JUDGMENT OF THE COURT (Seventh Chamber)

16 May 2013 (*)

(Non-repayment of the entirety of value added tax unduly paid – National legislation precluding repayment of VAT because it has been passed on to a third party – Compensation in the form of aid covering a fraction of the non-deductible VAT – Unjust enrichment)

In Case C-191/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Kúria (Hungary), made by decision of 14 March 2012, received at the Court on 23 April 2012, in the proceedings

Alakor Gabonatermel? és Forgalmazó Kft.

v

Nemzeti Adó- és Vámhivatal Észak-alföldi Regionális Adó F?igazgatósága,

THE COURT (Seventh Chamber),

composed of G. Arestis, President of the Chamber, J.-C. Bonichot and A. Arabadjiev (Rapporteur), Judges,

Advocate General: Y. Bot,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Alakor Gabonatermel? és Forgalmazó Kft., by A. Nacsa, ügyvéd,

– Hungary, by M.Z. Fehér and G. Koós and by K. Szijjártó, acting as Agents,

– the European Commission, by C. Soulay and A. Sipos, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of European Union (‘EU’) law on the recovery of sums unduly paid.

2 The request has been made in proceedings between Alakor Gabonatermel? és Forgalmazó Kft. (‘Alakor’) and Nemzeti Adó- és Vámhivatal Észak-alföldi Regionális Adó F?igazgatósága (Northern Great Plain Regional Directorate-General of Tax of the National Tax and Customs Office ‘F?igazgatósága’), concerning the refusal by the F?igazgatósága to repay the entirety of the value added tax (‘VAT’) the deduction of which has been rejected in infringement of European Union

(‘EU’) law.

Legal context

EU law

3 Rule 7 of Commission Regulation (EC) No 448/2004 of 10 March 2004 amending Regulation (EC) No 1685/2000 laying down detailed rules for the implementation of Council Regulation (EC) No 1260/1999 as regards the eligibility of expenditure of operations co-financed by the Structural Funds and withdrawing Regulation (EC) No 1145/2003 (OJ 2004 L 72, p. 66) is worded as follows:

‘Rule No 7: VAT and other taxes and charges

1. VAT does not constitute eligible expenditure except where it is genuinely and definitively borne by the final beneficiary, or individual recipient within the aid schemes pursuant to Article 87 of the Treaty and in the case of aid granted by the bodies designated by the Member States. VAT which is recoverable, by whatever means, may not be considered eligible, even if it is not actually recovered by the final beneficiary or individual recipient. The public or private status of the final beneficiary or the individual recipient is not taken into account for the determination whether VAT constitutes eligible expenditure in application of the provisions of this rule.

2. VAT which is not recoverable by the final beneficiary or individual recipient by virtue of the application of specific national rules shall only constitute eligible expenditure where such rules are in full compliance with the Sixth Council Directive 77/388/EEC [of 17 May 1977 on the harmonization 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”)]’.

Hungarian law

4 Article 38(1) of Law LXXIV of 1992 relating to value added tax (az általános forgalmi adóról szóló 1992. évi LXXIV. törvény, *Magyar Közlöny* 1992/128, XII. 19., ‘the Law relating to VAT’), repealed with effect from 1 January 2006, provided:

‘Taxable persons shall record the amounts of input VAT separately as deductible and non-deductible (positive distinction). A taxable person receiving any subsidies charged to public funds under Article 22(1) and (2) of this Law, not subject to taxation shall, unless otherwise prescribed by the act on the annual budget,

(a) be entitled to exercise his right of tax deduction only for the fraction of VAT relating to the amount not subsidised in the purchases of individual goods for which any subsidy is received;

…’

5 Article 124/C of Law XCII of 2003 relating to the General Law on Taxation (az adózás rendjér?l szóló 2003. évi XCII. törvény, *Magyar Közlöny* 2003/131, XI. 14., ‘the General Law on Taxation’), is worded as follows:

‘(1) When the Constitutional Court, the Kúria or the Court of Justice of the European Union state, with retroactive effect, that a rule of law which lays down a tax obligation is contrary to the Basic Law or a binding measure of the European Union, or, if it concerns a municipal regulation, is contrary to any other rule of law, and that that judicial decision creates a right to repayment for the taxpayer, the first instance tax authority shall, on application by the taxpayer, make a repayment – according to the methods specified in the decision concerned – in accordance with this article.

(2) The taxpayer may make his application in writing to the tax authority within 180 days following publication or notification of the decision of the Constitutional Court, of the Kúria or of the Court of Justice …; no application for leave to appeal shall be accepted on expiry of the deadline. The tax authority shall reject the application in the event of the right relating to the assessment of the tax being time-barred as at the date of publication or as at notification of the decision. …

(3) The application must mention, in addition to the information required to identify the taxpayer with the tax authority, the tax paid on the date of making the application and the repayment of which is sought and the instrument permitting enforcement on the basis of which it was paid; it must also refer to the decision of the Constitutional Court, of the Kúria or of the Court of Justice …; and must include a declaration that

(a) the taxpayer did not, as at the date of making the request, pass on to another person the tax for which he seeks repayment,

…’

6 Article 124/D of the General Law on Taxation provides:

‘(1) In so far as the present article does not provide otherwise, the provisions of Article 124/C apply to applications for repayment based on the right to deduct VAT.

(2) The taxpayer may claim the right referred to in paragraph 1 above by means of a tax regularisation declaration …

(3) If the return, as amended by the regularisation declaration, shows that the taxpayer has a right to repayment …, the tax authority shall apply to the amount to be repaid an interest rate which is equivalent to the central bank base rate …

(5) There is also passing on of tax for the purposes of Article 124/C(3)(a), where the taxpayer is granted aid in a manner which – taking account of the prohibition on deducting VAT – also finances VAT, and where the taxpayer is granted additional aid by the State budget to compensate for non-deductible VAT.

…’

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

7 During 2005, Alakor concluded a subsidy contract with the Földm?velésügyi és Vidékfejlesztési Minisztérium (Ministry of Agriculture and Rural Development, ‘the Funds provider’), aimed at enabling it to finance a project under the operational programme for agriculture and rural development relating to the second half of 2005 (‘the aid’).

8 As a consequence of Article 38(1)(a) of the Law on VAT, in its version in force at the material time, it was not possible to deduct, proportionally to the amount of the aid, the part of input VAT paid on costs relating to the subsidised project.

9 By contrast, under Ministry of Finance guidelines, the ‘eligible expenditure’ of a subsidised project included, for the purposes of calculating the aid, part of the VAT corresponding to a percentage of the project financed by that aid. Accordingly, in the present case, the eligible expenditure of the project at issue in the main proceedings came to HUF 207 174 606 in total, including HUF 18 645 714 of non-deductible VAT. For the purposes of financing that project, the Funds provider granted aid of HUF 90 000 000, corresponding to 43.44% of the eligible expenditure for the project, 75% of that aid being financed by Community funds and 25% being borne by the national budget.

10 The assessment of VAT relating to development expenditure was included in the monthly VAT returns for September and November 2005, and also those for December 2005 and January 2006 with a view to a claim to offset tax in the following period. Under Article 38(1)(a) of the Law on VAT, Alakor was unable to exercise its right to deduct HUF 4 440 000 of VAT relating to development expenditure paid in advance and calculated in the return for September 2005 and HUF 13 282 000 of that calculated in the return for November 2005, which represented a total of HUF 17 722 000.

11 In Case C-74/08 *PARAT Automotive Cabrio* [2009] ECR I-3459, the Court held that ‘Article 17(2) and (6) of the Sixth Directive must be interpreted to the effect that it precludes national legislation which, in the case of acquisition of goods subsidised by public funds, allows the deduction of related VAT only up to the limit of the non-subsidised part of the costs of that acquisition’.

12 In the light of that judgment, Alakor considered that it could deduct the entirety of the input VAT paid for the requirements of its taxable operations and that the VAT previously considered as being non-deductible could not continue to form part of the eligible expenditure of the project at issue. Consequently, on 21 July 2009 Alakor repaid the Funds provider the amount of the aid corresponding to the non-deductible VAT and requested it to amend the contract. The Funds provider declined that request and returned the amount received to Alakor.

13 On 22 July 2009, Alakor submitted to the tax authority regularisation declarations for September, November and December 2005 and for January 2006, in which, on the basis of *PARAT Automotive Cabrio*, it applied for repayment of the VAT which the limitation on the right to deduct had prevented it from deducting – HUF 17 722 000 in total – with interest for late payment.

14 In response to that request, the first-instance tax authority set the tax deductible and the sums to be paid to Alakor at a lower amount than that declared by Alakor in its regularisation declarations. The F?igazgatósága upheld those decisions noting that Alakor had already obtained, by means of aid, an amount corresponding to 43.44% of the non-deductible VAT. Therefore, pursuant to Articles 124/C(3)(a) and 124/D(5) of the General Law on Taxation, that sum had to be regarded as having been passed on.

15 Hearing the appeal for amendment or annulment of the decisions made by the tax authority, the court of first instance found that those appeals were well founded, annulled the decisions at issue on the ground that they unlawfully restricted the right to deduct contrary to *PARAT Automotive Cabrio*, and ordered the tax authority to recommence its assessment procedure.

16 The F?igazgatósága appealed to the Court of Cassation, claiming, in particular, that Alakor

had already received, in the form of aid, part of the VAT which it sought to recover in the regularisation declarations. Consequently, according to the F?igazgatósága, only the part of the VAT which was not offset by that aid ought to have been subject to repayment.

17 For its part, Alakor claims that Articles 124/C and 124/D of the General Law on Taxation were contrary to EU law and that the decisions of the tax authorities were incompatible with Rule No 7 of Regulation No 448/2004. In Alakor's view, the tax authorities had accordingly infringed EU law by restricting its right to deduct and refusing to repay to it the total amount of VAT but instead paying an amount calculated on a proportional basis. Moreover, Alakor could be required to repay the aid on the ground that it had infringed the State aid rules for rural development.

18 In those circumstances, the Kúria decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Can the fact that a taxpayer – where there is a prohibition on deducting VAT – has obtained aid in such a manner that this also funds VAT or has obtained additional State aid as compensation for non-deductible VAT be categorised as the passing on of tax according to EU law?

(2) If the answer is in the affirmative, would the answer be the same if the taxpayer did not receive the aid from a Member State or from the tax authority of a Member State, but instead the aid was co-financed – pursuant to the contract concluded with the Funds provider – from the European Union and the Member State's central budget?

(3) Can the principles of repayment of VAT based on fiscal neutrality and of effectiveness, equivalence and equal treatment be regarded as satisfied, and the prohibition on unjust enrichment complied with, where – owing to legislation on the right to deduct that is contrary to European Union law – the tax authority of a Member State upholds the taxpayer's claim for repayment or damages only in relation to that part or proportion not previously funded through the aid referred to [in the first two questions] above?'

Consideration of the questions referred

19 By its questions, which should be examined together, the referring court asks, in essence, whether the principle of repayment of taxes levied by a Member State in breach of the rules of EU law must be interpreted as meaning that it enables that State to refuse to repay part of the VAT, the deduction of which had been precluded by a national measure contrary to EU law, on the ground that that part of the tax had been subsidised by aid granted to the taxable person and financed by the EU and by that State.

20 The dispute in the main proceedings arises from the application of Article 38(1) of the Law on VAT, in the version in force at the material time, under which the taxable person could exercise his right of tax deduction only for the part of VAT relating to the amount not subsidised in the purchases of individual goods for which any subsidy is received.

21 In *PARAT Automotive Cabrio*, the Court first of all pointed out, at paragraph 15, that the right to deduct VAT, as an integral part of the VAT scheme, is a fundamental principle underlying the common system of VAT, and in principle may not be limited. Next, it held, at paragraph 20, that national legislation which contains a general limitation of the right to deduct VAT applicable to every acquisition of goods benefitting from a subsidy financed from public funds is not permissible under Article 17(2) of the Sixth Directive. Finally, the Court stated at paragraphs 33 to 35 of that Article 17(2) of the Sixth Directive confers rights on individuals which they may invoke before a national court in order to challenge national rules that are incompatible with that provision. A

taxable person having been subject to such a measure must therefore be able to recalculate his VAT debt in accordance with Article 17(2) of the Sixth Directive, in so far as the goods and services have been used for the purposes of taxable transactions.

22 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. The Member State is therefore in principle required to repay charges levied in breach of Community law (see, inter alia, Case C-591/10 *Littlewoods Retail and Others* [2012] ECR, paragraph 24 and the case-law cited).

23 Therefore, the Member State must, in principle, repay the entirety of the VAT which the taxable person was prevented from deducting in breach of EU law.

24 It appears from this that the right to the recovery of sums unduly paid helps to offset the consequences of the duty's incompatibility with EU law by neutralising the economic burden which that duty has unduly imposed on the operator who, in the final analysis, has actually borne it (Case C-94/10 *Danfoss and Sauer-Danfoss* [2011] ECR I-9963, paragraph 23).

25 However, by way of exception, such repayment can be refused where it entails unjust enrichment of the persons concerned. The protection of the rights so guaranteed by the legal order of the European Union does not require repayment of taxes, charges and duties levied in breach of European Union law where it is established that the person required to pay such charges has actually passed them on to other persons (Case C-398/09 *Lady & Kid and Others* [2011] ECR I-7375, paragraph 18).

26 In the absence of EU rules governing claims for the repayment of taxes, it is for the domestic legal system of each Member State to lay down the conditions under which those claims may be made; subject, nevertheless, to observance of the principles of equivalence and effectiveness (*Danfoss and Sauer-Danfoss*, paragraph 24 and the case-law cited).

27 In that regard, given the purpose of the right to the recovery of sums unduly paid, as recalled in paragraph 24 above, observance of the principle of effectiveness requires that the conditions under which an action may be brought for recovery of sums unduly paid be fixed by the Member States, pursuant to the principle of procedural autonomy, in such a way that the economic burden of the duty unduly paid can be neutralised (*Danfoss and Sauer-Danfoss*, paragraph 25).

28 Therefore, it is on condition that the economic burden that the tax unduly paid imposed on the taxable person has been completely neutralised, that a Member State may refuse to repay part of that tax on the ground that such repayment would give rise to unjust enrichment for the benefit of the taxable person.

29 In the present case, it is apparent from the file submitted to the Court that Article 124/D(5) of the General Law on Taxation, which was adopted after *PARAT Automotive Cabrio*, permits refusal to repay part of the VAT which could not be deducted in breach of EU law on the ground that the taxable person had already obtained, in the form of aid, compensation for part of the non-deductible VAT relating to the subsidised acquisition.

30 The question whether the repayment claimed in the dispute in the main proceedings seeks only to neutralise the economic burden of the tax unduly paid or, conversely, could lead to unjust enrichment for the benefit of the taxable person, is a question of fact to be determined by the national court, which is free to assess the evidence adduced before it following an economic analysis in which all the relevant circumstances are taken into account (see, to that effect, Case C-147/01 *Weber's Wine World and Others* [2003] ECR I-11365, paragraphs 96 and 100).

31 In preliminary ruling proceedings, the Court, which is called on to provide answers of use to the national court, may nevertheless provide guidance based on the documents in the file and on the written and oral observations which have been submitted to it, in order to enable the national court to give judgment (see, by analogy, Case C-167/97 *Seymour-Smith and Perez* [1999] ECR I-623, paragraph 68) and Case C-381/99 *Brunnhofer* [2001] ECR I-4961, paragraph 65).

32 In that regard, the national court must examine, in particular, the question whether the amount of the aid granted to the applicant in the main proceedings would have been less if the latter had not been prevented from exercising its right to deduct. It is apparent from the file submitted to the Court that the amount of the aid in question had been calculated by referring to the 'eligible expenses' of that project, which includes both the net cost of the project and the non-deductible VAT. The national court must accordingly determine whether, if the eligible expenses had been calculated by disregarding the non-deductible VAT, the amount of the aid ought to have been less than that which was actually granted. Were that the case, the excess resulting from the higher amount of the aid which Alakor accordingly was able to benefit from would be the consequence of the fact that part of the non-deductible VAT had been covered by that aid. The economic burden relating to the part of the tax corresponding to that excess would, on that basis, be subsidised by the Funds provider and not by Alakor.

33 It follows that, in order to neutralise the economic burden relating to the prohibition on deducting VAT, the amount of the repayment which the applicant in the main proceedings may claim must correspond to the difference between, first, the amount of VAT which Alakor was unable to deduct due to the national legislation of which the incompatibility with EU law was pointed out in *PARAT Automotive Cabrio*, and, second, the amount of the aid granted to Alakor which exceeds that which would have been granted had it not been prevented from exercising its right to deduct.

34 Finally, the fact that the financing for the aid in question came from both the EU budget and that of the Member State at issue has no bearing on the foregoing considerations. As was pointed out at paragraph 22 of this judgment, and as the European Commission notes, 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. The right to repayment cannot, consequently, differ on the basis of of the source from which the financing for the aid in question comes.

35 In the light of all the foregoing considerations, the answer to the questions referred is that the principle of repayment of taxes levied in a Member State in breach of the rules of EU law must be interpreted as meaning that it does not preclude that State from refusing to repay part of the VAT, the deduction of which had been precluded by a national measure contrary to EU law, on the ground that that part of the tax had been subsided by aid granted to the taxable person and financed by the European Union and by that State, provided that the economic burden relating to the refusal to deduct VAT has been completely neutralised, which is for the national court to determine.

Costs

36 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 (Seventh Chamber) hereby rules:

The principle of repayment of taxes levied in a Member State in infringement of the rules of EU law must be interpreted as meaning that it does not preclude that State from refusing to repay part of the value added tax, the deduction of which had been precluded by a national measure contrary to European Union law, on the ground that that part of the tax had been subsided by aid granted to the taxable person and financed by the European Union and by that State, provided that the economic burden relating to the refusal to deduct value added tax has been completely neutralised, which is for the national court to determine.

[Signatures]

* Language of the case: Hungarian.