JUDGMENT OF THE COURT (Grand Chamber)

19 July 2012 (*)

(Second and Sixth VAT Directives — Input tax — Refund of excess — Payment of interest — Procedures)

In Case C-591/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the High Court of Justice of England and Wales, Chancery Division (United Kingdom), made by decision of 25 November 2010, received at the Court on 14 December 2010, in the proceedings

Littlewoods Retail Ltd and Others

v

Her Majesty's Commissioners for Revenue and Customs,

THE COURT (Grand Chamber),

composed of V. Skouris, President, A. Tizzano, J.N. Cunha Rodrigues, K. Lenaerts, J.-C. Bonichot and A. Prechal, Presidents of Chambers, R. Silva de Lapuerta, K. Schiemann, E. Juhász, G. Arestis, A. Borg Barthet (Rapporteur), D. Šváby and M. Berger, Judges,

Advocate General: V. Trstenjak,

Registrar: A. Impellizzeri, Administrator,

having regard to the written procedure and further to the hearing on 22 November 2011,

after considering the observations submitted on behalf of:

– Littlewoods Retail Ltd and others, by D. Anderson and L. Rabinowitz QC, and S. Elliott, Barrister,

– the United Kingdom Government, by C. Murrell, acting as Agent, and D. Wyatt QC,

– the German Government, by T. Henze, K. Petersen and J. Möller, acting as Agents,

– the French Government, by G. de Bergues and N. Rouam, acting as Agents,

– the Cypriot Government, by K. Lykourgos and E. Symeonidou, acting as Agents,

– the Netherlands Government, by C. Wissels, acting as Agent,

– the Finnish Government, by H. Leppo, acting as Agent,

– the European Commission, by R. Lyal and C. Soulay, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 12 January 2012,

gives the following

Judgment

1 The reference for a preliminary ruling concerns the interpretation of EU law on compensation for financial loss suffered by a taxpayer through overpayment of value added tax ('VAT').

2 The reference has been made in the context of a dispute between the companies in the Littlewoods Group ('Littlewoods') and Her Majesty's Commissioners for Revenue and Customs ('the Commissioners') concerning procedures for compensating Littlewoods for loss suffered through an overpayment of VAT.

Legal context

EU law

3 Article 8 of and Annex A, point 13, to Second Council Directive 67/228/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes — Structure and procedures for application of the common system of value added tax (OJ, English Special Edition 1967(I), p. 16), define the taxable amount for value added tax as regards, inter alia, deliveries and supplies of services.

4 Article 11C(1) of Sixth Council Directive 77/388/EEC 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 (OJ 1977 L 145, p. 1; 'the Sixth Directive') provides:

'In the case of cancellation, refusal or total or partial non-payment, or where the price is reduced after the supply takes place, the taxable amount shall be reduced accordingly under conditions which shall be determined by the Member States.

However, in the case of total or partial non-payment, Member States may derogate from this rule.'

United Kingdom law

5 The Value Added Tax Act 1994 ('the VATA 1994') contains national legislative provisions relating to the administration, collection and enforcement of VAT and concerning the appeals which may be brought before a specialist tribunal. That act allows the Commissioners to recover VAT due but not paid by taxpayers, and allows taxpayers to recover sums paid by way of VAT when they were not due. It also contains provisions concerning the payment of interest on sums owed by taxpayers to the Commissioners and on sums owed by the latter to taxpayers.

6 Section 80 of the VATA 1994 provides:

'Credit for, or repayment of, overstated or overpaid VAT

(l) Where a person -

(a) has accounted to the Commissioners for VAT for a prescribed accounting period (whenever ended), and

(b) in doing so, has brought into account as output tax an amount that was not output tax due,

the Commissioners shall be liable to credit the person with that amount

...

(lB) Where a person has for a prescribed accounting period (whenever ended) paid to the Commissioners an amount by way of VAT that was not VAT due to them, otherwise than as a result of -

(a) an amount that was not output tax due being brought into account as output tax, ...

...

the Commissioners shall be liable to repay to that person the amount so paid.

(2) The Commissioners shall only be liable to credit or repay an amount under this section on a claim being made for the purpose.

(2A) Where -

(a) as a result of a claim under this section by virtue of subsection (l) or (lA) above an amount falls to be credited to a person, and

(b) after setting any sums against it under or by virtue of this Act, some or all of that amount remains to his credit,

the Commissioners shall be liable to pay (or repay) to him so much of that amount as so remains.

...

(7) Except as provided by this section, the Commissioners shall not be liable to credit or repay any amount accounted for or paid to them by way of VAT that was not VAT due to them.'

7 Where a claim under section 80 of the VATA 1994 is successful, the taxable person may also be entitled to interest on the sum overpaid calculated in accordance with the provisions of section 78 of the VATA 1994. That section provides:

'Interest in certain cases of official error

(1) Where, due to an error on the part of the Commissioners, a person has -

(a) accounted to them for an amount by way of output tax which was not output tax due from him and, as a result, they are liable under section 80(2A) to pay (or repay) an amount to him, or

(b) failed to claim credit under section 25 for an amount for which he was entitled so to claim credit and which they are in consequence liable to pay to him, or

(c) (otherwise than in a case falling within paragraph (a) or (b) above) paid them by way of VAT an amount that was not VAT due and which they are in consequence liable to repay to him, or

(d) suffered delay in receiving payment of an amount due to him from them in connection with VAT,

then, if and to the extent that they would not be liable to do so apart from this section, they shall pay interest to him on that amount for the applicable period, but subject to the following provisions

of this section.

...

(3) Interest under this section shall be payable at the rate applicable under section 197 of the Finance Act 1996 ...'

8 Interest under section 78 of the VATA 1994 is computed by reference to section 197 of the Finance Act 1996 and the Air Passenger Duty and Other Indirect Taxes (Interest Rate) Regulations 1998. The broad effect of the provisions is that, since 1998, for the purposes of section 78, rates are fixed by a formula referable to the average base lending rates of six clearing banks, which is called the 'reference rate'. For periods between 1973 and 1998, the rates are specified in Table 7 to the 1998 Regulations. The interest rate applicable under section 78 is the reference rate minus 1%. Section 78 defines the 'applicable period' for which interest is payable. In the circumstances of the main proceedings it begins with the date on which the Commissioners received the overpayment and ends on the date on which the Commissioners authorise payment of the amount on which interest is payable.

The actions in the main proceedings and the questions referred for a preliminary ruling

9 According to the referring court, since the introduction of VAT in the United Kingdom in 1973, the applicants in the main proceedings, save for the holding company, Littlewoods Limited, carried on catalogue-based home shopping businesses. Those businesses involved Littlewoods distributing catalogues and selling the goods shown in those catalogues through networks of persons known as 'agents'. The agents earned commission on sales made by or through them ('third party purchases'), which commission might be taken in cash, applied in respect of past purchases made by the agents themselves or (at an enhanced rate) applied towards future purchases.

10 From 1973 until October 2004, commission on third party purchases was mistakenly treated as consideration for services provided by the agent to Littlewoods. It should properly have been treated (as a matter of both EU and national law) as a discount against the consideration for past purchases (if taken in cash or applied in respect of those purchases) or future purchases (if applied at the enhanced rate towards future purchases). Littlewoods therefore overpaid VAT in respect of certain supplies because the taxable amount of goods supplied by it was mistakenly taken to be greater than it was.

11 The referring court thus considers that the overpaid sums were not lawfully due under Directive 67/228, as regards years prior to 1978, or under Directive 77/388, as regards the period from that year onwards.

12 Littlewoods submitted claims to the Commissioners for repayment of the overpaid VAT. Since October 2004, the Commissioners have repaid overpaid VAT of GBP 204 774 763 to Littlewoods. That repayment was made pursuant to section 80 of the VATA 1994.

13 The Commissioners have also paid simple interest on that repayment of GBP 268 159 135, in accordance with section 78 of the VATA 1994.

14 In the actions pending before the referring court, Littlewoods claim further sums amounting to some GBP 1 billion in aggregate. Those sums are said by Littlewoods to be the benefit the United Kingdom of Great Britain and Northern Ireland received through the use of the principal amounts of tax overpaid. They are said by Littlewoods to be calculated by reference to the compounded rates of interest applicable to United Kingdom Government borrowing from time to

time over the period in question. The figure claimed makes allowance for the simple interest that has already been paid.

15 In the national proceedings Littlewoods rely on two national law causes of action, namely a claim for restitution of tax unlawfully collected, commonly referred to as ‘the Woolwich claim’ and a claim for restitution of money paid pursuant to a mistake of law (the ‘mistake-based claim’).

16 In that regard, the referring court states that the limitation period applicable to a Woolwich claim is six years, running from the date on which the tax was overpaid, whereas the limitation period for a mistake-based restitutionary claim is six years running from the date on which the claimant discovered the mistake or could with reasonable diligence have discovered it.

17 The referring court considers that those domestic law limitation periods conform with the requirements of EU law.

18 In the cases in the main proceedings, it is undisputed that:

– between 1973 and October 2004 the Commissioners collected VAT in breach of EU and national law;

– Littlewoods have a right to repayment of the overpaid VAT as a matter of EU and national law, the corresponding amounts having been paid to the Commissioners;

– Littlewoods have also been paid simple interest pursuant to and calculated in accordance with the relevant national statutory provisions;

– the conditions for State liability for damages for breach of EU law are not met.

19 According to the referring court, none of the causes of action relied on by Littlewoods can apply in this case. That court considers that overpaid VAT could be recovered only by way of a claim under section 80 of the VATA 1994 and that the only basis on which Littlewoods could recover interest was section 78 of that Act. Consequently, the claims made by Littlewoods should, if national law only were to be applied, be dismissed pursuant to the said sections 78 and 80.

20 That court has doubts, however, as to whether such a solution complies with EU law.

21 In those circumstances, the High Court of Justice of England and Wales, Chancery Division, decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘1. Where a taxable person has overpaid VAT which was collected by the Member State contrary to the requirements of EU VAT legislation, does the remedy provided by a Member State accord with EU law if that remedy provides only for (a) reimbursement of the principal sums overpaid, and (b) simple interest on those sums in accordance with national legislation, such as section 78 of the VATA 1994?

2. If not, does EU law require that the remedy provided by a Member State should provide for (a) reimbursement of the principal sums overpaid, and (b) payment of compound interest as the measure of the use value of the sums overpaid in the hands of the Member State and/or the loss of the use value of the money in the hands of the taxpayer?

3. If the answer to both questions 1 and 2 is in the negative, what must the remedy that EU law requires the Member State to provide include, in addition to reimbursement of the principal sums overpaid, in respect of the use value of the overpayment and/or interest?

4. If the answer to question 1 is in the negative, does the EU law principle of effectiveness require a Member State to disapply national law restrictions (such as sections 78 and 80 of the VATA 1994) on any domestic claims or remedies that would otherwise be available to the taxable person to vindicate the EU law right established in the Court of Justice's answer to the first 3 questions, or is it sufficient that the national court disapplies such restrictions only in respect of one of these domestic claims or remedies?

What other principles should guide the national court in giving effect to this EU law right so as to accord with the EU law principle of effectiveness?'

The questions referred for a preliminary ruling

22 By its questions, which it will be convenient to examine together, the referring court asks, in essence, whether, in a situation such as that at issue in the cases in the main proceedings, in which an amount of VAT overpaid by reason of non-compliance with EU law has been repaid to the taxpayer concerned, it is in accordance with EU law for national law to provide for the payment of only 'simple' interest on that sum, or whether EU law requires national law to provide for payment of 'compound interest' as a counterpart for the value of the use of the overpaid sums and/or the loss of the value of the use of the latter or for another method of reparation which, in that latter case, the Court is asked to specify. Should the relevant national rule be incompatible with EU law, the national court asks what consequences it should draw from such incompatibility.

23 In that regard, it should be noted as a preliminary observation that, as is apparent from the order for reference, in the dispute in the main proceedings, Littlewoods brought not an action for compensation based on infringement, by the United Kingdom, of EU law, but an action for repayment of the VAT levied in breach of that law.

24 It is settled case-law that the right to a refund of charges levied in a Member State in breach of rules of EU law is the consequence and complement of the rights conferred on individuals by provisions of EU law as interpreted by the Court (see, inter alia, Case 199/82 *San Giorgio* [1983] ECR 3595, paragraph 12, and Joined Cases C-397/98 and C-410/98 *Metallgesellschaft and Others* [2001] ECR I-1727, paragraph 84). The Member State is therefore in principle required to repay charges levied in breach of Community law (Joined Cases C-192/95 to C-218/95 *Comateb and Others* [1997] ECR I-165, paragraph 20; *Metallgesellschaft*, paragraph 84; Case C-147/01 *Weber's Wine World and Others* [2003] ECR I-11365, paragraph 93; Case C-446/04 *Test Claimants in the FII Group Litigation* [2006] ECR I-11753, paragraph 202).

25 The Court has also held that, where a Member State has levied charges in breach of the rules of Community law, individuals are entitled to reimbursement not only of the tax unduly levied but also of the amounts paid to that State or retained by it which relate directly to that tax. That also includes losses constituted by the unavailability of sums of money as a result of a tax being levied prematurely (*Metallgesellschaft*, paragraphs 87 to 89, and *Test Claimants in the FII Group Litigation*, paragraph 205).

26 It follows from that case-law that the principle of the obligation of Member States to repay with interest amounts of tax levied in breach of EU law follows from that law.

27 In the absence of EU legislation, it is for the internal legal order of each Member State to lay

down the conditions in which such interest must be paid, particularly the rate of that interest and its method of calculation (simple or 'compound' interest). Those conditions must comply with the principles of equivalence and effectiveness; that is to say that they must not be less favourable than those concerning similar claims based on provisions of national law or arranged in such a way as to make the exercise of rights conferred by the EU legal order practically impossible (see, to that effect, *San Giorgio*, paragraph 12; *Weber's Wine World*, paragraph 103; and Case C-291/03 *MyTravel* [2005] ECR I-8477, paragraph 17).

28 Thus, according to consistent case-law, the principle of effectiveness prohibits a Member State from rendering the exercise of rights conferred by the EU legal order impossible in practice or excessively difficult (Case C-201/02 *Wells* [2004] ECR I-723, paragraph 67, and Joined Cases C-392/04 and C-422/04 *i-21 Germany and Arcor* [2006] ECR I-8559, paragraph 57).

29 In this case, that principle requires that the national rules referring in particular to the calculation of interest which may be due should not lead to depriving the taxpayer of an adequate indemnity for the loss occasioned through the undue payment of VAT.

30 It is for the referring court to determine whether that is so in the case at issue in the main proceedings, having regard to all the circumstances of the case. In that regard it should be noted that it is apparent from the order for reference that, under the provisions of section 78 of the VATA 1994, the Commissioners paid Littlewoods interest on the VAT levied in breach of EU law. Pursuant to those provisions, Littlewoods received payment of simple interest, in accordance with the said provisions, in an amount of GBP 268 159 135, corresponding to interest due over about 30 years, which amount exceeds by more than 23% that of the principal sum, which amounts to GBP 204 774 763.

31 As for verifying whether the principle of equivalence has been complied with in the case at issue in the main proceedings, it should be noted that compliance with that principle requires that the national rule in question apply without distinction to actions based on infringement of EU law and those based on infringement of national law having a similar purpose and cause of action. However, the principle of equivalence cannot be interpreted as requiring a Member State to extend its most favourable rules to all actions brought in a certain area of law. In order to ensure compliance with that principle, it is for the national court, which alone has direct knowledge of the procedural rules governing restitution actions against the State, to determine whether the procedural rules intended to ensure that the rights derived by individuals from EU law are safeguarded under domestic law comply with that principle and to consider both the purpose and the essential characteristics of allegedly similar domestic actions. For that purpose, the national court must consider whether the actions concerned are similar as regards their purpose, cause of action and essential characteristics (see, to that effect, Case C-63/08 *Pontin* [2009] ECR I-10467, paragraph 45 and case-law cited).

32 According to the referring court, application of section 78 of the VATA 1994 has the effect of excluding two actions provided for by common law, namely the Woolwich claim and the restitution action based on an error of law. In essence, the referring court asks whether, if it is found that section 78 and section 80 of the VATA 1994 are contrary to EU law, a failure to apply the restriction contained therein in relation to the Woolwich claim in the main proceedings could lead to payment of interest which is compatible with EU law or whether the restriction contained in section 78 and section 80 of VATA 1994 should be disapplied in respect of all the claims or remedies under common law.

33 As is apparent from consistent case-law, when faced with a rule of law that is incompatible with directly applicable EU law, the national court is required to disapply that national rule, it being understood that that obligation does not restrict the power of the competent national courts to

apply, amongst the various procedures of the internal legal order, those which are appropriate to safeguard the individual rights conferred by EU law (see in particular, to that effect, Case C-337/91 *van Gemert-Derks* [1993] ECR I-5435, paragraph 33; Joined Cases C-10/97 to C-22/97 *IN. CO. GE. 90 and Others* [1998] ECR I-6307, paragraph 21; and Case C-314/08 *Filipiak* [2009] ECR I-11049, paragraph 83).

34 In the light of the foregoing, the answer to the questions referred is that EU law must be interpreted as requiring that a taxable person who has overpaid VAT which was collected by the Member State contrary to the requirements of EU VAT legislation has a right to reimbursement of the tax collected in breach of EU law and to the payment of interest on the amount of the latter. It is for national law to determine, in compliance with the principles of effectiveness and equivalence, whether the principal sum must bear ‘simple interest’, ‘compound interest’ or another type of interest.

Costs

35 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

European Union law must be interpreted as requiring that a taxable person who has overpaid value added tax which was collected by the Member State contrary to the requirements of European Union legislation on value added tax has a right to reimbursement of the tax collected in breach of European Union law and to the payment of interest on the amount of the latter. It is for national law to determine, in compliance with the principles of effectiveness and equivalence, whether the principal sum must bear ‘simple interest’, ‘compound interest’ or another type of interest.

[Signatures]

* Language of the case: English.