Provisional text

JUDGMENT OF THE COURT (Second Chamber)

12 May 2021 (*)

(Reference for a preliminary ruling – Common system of value added tax (VAT) – Directive 2006/112/EC – Article 90 – Reduction of the taxable amount – Article 183 – Refund of excess VAT – Default interest – No national rule – Principle of fiscal neutrality – Direct effect of provisions of EU law – Principle that national law must be interpreted in conformity with EU law)

In Case C?844/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Verwaltungsgerichtshof (Administrative Court, Austria), made by decision of 24 October 2019, received at the Court on 15 November 2019, in the proceedings

CS,

Finanzamt Österreich, Dienststelle Graz-Stadt, formerly Finanzamt Graz-Stadt,

v

Finanzamt Österreich, Dienststelle Judenburg Liezen, formerly Finanzamt Judenburg Liezen,

technoRent International GmbH,

THE COURT (Second Chamber),

composed of A. Arabadjiev, President of the Chamber, A. Kumin, T. von Danwitz, P.G. Xuereb (Rapporteur) and I. Ziemele, Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Austrian Government, by A. Posch and F. Koppensteiner, acting as Agents,

– the European Commission, by J. Jokubauskait? and L. Mantl, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 21 January 2021,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 90(1) and Article 183 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value

added tax (OJ 2006 L 347, p. 1) (‘the VAT directive’) and of the second subparagraph of Article 27(2) of 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 (OJ 2008 L 44, p. 23).

2 The request has been made in two sets of proceedings between, first, CS, a natural person, and the Finanzamt Österreich, Dienststelle Judenburg Liezen (Austrian Tax Office, Judenburg Liezen Branch, Austria), formerly Finanzamt Judenburg Liezen (Judenburg Liezen Tax Office), and, secondly, the Finanzamt Österreich, Dienststelle Graz-Stadt (Austrian Tax Office, City of Graz Division, Austria), formerly Finanzamt Graz-Stadt (City of Graz Tax Office), and technoRent International GmbH, a company established in Germany.

Legal context

EU law

The VAT directive

3 Article 90(1) of the VAT 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.’

4 Under Article 167 of that directive:

‘A right of deduction shall arise at the time the deductible tax becomes chargeable.’

5 Article 183 of the directive states:

‘Where, for a given tax period, the amount of deductions exceeds the amount of [value added tax (VAT)] due, the Member States may, in accordance with conditions which they shall determine, either make a refund or carry the excess forward to the following period.

However, Member States may refuse to refund or carry forward if the amount of the excess is insignificant.’

Directive 2008/9

6 Recitals 1 to 3 of Directive 2008/9 are worded as follows:

‘(1) Considerable problems are posed, both for the administrative authorities of Member States and for businesses, by the implementing rules laid down by 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 [(OJ 1979 L 331, p. 11)].

(2) The arrangements laid down in that Directive should be amended in respect of the period within which decisions concerning applications for refund are notified to businesses. At the same time, it should be laid down that businesses too must provide responses within specified periods. In addition, the procedure should be simplified and modernised by allowing for the use of modern technologies.

(3) The new procedure should enhance the position of businesses since the Member States

shall be liable to pay interest if the refund is made late and the right of appeal by businesses will be strengthened.'

7 Directive 2008/9 defines, as is clear from Article 1 thereof, the detailed rules for the refund of VAT to taxable persons not established in the Member State of refund, who meet the conditions laid down in Article 3 of that directive.

8 Article 19(2) of that directive provides that the Member State of refund is to notify the taxable person of its decision to approve or refuse the refund application within four months of its receipt by that Member State.

9 Under Article 21 of Directive 2008/9, the period of time available for the decision in respect of such a refund is at least six months, if the Member State of refund requests additional information, and eight months if that Member State requests further additional information.

10 Article 22(1) of that directive provides:

'Where the refund application is approved, refunds of the approved amount shall be paid by the Member State of refund at the latest within 10 working days of the expiry of the deadline referred to in Article 19(2) or, where additional or further additional information has been requested, the deadlines referred to in Article 21.'

11 Article 26 of the directive reads as follows:

'Interest shall be due to the applicant by the Member State of refund on the amount of the refund to be paid if the refund is paid after the last date of payment pursuant to Article 22(1).

…'

12 Article 27 of the same directive provides:

'1. Interest shall be calculated from the day following the last day for payment of the refund pursuant to Article 22(1) until the day the refund is actually paid.

2. Interest rates shall be equal to the interest rate applicable with respect to refunds of VAT to taxable persons established in the Member State of refund under the national law of that Member State.

If no interest is payable under national law in respect of refunds to established taxable persons, the interest payable shall be equal to the interest or equivalent charge which is applied by the Member State of refund in respect of late payments of VAT by taxable persons.'

Austrian law

13 The Bundesabgabenordnung (Federal Tax Code) (BGBl. 194/1961), in its version applicable to the facts in the main proceedings ('the BAO'), provides, in Article 205 thereof, entitled 'Interest on tax deferral':

'1. Differences in income tax and corporation tax arising from tax notices in disregard of initial payments (subparagraph 3), after comparison with advance payments or with the previously fixed tax, shall bear interest for the period from 1 October of the year following the year in which the tax became chargeable until the date of publication of those notices (interest on tax deferral). This shall apply *mutatis mutandis* to differences arising from:

(a) cancellations of tax notices,

…

(2) The interest rate *per annum* shall be the basic rate plus 2%. Interest on tax deferral which is less than the sum of EUR 50 shall not be applied. Interest on tax deferral shall be applied for a maximum period of 48 months.

…’

14 Article 205a of the BAO, entitled ‘Appeal interest’ and applicable from 1 January 2012, provides:

‘1. Where a previously paid tax liability the amount of which depends directly or indirectly on the outcome of an appeal brought against an administrative decision is reduced, interest shall be applied, at the request of the taxable person, for the period from payment until publication of the notice or decision reducing the tax (appeal interest).

…

(4) The interest rate *per annum* shall be the basic rate plus 2%. Interest which is less than EUR 50 shall not be applied.’

15 For taxable persons not established in Austria who do not carry out any transactions there, Article 3 of the Verordnung des Bundesministers für Finanzen, mit der ein eigenes Verfahren für die Erstattung der abziehbaren Vorsteuern an ausländische Unternehmer geschaffen wird (Regulation of the Federal Minister for Finance introducing a separate procedure for the refund of deductible input VAT to foreign entrepreneurs) of 21 April 1995 (BGBl. 279/1995), in the version applicable to the facts in the main proceedings (BGBl. II, 158/2014), provides, in respect of taxable persons established in other Member States, that where, on expiry of a period of 4 months and 10 working days after receipt of the application for refund by the tax authorities, the latter has not paid the amount to be refunded, a penalty for late payment of 2% of the amount of the tax not refunded in time, must be applied in favour of the taxable person. If the tax authorities request additional information, that period is 6 months and 10 working days and, in the event of a second reminder, 8 months and 10 working days. A second penalty for late payment, amounting to 1% of the amount not refunded, is to be applied if the amount of the tax is not refunded within three months after the expiry of that period of time. Finally, a third penalty for late payment, amounting also to 1% of the amount not refunded, is to be applied if the amount of the tax is not refunded within three months after the expiry of the period of time giving rise to the second penalty for delay.

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

16 CS operates a hotel in Austria. In his preliminary VAT return for August 2007, he claimed excess VAT in the amount of EUR 60 689.28.

17 However, by decision of 18 October 2007, after carrying out an audit, the Judenburg Liezen Tax Office set the excess VAT payable to CS at only EUR 14 689.28.

18 CS brought an appeal against that decision. On 15 May 2013, that appeal was upheld by the Unabhängiger Finanzsenat (Independent Finance Tribunal, Austria). The total amount of excess declared by CS was then credited to the latter’s tax account.

19 On 30 May 2013, CS submitted, on the basis of Article 205a of the BAO, an application for

payment of interest on the excess VAT in question from 1 January 2012, the date on which that provision entered into force. The Judenburg Liezen Tax Office dismissed that application by decision of 10 June 2013.

20 CS unsuccessfully brought an action against that decision before the Bundesfinanzgericht (Federal Finance Court, Austria). According to that court, Article 205a of the BAO does not apply to circumstances such as that in the present case where, following an action brought against the Tax Office's initial decision, the taxable person is granted a refund of excess VAT.

21 CS brought an appeal on a point of law against the judgment of that court before the Verwaltungsgerichtshof (Supreme Administrative Court, Austria).

22 In 2003-2004, technoRent International sold machines in Austria, which were subject to VAT in that Member State. In the preliminary VAT return for May 2005, that company claimed a VAT credit in the amount of EUR 367 081.58 on the basis of a reduction in the sale price of those machines made after they had been sold.

23 The sale of those machines was subject to an audit, which began in July 2006. On 10 March 2008, the amount stated by technoRent International was credited to the latter's tax account. Following that audit, however, the City of Graz Tax Office took the view that the sale price should not have been adjusted and that there was therefore no excess VAT to be refunded. The tax authorities then recovered the amount which had been paid into the tax account of technoRent International.

24 That company brought an action against that decision, which was upheld by the Unabhängiger Finanzsenat (Independent Finance Tribunal) on 8 April 2013. On 10 May 2013, the amount of EUR 367 081.58 was again credited to the tax account of technoRent International.

25 On 21 October 2013, technoRent International, on the basis of the Court's case-law on VAT, sought payment of interest on the amount of EUR 367 081.58 for the period from July 2005 to May 2013. By decision of 4 February 2014, the City of Graz Tax Office granted that application in part and granted interest for the period from 1 January 2012, the date on which Article 205a of the BAO entered into force, to 8 April 2013, the date of the decision of the Unabhängiger Finanzsenat (Independent Finance Tribunal).

26 The decision of the City of Graz Tax Office, in so far as it rejected in part technoRent International's application, was the subject of an appeal brought by it before the Bundesfinanzgericht (Federal Finance Court). That court held, by judgment of 29 May 2017, that, in the light of the Court's case-law on VAT, technoRent International was entitled to default interest also for the period from 2 September 2005 to 9 March 2008.

27 The City of Graz Tax Office brought an appeal on a point of law before the Verwaltungsgerichtshof (Supreme Administrative Court) against that judgment.

28 The referring court observes that Austrian tax law does not provide for any general rules on the application of interest on tax credits, since Article 205 of the BAO refers only to income tax and corporation tax and Article 205a of that law provides only for appeal interest.

29 According to the referring court, with regard to the late refund of excess VAT, which is the subject of the first appeal on a point of law brought before it, the Court has already held, on several occasions, that default interest should be paid to the taxable person where that refund is not made within a reasonable period of time. The referring court argues that, however, that case-law of the Court concerns situations in which the legal systems of the Member States in question,

unlike Austrian law, provided for general rules under which the Member State concerned was required to pay the taxable person interest in the event of unlawful delay in the refund of excess VAT.

30 The question therefore arises whether, in the absence of such rules, EU law, and in particular Article 183 of the VAT directive, may be interpreted as meaning that it constitutes a rule having direct effect on which the taxable person may rely in order to be awarded default interest for late refund of excess VAT. The referring court notes, in that regard, that the second subparagraph of Article 27(2) of Directive 2008/9 does not proceed on the basis that, under EU law, the taxable person must necessarily be granted entitlement to default interest. If EU law were nevertheless to be interpreted as meaning that such an entitlement exists, that provision would be rendered meaningless.

31 The referring court observes that the second appeal on a point of law pending before it does not concern excess VAT, for the purposes of Article 183 of the VAT directive, but the reduction of the taxable amount for VAT, for the purposes of Article 90(1) of that directive. Therefore, it is necessary to clarify whether, in the event that the Court's case-law on taxes levied in breach of EU law were to be applicable to such a case, EU law provides for rules with direct effect granting a taxable person, to whom the tax authorities – in a situation such as that at issue in the present case – do not refund a VAT credit in time, entitlement to default interest, with the result that the taxable person may assert that right before those tax authorities and the administrative courts, even though the national law does not provide for default interest for similar tax credits.

32 If such a right exists, both as regards the situations referred to in Article 183 of the VAT directive and those referred to in Article 90(1) of that directive, the question would also arise as to the point at which interest is to be calculated and whether, in the absence of rules on that point in Austrian law, the legal consequence imposed, as regards taxable persons not established in Austria, in the second subparagraph of Article 27(2) of Directive 2008/9, must be applied even though the proceedings pending before the referring court do not fall within the scope of the directive.

33 In those circumstances the Verwaltungsgerichtshof (Supreme Administrative Court) decided to stay proceedings and to refer to the Court of Justice the following questions for a preliminary ruling:

'1. Is there a rule with direct effect under EU law that grants a [taxable person] to whom the tax office, in circumstances such as those in the main proceedings, has not refunded a turnover tax credit in good time, entitlement to interest for late payment, with the result that he can claim that entitlement before the tax office or before the administrative courts, even though national law does not provide for such a rule on interest?

If Question 1 is answered in the affirmative:

2. Is it permissible also in the case of a turnover tax claim made by the taxable person as a result of a subsequent reduction of consideration under Article 90(1) of [the VAT directive] that interest begins to accrue only after expiry of a reasonable period for the tax office to assess the lawfulness of the entitlement claimed by the taxable person?

3. Does the fact that the national law of a Member State does not provide for any rule on interest in respect of the late crediting of turnover tax credits mean that the national courts must, when calculating interest, apply the legal consequence laid down by the second subparagraph of Article 27(2) of [Directive 2008/9], even though the main proceedings do not fall within the scope of that directive?'

Consideration of the questions referred

34 By its three questions, which it is appropriate to address together, the referring court asks, in essence, whether EU law must be interpreted as meaning that a refund resulting from an adjustment of the taxable amount under Article 90(1) of the VAT directive must, like a refund of excess VAT under Article 183 of that directive, give rise to the payment of interest where it is not made within a reasonable period of time and, if so, under what conditions.

Payment of default interest

35 As regards the refund of excess VAT under Article 183 of the VAT directive, it should be recalled that, as the Court has repeatedly held, the right to deduct provided for in Article 167 et seq. of that directive is an integral part of the VAT scheme and in principle may not be limited. In particular, the right to deduct is exercisable immediately in respect of all the taxes charged on transactions relating to inputs (see, inter alia, judgments of 21 June 2012, *Mahagében and Dávid*, C?80/11 and C?142/11, EU:C:2012:373, paragraph 38, and of 26 April 2018, *Zabrus Siret*, C?81/17, EU:C:2018:283, paragraph 33).

36 The deduction system, and accordingly the refund system, is intended to relieve the operator entirely of the burden of the VAT due or paid in the course of all his or her economic activities. The common system of VAT therefore ensures neutrality of taxation of all economic activities, whatever their purpose or results, provided that they are themselves, in principle, subject to VAT (judgment of 21 March 2018, *Volkswagen*, C?533/16, EU:C:2018:204, paragraph 38).

37 It is also apparent from the Court's case-law that, while the Member States have a certain freedom in determining the conditions referred to in Article 183 of the VAT directive, those conditions cannot undermine the principle of fiscal neutrality by making the taxable person bear the burden of the VAT in whole or in part (judgments of 12 May 2011, *Enel Maritsa Iztok 3*, C?107/10, EU:C:2011:298, paragraph 33, and of 14 May 2020, *Agrobet CZ*, C?446/18, EU:C:2020:369, paragraph 35).

38 In particular, such conditions must enable the taxable person, in appropriate circumstances, to recover the entirety of the credit arising from that excess VAT. This implies that the refund is made within a reasonable period of time by a payment in liquid funds or equivalent means, and that, in any event, the method of refund adopted must not entail any financial risk for the taxable person (judgment of 12 May 2011, *Enel Maritsa Iztok 3*, C?107/10, EU:C:2011:298, paragraph 33).

39 If, in the event that the refund of excess VAT is not made within a reasonable period of time, the taxable person were not entitled to default interest, the taxable person's situation would be negatively affected, in breach of the principle of fiscal neutrality.

40 It follows that, even though Article 183 of the VAT directive does not lay down an obligation to pay interest on the excess VAT to be refunded or specify the date from which such interest is payable, the principle of fiscal neutrality of the VAT system requires that the financial loss incurred on account of a refund of excess VAT not made within a reasonable period of time be compensated through the payment of default interest (judgments of 28 February 2018, *Nidera*,

C?387/16, EU:C:2018:121, paragraph 25, and of 14 May 2020, *Agrobet CZ*, C?446/18, EU:C:2020:369, paragraph 40).

41 The same is true, as the Advocate General observed in point 31 of her Opinion, in connection with the refund of VAT following from a reduction of the taxable amount for VAT pursuant to Article 90(1) of the VAT directive.

42 In such a situation, the taxable person is also charged excess VAT which must be refunded to him or her, incurring financial loss to his or her detriment, on account of the unavailability of the sums of money at issue. If, in the event that the tax authorities do not reimburse that excess within a reasonable period of time, the taxable person were not entitled to default interest, the taxable person's situation would be negatively affected, thereby undermining the principle of fiscal neutrality.

43 That conclusion is not affected by the second subparagraph of Article 27(2) of Directive 2008/9.

44 In that regard, it should be noted, first, that, although that provision expressly refers to a situation in which the law of a Member State does not provide for interest to be applied where the refund of excess VAT is not made within a reasonable period of time, it cannot be inferred from the wording of that provision that it would be consistent with EU law not to provide, in national law, for the payment of interest in such situations.

45 Secondly, as the Advocate General noted in point 35 of her Opinion, it is apparent from recitals 1 to 3 of Directive 2008/9 that the provisions relating to the detailed rules for the refund of VAT to taxable persons not established in the Member State of refund which were in force before the adoption of that directive posed considerable problems, both for the administrative authorities of Member States and for businesses, and that, consequently, the position of the latter had to be strengthened, since the Member States are liable to pay interest if the refund is made late.

46 It follows that the second subparagraph of Article 27(2) of Directive 2008/9 constitutes a catch-all clause intended to protect taxable persons not established in the Member State of refund where, at the date of adoption of that directive, the law of that Member State did not, contrary to the principle of fiscal neutrality, impose an obligation to apply default interest to VAT refunds.

Obligations of the national court

47 As regards the conditions under which a refund resulting from an adjustment of the taxable amount under Article 90(1) of the VAT directive or a refund of excess VAT under Article 183 of that directive must give rise to the payment of interest where it is not made within a reasonable period of time, it should be noted that those provisions do not contain any details in that regard, in particular as regards the interest rate to be applied and the date from which such interest would be payable.

48 It should be recalled that, according to settled case-law, the implementation of the right to a refund of excess VAT provided for in Article 183 of the VAT directive falls, as a rule, under the procedural autonomy of the Member States, circumscribed by the principles of equivalence and effectiveness. Thus, while the Member States have a certain freedom in determining the conditions for the refund of excess VAT, those conditions cannot undermine the principle of fiscal neutrality (judgment of 28 February 2018, *Nidera*, C?387/16, EU:C:2018:121, paragraphs 22 and 24 and the case-law cited).

49 The same is true, as regards the conditions for the application of interest, for the refund of

VAT resulting from a reduction of the taxable amount for VAT under Article 90(1) of that directive, given that no provision is made for those conditions in that directive.

50 As regards the situation at issue in the main proceedings, it is apparent from the request for a preliminary ruling that Austrian law does not provide for any rule entitling taxable persons, such as those referred to in that request, to be paid interest where the refund resulting from an adjustment of the taxable amount under Article 90(1) of the VAT directive, or the refund of excess VAT under Article 183 of that directive, is not made within a reasonable period of time. Furthermore, as regards Article 27 of Directive 2008/9, the facts in the main proceedings do not fall within the scope of that directive, since that directive is intended, as is apparent from Article 1 thereof, to lay down only the conditions for the refund of VAT to taxable persons not established in the Member State of refund, who meet certain conditions.

51 Therefore, and having regard to the freedom enjoyed by the Member States, as noted in paragraph 48 above, as regards the determination of the conditions for the refund of VAT, Article 27 of Directive 2008/9 cannot be applied, even by analogy, including as regards the period for which, under that provision, default interest would be due. Furthermore, as the Advocate General observed in point 44 of her Opinion, there is no regulatory gap in EU law which should be filled by such an application by analogy of the rule in that provision.

52 It must be borne in mind, however, that in accordance with the Court's settled case-law both the administrative authorities and the national courts that are called upon, within the exercise of their respective powers, to apply provisions of EU law are under a duty to give full effect to those provisions (judgment of 5 March 2019, *Eesti Pagar*, C?349/17, EU:C:2019:172, paragraph 91 and the case-law cited).

53 In particular, the principle that national law must be interpreted in conformity with EU law, by virtue of which the national court is required, to the greatest extent possible, to interpret national law in conformity with the requirements of EU law, is inherent in the system of the treaties, since it permits the national court, within the limits of its jurisdiction, to ensure the full effectiveness of EU law when it determines the dispute before it (judgment of 19 November 2019, *A.K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, C?585/18, C?624/18 and C?625/18, EU:C:2019:982, paragraph 159). That obligation to interpret national law in conformity with EU law requires the national court to consider, where necessary, the whole body of national law in order to assess to what extent it may be applied so as not to produce a result contrary to EU law (judgment of 4 March 2020, *Telecom Italia*, C?34/19, EU:C:2020:148, paragraph 59 and the case-law cited).

54 That being said, the principle that national law must be interpreted in conformity with EU law has certain limits. Thus, the obligation on a national court to refer to the content of EU law when interpreting and applying the relevant rules of domestic law is limited by general principles of law, including legal certainty, and cannot serve as the basis for an interpretation of national law *contra legem* (see, to that effect, judgment of 13 July 2016, *Pöpperl*, C?187/15, EU:C:2016:550, paragraph 44 and the case-law cited).

55 In the present case, it will be for the referring court, in particular, to examine whether it is possible to give full effect to EU law by considering the whole body of national law and by proceeding to an application by analogy of the provisions of the latter.

56 In the light of the foregoing, the answer to the three questions is that Article 90(1) and Article 183 of the VAT directive, read in conjunction with the principle of fiscal neutrality, must be interpreted as meaning that a refund resulting from an adjustment of the taxable amount under Article 90(1) of that directive must, like a refund of excess VAT under Article 183 of that directive,

give rise to the payment of interest where it is not made within a reasonable period of time. It is for the referring court to do whatever lies within its jurisdiction to give full effect to those provisions by interpreting national law in conformity with EU law.

Costs

57 Since these proceedings are, for the parties to the main proceedings, a step in the action 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 (Second Chamber) hereby rules:

Article 90(1) and Article 183 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, read in conjunction with the principle of fiscal neutrality, must be interpreted as meaning that a refund resulting from an adjustment of the taxable amount under Article 90(1) of that directive must, like a refund of excess value added tax under Article 183 of that directive, give rise to the payment of interest where it is not made within a reasonable period of time. It is for the referring court to do whatever lies within its jurisdiction to give full effect to those provisions by interpreting national law in conformity with EU law.

[Signatures]

* Language of the case: German.