, as the tax authority of second instance, the complaint lodged by the appellant was dismissed. In that decision, the Ministry of Finance, on the one hand, confirmed the position of the tax authority of first instance regarding the evidence submitted out of time ex post and, on the other, considered that the individual items of evidence submitted (ex post), and submitted again with the complaint, likewise failed to show that the goods had been transported outside Slovenia.

Administrative dispute

7 The appellant brought a court action against the assessment notice issued by the tax authority of first instance, which was dismissed by the Upravno sodišče (Administrative Court) on grounds essentially identical to those set out in the decisions of the tax authorities. That court thus upheld the tax authorities’ assessment that the appellant had failed to provide credible evidence to show that the goods in question had been transported to another Member State. As regards the supporting documents provided ex post, the Administrative Court (also) considered that the reason for the delay in submitting the documentation, on which the appellant relied in its observations on the report, was not justifiable under Article 140(2) of the ZDavP-2. It added that the appellant had, moreover, failed to demonstrate the contrary. At the same, it concurred with the assessment of the evidence set out by the tax authority in the context of the decision on the complaint.

8 The appellant requested leave to appeal on a point of law against the judgment of the Administrative Court — which was partially granted by the Supreme Court of the Republic of Slovenia, which permitted the appeal on a point of law by order […] of 18 November 2020 — also to resolve, inter alia, the important legal issue of whether the time-bar on producing evidence in the tax procedure, after the tax inspection report has been issued (Article 140(2) of the ZDavP-2), can prevail over the principle of neutrality in the VAT system.

9 On that basis, the appellant lodged an appeal on a point of law. In that appeal, it submits, with reference to the judgment of the Court of Justice of the European Union (‘the Court of Justice’) of 27 September 2007 in the case of *Collée*, C-146/05, EU:C:2007:549, that the principle of time-barring cannot prevail over the principle of neutrality in the VAT system. It contends that, in cases such as the present, it is necessary, according to the case-law of the Court of Justice, to assess whether the delay in the production of evidence was such as to lead to a loss of tax revenue or jeopardise the levying of VAT, and whether there is, possibly, evasion of VAT.

10 Since a correct interpretation of EU law is necessary in order to decide whether the system laid down in the VAT Directive precludes national legislation under which the taxable persons in a tax inspection procedure may not (without justification) submit new evidence in their observations on the assessment report (as an intermediate procedural step), that is to say even before a decision of the tax authority of first instance was adopted, the Vrhovno sodišče, as the supreme court of the Republic of Slovenia, is required to refer a question to the Court of Justice for a preliminary ruling.

Applicable legislation

EU law

11 Article 138(1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax ('the VAT directive'), provides:

'Member States shall exempt the supply of goods dispatched or transported to a destination outside their respective territory but within the Community, by or on behalf of the vendor or the person acquiring the goods, for another taxable person, or for a non-taxable legal person acting as such in a Member State other than that in which dispatch or transport of the goods began.'

12 Article 131 of the VAT Directive provides:

'The exemptions provided for in Chapters 2 to 9 shall apply without prejudice to other Community provisions and in accordance with conditions which the Member States shall lay down for the purposes of ensuring the correct and straightforward application of those exemptions and of preventing any possible evasion, avoidance or abuse.'

National legislation

13 Article 46 of the ZDDV-1 (Law on value added tax), then in force, provided:

'The following shall be exempt from VAT: 1. supplies of goods dispatched or transported by the vendor or the person who receives the goods or another person acting on behalf of one or other of those persons from the territory of Slovenia to another Member State, where the supplies are made in favour of another taxable person or a non-taxable legal person acting as such in that other Member State.'

14 Article 138 of the ZDDV-1 provides:

'The levying and payment of VAT shall be subject to inspections by the tax administration in accordance with the law governing tax procedure and the law governing the tax administration'.

15 Article 140 of the ZDavP-2 provides:

‘(1) Within 10 days of the completion of the tax inspection, the tax authority shall draw up a report, which it shall then notify to the taxable person. The report shall set out the factual situation established, including all facts and circumstances relevant to the decision. The report shall draw the attention of the taxable person to the possibility of submitting and having taken into account new facts and evidence within the meaning of paragraph 2 of this article. The taxable person may submit observations on the report within 20 days of the notification thereof, and must be informed of that possibility in the report itself. The time limit for submitting observations shall be extended upon application by the taxable person before the expiry of the time limit, provided that there is justification for the extension. Whether the time limit is extended shall be determined in a decision. Further extensions of the time limit shall not be permitted.

(2) In its observations on the report referred to in paragraph 1 of this article, the taxable person may put forward new facts and evidence, but must set out the reasons why he or she did not rely on them before the report was issued. The tax administration shall draw up a supplementary report within 30 days of receiving the observations, where they affect the amount of the tax liability. The new facts and evidence shall be taken into account only if they existed before the report was issued and if the taxable person was unable, with justification, to invoke or produce them before the report was issued. Paragraph 1 of this article shall apply to the notification and submission of observations on the supplementary report.’

16 Article 141(1) of the ZDavP-2 provides:

‘Following the completion of the tax inspection, the tax authority shall issue an assessment notice within the meaning of Article 84 of this Law or a decision identifying irregularities which do not affect the amount of the tax liability.’

17 Article 238(3) of the ZUP [Zakon o splošnem upravnem postopku – Law on general administrative procedure] provides:

‘In its administrative appeal, the appellant may rely on new facts and evidence, but must set out the reasons why he or she did not rely on them before the body of first instance. The new facts and evidence may be taken into consideration as grounds of appeal only if they existed at the time of the decision at first instance and if the party concerned was unable, with justification, to invoke or produce them when the dispute was being settled’.

18 Article 52 of the ZUS-1 [Zakon o upravnem sporu – Law on administrative disputes]:

‘In the court action, the applicant may rely on new facts and evidence, but must set out the reasons why he or she did not rely on them during the procedure for adopting the administrative act. The new facts and evidence may be taken into consideration as grounds for the action only if they existed at the time of the decision in the procedure at first instance for the adoption of an administrative act

and if the party concerned was unable, with justification, to rely on or produce them during the procedure for the adoption of the administrative act'.

Issues relating to EU law

19 Article 138(1) of the VAT Directive, which requires Member States to exempt from VAT supplies of goods effected within the EU, was transposed into Slovenian law by Article 46(1) of the ZDDV-1.

20 The Court of Justice has already stated [1] that, as a derogation from the fundamental principle which underlies the common system of VAT, according to which VAT applies to each transaction by way of production or distribution, that exemption is based on the transitional VAT regime applicable to intra-Community trade, under which the taxation of trade between the Member States is based on the principle that tax revenues should accrue to the Member State in which the final consumption takes place. Thus, the exemption of an intra-Community supply in the Member State of departure of the intra-Community dispatch or transport of goods, which has, as its corollary, an intra-Community acquisition that is taxed in the Member State of arrival of the goods dispatched or transported, enables double taxation and, therefore, infringement of the principle of fiscal neutrality inherent in the common system of VAT to be avoided. [2]

21 The case-law of the Court of Justice specifying who is required to demonstrate that the conditions for the exemption from VAT are satisfied, and what must be demonstrated, is clear. A supply of good within the EU is exempt from VAT only when the right to dispose of the goods as owner has been transferred to the purchaser and the supplier (vendor) establishes that those goods have been dispatched or transported to another Member State and that, as a result of that dispatch or that transport, they have physically left the territory of the Member State of supply. [3]

22 The VAT Directive does not specify the point in time up until which the supplier (vendor) may, in the context of an administrative (or court) procedure, submit evidence demonstrating that the (substantive) conditions for benefiting from the VAT exemption under Article 138(1) thereof have been satisfied. Article 131 thereof merely provides that the exemptions provided for in Chapters 2 to 9 are to apply in accordance with the conditions laid down by the Member States.

23 The Court of Justice has repeatedly held that the measures which the Member States may adopt in order to ensure the correct levying and collection of the tax

1 See, for example, also the *Collée* judgment cited, paragraph 22.

2 See, to that effect, the judgment of 27 September 2007, *Teleos and Others*, C-409/04, ECLI:EU:C:2007:548, paragraphs 24 and 25.

3 See, for example, also the judgment in *Teleos*, paragraph 42.

and for the prevention of fraud must not go further than is necessary to attain such objectives. Those measures may not, therefore, be used in such a way as to have the effect of undermining the fundamental principle of the neutrality of VAT. [4] Furthermore, in the case of *Collée*, to which the appellant refers, the Court of Justice held that, according to settled case-law, the fundamental principle of neutrality requires that an exemption from VAT be allowed if the substantive requirements are satisfied, even if the taxable person has failed to comply with some of the formal requirements. At the same time the Court of Justice stated that the only exception is if non-compliance with such formal requirements would effectively prevent the production of conclusive evidence that the substantive requirements have been satisfied. [5]

24 The Supreme Court of the Republic of Slovenia considers that in the present case the main proceedings do not concern a situation in which the substantive conditions for exemption from VAT are satisfied but the procedural requirements are not (as in *Collée*), but rather, as has already been explained, the time until which it is possible in a procedure before the tax authority of first instance — that is to say even before the assessment notice is issued — to furnish evidence that the substantive requirements for exemption from VAT are satisfied. Thus, there could be a situation in which, on account of non-compliance with a formal requirement, it has not been possible to determine whether the substantive requirements for exemption from VAT are satisfied.

25 Moreover, a similar issue [6] was addressed by the Court of Justice in its judgment of 9 September 2021 in the case of *GE Auto Service Leasing*, C-294/20, ECLI:EU:C:2021:723. In that judgment, the Court also referred to settled case-law, according to which the principle of VAT neutrality requires the deduction or refund of input VAT to be allowed if the substantive requirements are satisfied, even if the taxable person has failed to comply with some of the formal requirements. At the same time, in that case the Court of Justice also emphasised that the position is different if non-compliance with such formal requirements effectively prevents the production of conclusive evidence that the substantive requirements have been satisfied. [7] However, the Court of Justice pointed out that the dispute in that case (which is similar to that in the present case) did not concern non-compliance with formal requirements preventing the production of evidence that the substantive requirements for entitlement to a VAT refund had

4 See, for example, also the judgment in *Collée*, paragraph 26.

5 Ibid., paragraph 31.

6 The issue was whether or not it must be accepted as lawful for a taxable person, following repeated requests from the tax authority that it establish compliance with the conditions for entitlement to a refund, to fail to comply with those requests without any reasonable justification and, after it has been refused a refund, for that person to defer the submission of documents until the review procedure or legal action (paragraph 38 of the judgment).

7 See paragraph 53 of the judgment.

been satisfied, but rather focussed on the date up until which such evidence could be furnished. [8]

26 In that regard, in the cited judgment the Court of Justice held that the enactment of national measure[s] under which evidence is not to be taken into account where it has been produced after a decision rejecting a refund application has been adopted is not governed by the Eighth Council Directive [79/1072/EEC] of 6 December 1979 on the harmonisation of the laws of the Member States relating to turnover taxes – Arrangements for the refund of value added tax to taxable persons not established in the territory of the country ('the Eighth VAT Directive'). Consequently, in accordance with the principle of the procedural autonomy of the Member States [such a] measure falls within the internal legal order of each Member State. However, according to the Court of Justice, such a measure must not be less favourable than those governing similar domestic situations (principle of equivalence) and they may not make it impossible in practice or excessively difficult to exercise rights conferred by EU law (principle of effectiveness). [9] In that respect, as regards the principle of effectiveness, the Court has repeatedly pointed out that, according to settled case-law, the possibility of submitting an application for a refund of overpaid VAT without any temporal limit is contrary to the principle of legal certainty, which requires that the position of the taxable person, having regard to his or her rights and obligations vis-à-vis the tax authorities, not be open to challenge indefinitely. [10]

27 In the light of the foregoing, the Court of Justice held, in the judgment in question, that the provisions of the Eighth VAT Directive and the principles of EU law, in particular the principle of fiscal neutrality, must be interpreted as not precluding an application for a refund of value added tax (VAT) from being rejected where the taxable person has not, within the time limits laid down, submitted to the competent tax authority (even at the latter's request) all the documents and information required to prove his or her right to a refund of VAT, irrespective of the fact that those documents and information were submitted by that taxable person, on his or her own initiative, in the context of the complaint or the judicial review of the decision rejecting such a right to a refund, provided that the principles of equivalence and effectiveness are complied with, which is a matter for the referring court to verify.

28 It might be inferred from the foregoing that the question which arises in the present case has already been resolved (*acte éclairé*), and nevertheless the Supreme Court of the Republic of Slovenia finds that the factual and legal circumstances of Case C-294/20 are not, in substance, comparable to those of the present case.

8 See paragraph 56 of the judgment.

9 See paragraph 59 of the judgment.

10 See paragraph 60 of the judgment.

29 In Case C-294/20 the subject of the dispute was whether (or not) new evidence should be taken into account in administrative review proceedings [11] and, subsequently, in court proceedings, that is to say after the adoption of the tax decision at first instance, whereas the issue in the present case is whether (or not) new evidence submitted in the context of observations on the report should be taken into account, that is to say already in the administrative proceedings at first instance, namely, before the adoption of the tax decision at first instance. The tax inspection procedure is not completed (notwithstanding the first sentence of Article 140(1) of the ZDavP-2) by the drawing up of a report (and the submission of observations thereon), but only by a tax assessment notice (Article 141(1) of the ZDavP-2). The report referred to in Article 140 of ZDavP-2, which merely constitutes an intermediate step in the procedure, is therefore intended solely to ensure that the taxable person (in principle only at that point in time) is informed of the results thus far of the procedure for taking evidence (that is to say regarding the factual situation established by the tax authority, which includes all the facts and circumstances relevant to the decision) and submits observations on that report. If, in his or her observations on the report, the taxable person submits new evidence by which he or she objects to the findings of fact made, he or she is required to set out the reasons why he or she did not submit it before the report was issued and the new facts and evidence are taken into account only if they existed before the report was issued and the taxpayer was unable, with justification, to rely on or produce them before the report was issued.

30 Furthermore, in Case C-294/20, the Court of Justice interpreted the principle of neutrality by reference to the right to deduct VAT and the Eighth VAT Directive, which was subsequently repealed by 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. On the other hand, under Article 4 thereof, that directive is not to apply to amounts of VAT invoiced in respect of supplies of goods the supply of which is, or may be, exempt under Article 138 of the VAT Directive.

31 Therefore, in the light of the positions adopted by the Court of Justice, the Supreme Court of the Republic of Slovenia asks, with reference to the

[11] In that regard, it should be noted that the applicant in Case C-294/20 was barred from submitting evidence only in the administrative review proceedings brought against the decision of the Spanish tax administration of 1 February 2010, which had dismissed the administrative appeal brought against the decision of the Spanish tax administration of 18 February 2009 rejecting the VAT refund applications; that is to say, the bar on submitting evidence applied only in the administrative review proceedings before the Tribunal Económico-Administrativo Central (Central Tax Tribunal), and subsequently in the legal action before the Audiencia Nacional (National High Court), but not in the administrative proceedings against the decision of the Spanish administration of 18 February 2009 rejecting the VAT refund applications, on which the Spanish administration ruled by decision of 1 February 2010, and in each case that bar did not occur before the decision of 18 February 2009 was adopted.

circumstances of the present case, whether the findings made in Case C-294/20 can be applied also in a case such as the present.

32 Taking account of the fact that the interpretation of the concept 'justification' [12] depends on the circumstances of each case and that the Court of Justice has already ruled (moreover, with reference to the interpretation of the Eighth VAT Directive) that the provisions thereof do not prevent the Member States from accepting, after the assessment notice has been adopted, the production of new evidence, [13] the Supreme Court of the Republic of Slovenia asks whether the prohibition on invoking new facts and presenting new evidence at a given time (as in the present case) is in itself – and thus irrespective of the possibility of partially 'overcoming' that prohibition by virtue of the abovementioned justification – incompatible with the system established by the VAT Directive, and more specifically with the principles of tax neutrality, efficiency and proportionality.

33 On the one hand, it is true that the prohibition on invoking (and producing) new facts and evidence facilitates the economy and effectiveness of the tax inspection procedure but, on the other, that prohibition makes (may make) it excessively difficult to exercise rights conferred by EU law, since it restricts the taxable person, even *before* the notice of assessment is issued, in proving that the substantive requirements for benefiting from the VAT exemption have been satisfied.

34 The fact that such a prohibition may make it excessively difficult for taxable persons to exercise their rights may be inferred by analogy from the case-law of the Court of Justice which, in relation to corrections of invoices on the basis of which taxable persons exercise their right to deduct VAT, draws a distinction according to whether the correct invoice was submitted to the tax authority *before* or merely *after* the assessment notice was adopted. In the first case, where all of the material conditions required in order to benefit from the right to deduct VAT are satisfied and, before the tax authority concerned has made a decision, the taxable person has submitted a corrected invoice to that tax authority, the benefit of that right cannot, in principle, be refused on the ground that the original invoice contained an error. [14] In the second case, however, the Court of Justice found that the provisions of the Sixth Council Directive of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (Directive 77/388/EEC), as amended by Council Directive 94/5/EC of 14 February 1994, do *not* preclude national legislation under which the right to deduct VAT may be

[12] According to Slovenia case-law to date, it has been for the taxable person to demonstrate that he or she had been unable to present (new) facts and evidence before the report through no fault of his or her part.

[13] See paragraph 58 of the judgment in *GE Auto Service Leasing*.

[14] See the judgment of 8 May 2013, *Petroma Transports and Others*, C-271/12, ECLI:EU:C:2013:297, paragraph 34.

refused to taxable persons who are recipients of services and are in possession of invoices which are incomplete, even if those invoices are supplemented by the provision of information seeking to prove the occurrence, nature and amount of the transactions invoiced *after* such a refusal decision was adopted. [15]

35 Furthermore, in the view of the Supreme Court of the Republic of Slovenia, the principle of legal certainty (which, according to the case-law of the Court of Justice, derives from the need for the tax position of the taxable person, having regard to his or her rights and obligations vis-à-vis the tax authorities, not to be open to challenge indefinitely) is already protected in that procedure by the time-bar on bringing actions (after the tax assessment notice has been adopted), as well as by the subsequent prohibition on relying on new evidence in the administrative appeal procedure (Article 238(3) of the ZUP) and the administrative court procedure (Article 52 of the ZUS-1). On the other hand, as explained above, the Court of Justice held in its judgment in *GE auto Service Leasing* that such a prohibition on invoking new facts (at those stages of the procedure) is not per se contrary to the principle of VAT neutrality.

Question referred for a preliminary ruling:

36 In the light of the foregoing, the Supreme Court of the Republic of Slovenia has decided to refer the following question to the Court of Justice of the European Union for a preliminary ruling:

Do the provisions of the VAT Directive, in particular Articles 131 and 138(1) thereof, and the principles of EU law, in particular the principles of tax […] neutrality, effectiveness and proportionality, preclude national legislation which prohibits the submission and acceptance of new evidence to demonstrate satisfaction of the substantive requirements laid down in Article 138(1) of the VAT Directive, already during the administrative procedure at first instance, and more specifically in the context of the observations submitted on the tax inspection report issued before a tax assessment notice has been issued?

…

15 See judgment in the case of *Petroma Transports*, paragraph 36.