JUDGMENT OF THE COURT (Third Chamber)

15 December 2011 *

In Case C-427/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Corte suprema di cassazione (Italy), made by decision of 7 June 2010, received at the Court on 31 August 2010, in the proceedings

Banca Antoniana Popolare Veneta SpA, incorporating Banca Nazionale dell'Agricoltura SpA,

v

Ministero dell'Economia e delle Finanze,

Agenzia delle Entrate,

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, E. Juhász, G. Arestis (Rapporteur), T. von Danwitz and D. Šváby, Judges,

* Language of the case: Italian.

Advocate General: J. Mazák,
Registrar: A. Impellizzeri, Administrator,

having regard to the written procedure and further to the hearing on 16 June 2011,

after considering the observations submitted on behalf of:

— Banca Antoniana Popolare Veneta SpA, incorporating Banca Nazionale dell'Agricoltura SpA, by A. Fantozzi, R. Tieghi and R. Esposito, avvocati,

— the Italian Government, by G. Palmieri, acting as Agent, assisted by G. De Bellis, avvocato dello Stato,

— the German Government, by T. Henze and C. Blaschke, acting as Agents,

— the United Kingdom Government, by S. Hathaway, acting as Agent, assisted by P. Mantle, Barrister,

— the European Commission, by D. Recchia and R. Lyal, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 15 September 2011,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of the principles of tax neutrality, effectiveness and non-discrimination in the context of value added tax ('VAT').

2 The reference has been made in proceedings between, on the one hand, Banca Antoniana Popolare Veneta SpA, incorporating Banca Nazionale dell'Agricoltura SpA, ('BAPV') and, on the other, the Ministero dell'Economia e delle Finanze and the Agenzia delle Entrate (collectively, 'the tax authority'), concerning the tax authority's refusal to grant BAPV a refund of the VAT which, albeit not due, had been levied on the supply by BAPV of services consisting in the collection of contributions due to a number of consortia.

Legal context

European Union ('EU') legislation

3 Article 2 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:

'The following shall be subject to value added tax:

1. the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such;

…'

4 Under points 2 and 3 of Article 13B(d) of the Sixth Directive:

'B. Other exemptions

Without prejudice to other Community provisions, Member States shall exempt the following under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of the exemptions and of preventing any possible evasion, avoidance or abuse:

…

(d) the following transactions:

…

2. the negotiation of or any dealings in credit guarantees or any other security for money and the management of credit guarantees by the person who is granting the credit;

3. transactions, including negotiation, concerning deposit and current accounts, payments, transfers, debts, cheques and other negotiable instruments, but excluding debt collection and factoring.'

5 Under the first paragraph of Article 13C of that directive:

'C. Options

Member States may allow taxpayers a right of option for taxation in cases of:

…

(b) the transactions covered in B(d)... above.'

6 Paragraph 1(a) of Article 21 of the Sixth Directive, which is entitled 'Persons liable to pay tax to the authorities', states:

'The following shall be liable to pay value added tax:

1. under the internal system:

(a) taxable persons who carry out taxable transactions other than those referred to in Article 9(2)(e) and carried out by a taxable person resident abroad. When the taxable transaction is effected by a taxable person resident abroad Member States may adopt arrangements whereby tax is payable by someone other than the taxable person residing abroad. Inter alia a tax representative or other person for whom the taxable transaction is carried out may be designated as such other person. The Member States may also provide that someone other than the taxable person shall be held jointly and severally liable for payment of the tax'.

National legislation

7 Article 10(5) of Presidential Decree No 633 of 26 October 1972 establishing and governing value added tax (ordinary supplement to GURI No 1 of 11 November 1972, p. 1; 'DPR No 633/72'), provides:

'The following shall be exempt from VAT:

...

5. transactions relating to the collection of taxes, including those relating to tax payments made on behalf of taxpayers by credit societies or institutions, in accordance with specific statutory provisions'.

8 Under Article 21 of Legislative Decree No 546 of 31 December 1992 laying down provisions relating to proceedings before the tax courts, pursuant to the powers delegated to the Government by Article 30 of Law No 413 of 30 December 1991 (ordinary supplement to GURI No 8 of 13 January 1993, p. 1):

'1. In order to be admissible, the action must be brought within 60 days of the date on which the contested measure was notified. Notification of the notice of assessment is equivalent to notification of the tax roll.

2. An action against a tacit refusal to grant a refund, as referred to in Article 19(1)(g), may be brought from the 90th day following the submission of an application for a refund within the time-limits laid down in the individual tax statute, up until such time as the right to a refund becomes time-barred. Save where specific provision is made, the application for a refund may not be submitted more than two years after the date of payment or the date on which the conditions for a refund arise, if later.'

9 Article 2033 of the Civil Code, which governs the payment of tax which is not due, provides:

'Anyone who has made a payment which is not due shall be entitled to reclaim the monies paid. In addition, the person concerned shall be entitled to interest reckoned from the date of the payment where the person who received the payment was not acting in good faith or, where the recipient acted in good faith, from the date of issue of the demand for payment (Article 163 of the Code of Civil Procedure).'

10 Article 2946 of the Civil Code lays down the general rule governing the time-barring of actions:

'Except where otherwise provided by law, rights of action shall lapse on the expiry of a period of 10 years.'

11 In accordance with Article 2935 of the Civil Code, time for the purposes of bringing proceedings starts to run from the date on which the right can be relied upon.

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

12 From 1984 to 1994, BAPV supplied a service consisting in the collection of consortium contributions, due from members, on behalf of three Consorzi di Bonifica (land reclamation consortia), that is to say, public bodies governed by national and regional laws and tasked with carrying out public infrastructure works. As the payments received in return for those services were subject to VAT, BAPV charged VAT on those supplies to the consortia. BAPV regularly paid the VAT to the tax authority in accordance with the statutory procedure since, at the time, the collection of consortium contributions was not regarded by the tax authority as falling within the exemption provided for under Article 10(5) of DPR No 633/72.

13 By administrative circular dated 26 February 1999, the tax authority announced that it had changed its original interpretation of that provision, taking the view that the contributions to the consortia were fiscal in nature and, in consequence, that the payments due from the consortia in return for the collection of contributions were to be regarded as exempt from VAT for the purposes of Article 10(5) of DPR No 633/72.

14 Accordingly, the land reclamation consortia asked SIFER SpA, the company which had succeeded BAPV, for the refund – by way of sums paid but not due, for the purposes of Article 2033 of the Civil Code – of the VAT paid on the payments for the collection of contributions. Following the action brought before the Tribunale civile di Ferrara (Ferrara Civil Court) by one of the consortia, BAPV was ordered to repay those sums.

15 BAPV brought a claim against the tax authority for a VAT refund equivalent in amount to the sums claimed back by the recipients of the services. When faced with an implied decision rejecting that claim, BAPV brought before the Commissione

tributaria provinciale di Roma (Provincial Tax Court of Rome) three separate actions, all of which were upheld.

16 However, the tax authority appealed against those three decisions and, after joining the appeals, the Commissione tributaria regionale del Lazio (Provincial Tax Court of Lazio) found that BAPV's right to a refund had lapsed since its claim for a refund had been entered after the expiry of the specific two-year time-limit, with effect from payment of the VAT, laid down in Article 21(2) of Legislative Decree No 546 of 31 December 1992. In that connection, the Commissione tributaria regionale del Lazio stated that the administrative circular of 26 February 1999 could not constitute a chargeable event from which time for the purposes of that time-limit started to run.

17 BAPV brought an appeal in cassation against that judgment before the Corte suprema di cassazione.

18 The Corte suprema di cassazione has doubts as to whether the national procedural rules are compatible with the guiding principles relating to VAT, given the fact that those rules can give rise to situations like that at issue before it, which result in a substantive denial of the right to a refund of VAT paid but not due. The Corte suprema di cassazione notes that BAPV, which paid the VAT to the tax authority, is compelled, pursuant to a judgment by a civil court, to refund the VAT to the person who paid the charge, but cannot then obtain reimbursement from the tax authority. Ultimately, therefore, the provisions of national law governing procedure and the rules of substantive law governing the reimbursement of VAT paid but not due make it virtually impossible to exercise the right to a refund.

19 In those circumstances, the Corte suprema di cassazione decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Do the principles of effectiveness, non-discrimination and tax neutrality in relation to VAT preclude national rules or practice in accordance with which the

right of the purchaser/client to reimbursement of VAT paid in error is construed, in contrast to the right exercised by the principal debtor (supplier/provider of the service), as a right under the ordinary law to the recovery of sums paid but not due, and time-limits are applied in the case of the purchaser/client which are significantly more generous than those applied to the principal debtor, with the result that the claim of the purchaser/client, brought after the time-limits for the principal debtor have expired, can give rise to an order directing the principal debtor to provide reimbursement, while it is no longer possible for the latter to claim a refund from the tax authority and there is no provision for any bridging instrument, designed to prevent conflicts or disputes, to coordinate the proceedings brought or to be brought before the various courts?

2. Quite apart from that situation, are the above principles compatible with national practice or case-law under which it is possible for a judgment to direct that the purchaser/client be reimbursed by the supplier/provider of the service, where the latter has not brought a reimbursement claim before another court within the time allowed for that purpose – in reliance on an interpretation, handed down by case-law and subsequently implemented through administrative practice, to the effect that the transaction was subject to VAT?'

Consideration of the questions referred

The first question

20 By its first question, the referring court asks, in essence, whether the principles of effectiveness, tax neutrality and non-discrimination preclude national rules governing the recovery of sums paid but not due, such as those at issue in the main proceedings, under which the specific time-limits for bringing a claim for a tax refund are narrower

than the time-limits for bringing a civil law action for recovery of sums paid but not due, with the result that a recipient of services bringing such an action against the provider of those services can obtain a refund from that provider of VAT paid but not due, whereas the provider cannot in turn obtain a refund from the tax authority.

21 First of all, it should be noted that, as a general rule, the Court will refrain from considering the principle of tax neutrality with a view to ascertaining whether EU law precludes national rules which lay down time-limits within which a VAT refund must be claimed, failing which the action is time-barred (see, to that effect, Case C-85/97 *SFI* [1998] ECR I-7447, paragraphs 22 to 36; Case-62/00 *Marks & Spencer* [2002] ECR I-6325, paragraphs 22 to 47; and Case C-472/08 *Alstom Power Hydro* [2010] ECR I-623, paragraphs 14 to 22).

22 As the Court ruled in Case C-35/05 *Reemtsma Cigarettenfabriken* [2007] ECR I-2425, in the absence of Community rules on claims for the repayment of taxes paid but not due, it is for the domestic legal system of each Member State to lay down the conditions in accordance with which such claims may be made; those conditions must be consistent with the principles of equivalence and effectiveness, that is to say, they must not be less favourable than those relating to similar claims founded on provisions of domestic law or so framed as to render virtually impossible the exercise of rights conferred by the Community legal order (paragraph 37).

23 In paragraph 42 of *Reemtsma Cigarettenfabriken*, the Court held, in particular, that the principle of effectiveness does not preclude national legislation under which only the supplier/provider of services may seek reimbursement of the sums paid, but not due, by way of VAT to the tax authorities and the recipient of those services may bring a civil law action against that supplier/provider for recovery of sums paid but not due.

24 The Court has also stated that it is compatible with EU law to lay down reasonable time-limits for bringing proceedings, in the interests of legal certainty, which protects both the taxpayer and the authorities concerned. Such time-limits do not make it virtually impossible or excessively difficult to exercise the rights conferred by EU law (see, to that effect, Case C-228/96 *Aprile* [1998] ECR I-7141, paragraph 19, and Case C-262/09 *Meilicke and Others* [2011] ECR I-5669, paragraph 56).

25 That is the position in the case of a two-year time-limit since, in principle, that enables any normally attentive taxable person validly to assert the rights derived from EU law (see, to that effect, *Alstom Power Hydro*, paragraphs 20 and 21). This is true also of a two-year time-limit in respect of the right to a refund of VAT paid, but not due, to the tax authority.

26 The Court has also held that the principle of effectiveness is not infringed where the time-limits prescribed by national law are allegedly more advantageous for the tax authorities than the time-limits in force for individuals (see Joined Cases C-89/10 and C-96/10 *Q-Beef and Bosschaert* [2011] ECR I-7819, paragraph 42).

27 Consequently, to prescribe by way of specific time-limit a two-year period during which the taxable person may claim from the tax authority a refund of VAT paid but not due, while at the same time actions between individuals for the recovery of sums paid but not due are subject to a time-limit of 10 years, is not as such contrary to the principle of effectiveness.

28 The Court has held, however, that where reimbursement of the VAT would become impossible or excessively difficult, the Member States must, in order to respect the principle of effectiveness, provide the instruments necessary to enable the recipient of the services to recover the tax which was invoiced but not due (see, to that effect, *Reemtsma Cigarettenfabriken*, paragraph 42).

29 Those same considerations must prevail where the fact that it is impossible or excessively difficult to obtain reimbursement of the VAT paid but not due affects, not the recipient of the services, but the provider.

30 It also follows from the case-law that the principle of effectiveness would be infringed if the taxable person had neither the right to obtain reimbursement of the tax concerned during the period allowed for bringing a claim against the tax authority, nor – after an action for recovery of sums paid but not due has been brought against him by his clients subsequent to the expiry of that period – the possibility of bringing proceedings against the tax authority, with the result that the consequences of the VAT payments made but not due, attributable to the State, would be borne by the taxable person alone (see, by analogy, *Q-Beef and Bosschaert*, paragraph 43).

31 Likewise, the Court has held that a national authority may not rely on the expiry of a reasonable time-limit if the conduct of the national authorities, combined with the existence of a time-limit, means that a person is totally deprived of any possibility of enforcing his rights before the national courts (see, by analogy, *Q-Beef and Bosschaert*, paragraph 51).

32 In the case before the referring court, it should be noted, first of all, that – as the European Commission pointed out at the hearing – it would have been impossible or, at the very least, excessively difficult for BAPV to obtain, by means of an action brought within the two-year time-limit, a refund of the VAT paid in the years from 1984 to 1994, particularly in view of the position adopted by the tax authority – and confirmed, according to the information provided by the referring court, by the case-law of the national courts – which dismissed the possibility that the services supplied by BAPV fell within the exemption provided for under Article 10(5) of DPR No 633/72.

33 Also, by attributing retroactive effect to the Circular of 26 February 1999, the interpretation provided by the referring court and by the court decision referred to in paragraph 16 above has the result of moving the starting point of actions for recovery

back to the date on which the VAT was paid, which – given that the service provider had no more than two years in which to bring an action against the tax authority for the recovery of sums paid but not due – totally deprived the provider of any possibility of recovering the tax paid but not due.

34 Lastly, it is common ground that the consortia brought an action for the recovery of sums paid but not due after the expiry of the two-year specific limitation period during which it was open to BAPV, with effect – according to the case-law interpretation mentioned above – from the date on which the VAT was paid, to claim a refund from the tax authority of the VAT paid but not due.

35 The consortia brought an action for recovery of sums paid but not due following publication of the Circular of 26 February 1999 by which the tax authority changed its interpretation of the nature of the transactions at issue in the main proceedings, thereafter regarding them as exempt from VAT.

36 Consequently, it should be noted that, in a situation such as that at issue before the referring court, it is BAPV itself which bears the cost of paying the VAT which was not due, without any possibility of effectively claiming a refund from the tax authority because the two-year time-limit has expired, even though such a situation is not its fault, but a result of the fact that, prompted by the Circular of 26 February 1999, the recipients of the services brought an action against BAPV, after the expiry of the above time-limit, for the recovery of sums paid but not due.

37 There is nothing in the case-file forwarded by the referring court to suggest that BAPV did not act as a prudent and alert economic operator in collecting consortium contributions in return for the payment of a price including VAT and in paying the VAT to the tax authority.

38 In that regard, it is apparent from the order for reference that BAPV correctly applied VAT to the transactions consisting in the collection of consortium contributions and correctly paid that tax to the tax authority, consistently with the practice of the tax authority at the time when the transactions were invoiced.

39 The Italian Government noted, however, that the question of the status of those transactions with regard to VAT has been a controversial issue for some time, with the result that no prudent and alert economic operator could have a legitimate expectation that those transactions would continue to be subject to VAT.

40 However, it should be observed that it was not until the Circular of 26 February 1999 that it became clear that the tax authority, which is the administrative authority responsible for ensuring that the relevant legislation is applied, expressly stated that the consortium contributions were fiscal in nature and that, accordingly, the payments owed by the consortia should be regarded as exempt from VAT for the purposes of Article 10(5) of DPR No 633/72. As a consequence, such a circular retroactively reopened the question whether transactions consisting in the collection of those contributions were subject to VAT.

41 In such a situation, the tax authority must take account of the particular situations of the economic operators and, where appropriate, provide for adjustments to the way in which its new legal assessments of those transactions are applied (see, to that effect, Case C-201/08 *Plantanol* [2009] ECR I-8343, paragraph 49).

42 It is apparent from the above considerations that the principle of effectiveness does not preclude national rules governing the recovery of sums paid but not due, under which the time-limits for a civil law action for recovery of sums paid but not due, brought by the recipient of services against the supplier, a taxable person for the

purposes of VAT, are more generous than the specific time-limits for a fiscal law action for a tax refund, brought by the supplier against the tax authority, provided that it is possible for that taxable person effectively to claim reimbursement of the VAT from the tax authority. That condition is not satisfied where the application of such rules has the effect of totally depriving the taxable person of the right to obtain from the tax authority a refund of the VAT paid but not due, which the taxable person has himself had to pay back to the recipient of his services.

The second question

43 In the light of the answer given to the first question, there is no need to answer the second question.

Costs

44 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 (Third Chamber) hereby rules:

The principle of effectiveness does not preclude national rules governing the recovery of sums paid but not due, under which the time-limits for a civil law action for recovery of sums paid but not due, brought by the recipient of services

against the supplier, a taxable person for the purposes of VAT, are more generous than the specific time-limits for a fiscal law action for a tax refund, brought by the supplier against the tax authority, provided that it is possible for that taxable person effectively to claim reimbursement of the VAT from the tax authority. That condition is not satisfied where the application of such rules has the effect of totally depriving the taxable person of the right to obtain from the tax authority a refund of the VAT paid but not due, which the taxable person has himself had to pay back to the recipient of his services.

[Signatures]