Reports of Cases

JUDGMENT OF THE COURT (Eighth Chamber)

5 December 2024*

(Reference for a preliminary ruling – Common system of value added tax (VAT) – Directive 2006/112/EC – First paragraph of Article 183 – Rules governing the exercise of the right of deduction – Carrying forward excess VAT – Concept of 'following period' – Refund of excess VAT – Cessation of economic activity)

In Case C-680/23,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunal Administrativo e Fiscal do Funchal (Administrative and Tax Court, Funchal, Portugal), made by decision of 13 November 2023, received at the Court on 14 November 2023, in the proceedings

Modexel – Consultores e Serviços SA

v

Autoridade Tributária e Assuntos Fiscais da Região Autónoma da Madeira,

THE COURT (Eighth Chamber),

composed of S. Rodin, President of the Chamber, O. Spineanu-Matei (Rapporteur) and N. Fenger, Judges,

Advocate General: T. Ćapeta,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Portuguese Government, by P. Barros da Costa, C. Bento and A. Rodrigues, acting as Agents,

– the European Commission, by J. Jokubauskaitė and L. Santiago de Albuquerque, acting as Agents,

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

* Language of the case: Portuguese.

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of the first paragraph of 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').

2 The request has been made in proceedings between Modexel – Consultores e Serviços SA ('Modexel') and the Autoridade Tributária e Assuntos Fiscais da Região Autónoma da Madeira (Tax Authority of the Autonomous Region of Madeira, Portugal) ('the tax authority') concerning a request to carry forward, after the resumption of an economic activity, excess value added tax (VAT) that had arisen as at the time of cessation of the same economic activity previously carried out.

Legal context

European Union law

3 Article 9(1) of the VAT Directive provides:

'"Taxable person" shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity.

Any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions, shall be regarded as "economic activity". The exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as an economic activity.'

4 Under the first paragraph of Article 179 of that directive:

'The taxable person shall make the deduction by subtracting from the total amount of VAT due for a given tax period the total amount of VAT in respect of which, during the same period, the right of deduction has arisen and is exercised in accordance with Article 178.'

5 Article 183 of that directive is worded as follows:

'Where, for a given tax period, the amount of deductions exceeds the amount of 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.'

6 Article 213(1) of that directive provides:

'Every taxable person shall state when his activity as a taxable person commences, changes or ceases.

Member States shall allow, and may require, the statement to be made by electronic means, in accordance with conditions which they lay down.'

7 Under Article 252 of the VAT Directive:

‘1. The VAT return shall be submitted by a deadline to be determined by Member States. That deadline may not be more than two months after the end of each tax period.

2. The tax period shall be set by each Member State at one month, two months or three months.

Member States may, however, set different tax periods provided that those periods do not exceed one year.’

8 Article 23 of Council Regulation (EU) No 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax (OJ 2010 L 268, p. 1) states:

‘Member States shall ensure that the VAT identification number, referred to in Article 214 of [the VAT Directive], is shown as invalid in the electronic system referred to in Article 17 of this Regulation at least in the following situations:

(a) where persons identified for VAT purposes have stated that their economic activity, as defined in Article 9 of [the VAT Directive], has ceased or where the competent tax administration considers that they have ceased such activity. A tax administration may presume in particular that a person has ceased economic activity when, despite being required to do so, that person has failed to submit VAT returns and recapitulative statements for a year after expiry of the deadline for submission of the first return or statement missed. The person shall have the right to prove the existence of an economic activity by other means;

…’

Portuguese law

9 Article 183 of the VAT Directive was transposed into Portuguese law by Article 22(4) to (6) of the Código do Imposto sobre o Valor Acrescentado (Value Added Tax Code).

10 Article 22 of the Value Added Tax Code, in the version resulting from Lei n.º 10/2009 (Law No 10/2009) of 10 March 2009 (*Diário da República*, Series I, No 48, of 10 March 2009), provides:

‘…

4. Where the tax deduction to be made exceeds the amount due for taxable transactions in the corresponding period, the excess is to be deducted in the following tax periods.

5. If, after 12 months from the period in which the excess arose, there is still a credit in favour of the taxable person of more than EUR 250, that taxable person may request a refund.

6. Without prejudice to the provisions of the previous paragraph, the taxable person may request a refund before the end of the 12-month period if that person ceases activity or becomes subject to Article 29(3) and (4), Article 54(1) or Article 61(1), provided that the amount of the refund is equal to or greater than EUR 25, and where the credit in that person’s favour exceeds EUR 3 000.

…’

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

11 Modexel submitted a declaration of cessation of economic activity with effect from 28 February 2015 and set out a VAT credit in the amount of EUR 12 456.20 in its VAT return for the first quarter of 2015.

12 On 10 May 2016, Modexel resumed its economic activity. Modexel deducted that VAT credit in its first VAT return after that resumption.

13 The tax authority refused the deduction of that VAT credit, on the ground that Modexel should have requested a refund of that credit within 12 months from the date on which it ceased its economic activity and that, since Modexel had not made such a request, it had forfeited the amount at issue.

14 Modexel brought an action against the tax authority's decision before the Tribunal Administrativo e Fiscal do Funchal (Administrative and Tax Court, Funchal, Portugal), which is the referring court.

15 The referring court states that it is uncertain about the interpretation of the concept of 'following period' in the first paragraph of Article 183 of the VAT Directive. That court states that, according to the tax authority, that expression should be understood literally, as referring to the period immediately following, in the calendar, the period in respect of which the VAT credit at issue was declared. By contrast, according to Modexel, there may be, by reason of the cessation of the economic activity of the undertaking concerned, a time interval between the period in respect of which the VAT credit at issue was declared and the period in which the deduction of that credit is made, after that undertaking has resumed its economic activity.

16 In those circumstances the Tribunal Administrativo e Fiscal do Funchal (Administrative and Tax Court, Funchal) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must the expression "the following period" in Article 183 of the VAT Directive be interpreted as referring literally to the period which immediately follows in the calendar year?

(2) If the answer to question 1 is in the negative, where an undertaking ceases its activity and subsequently recommences that activity, with a period of [approximately] 15 months having elapsed between those two points in time, is that undertaking entitled to deduct the amount of the excess which it [declared] when it ceased its activity in the first assessment that it files after recommencing its activity?'

Consideration of the questions referred

17 According to settled case-law, in the procedure laid down by Article 267 TFEU providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to determine the case before it. To that end, the Court should, where necessary, reformulate the questions referred to it. It is for the Court to extract from all the information provided by the national court, in particular from the

grounds of the order for reference, the points of EU law which require interpretation, having regard to the subject matter of the dispute (judgment of 30 April 2024, *M.N. (EncroChat)*, C-670/22, EU:C:2024:372, paragraph 78 and the case-law cited).

18 It must be noted in that regard that, as is apparent from the order for reference, when it ceased its economic activity, Modexel had declared excess VAT which it sought to deduct from the VAT that it was liable to pay in the first return made after it resumed its economic activity. It is also apparent from that order for reference that the tax authority corrected that tax return, taking the view that it was not appropriate to carry that excess forward because Modexel should have requested a refund within 12 months from the date on which it ceased its economic activity.

19 In the wording of the first question, which concerns the situation where excess VAT is carried forward, the referring court does not specify the fact that the undertaking concerned ceased its economic activity and then resumed it. In the wording of the second question, the referring court does not refer to a situation such as that in the main proceedings, in which, under national legislation, an undertaking which has ceased its economic activity cannot carry forward excess VAT after that activity has been resumed, but may request a refund within 12 months from the date on which its economic activity ceased, the correction of Modexel's tax return arising from the application of that legislation.

20 In those circumstances, in order to provide the referring court with an answer which will be of use to it and enable it to determine the case before it, it is necessary, first, with a view to interpreting the concept of 'following period' within the meaning of the first paragraph of Article 183 of the VAT Directive, for the Court of Justice to proceed from the premiss that the undertaking concerned ceased its economic activity and then resumed that activity.

21 Second, it is necessary to examine whether the first paragraph of Article 183 of the VAT Directive must be interpreted as not precluding national legislation from providing that an undertaking which has ceased its economic activity may not carry forward excess VAT after that activity has been resumed, but may request a refund within 12 months from the date on which that activity ceased.

22 Consequently, it must be stated that, by its two questions, which it is appropriate to examine together, the referring court asks, in essence, whether the first paragraph of Article 183 of the VAT Directive must be interpreted as not precluding national legislation which provides that, where a taxable person ceases economic activity, that person may not carry excess VAT, declared at the time of that cessation of activity, forward to a following period and may recover that amount only by requesting a refund within 12 months from the date on which that activity ceased.

23 It should be recalled, as a preliminary point, that, according to settled case-law, the right of taxable persons to deduct the VAT due or already paid on goods purchased and services received as inputs from the VAT which they are liable to pay is a fundamental principle of the common system of VAT established by EU legislation (judgment of 6 October 2022, *Vittamed technologijos*, C-293/21, EU:C:2022:763, paragraph 38 and the case-law cited).

24 The rules governing deduction are intended to relieve the taxable person entirely of the burden of the VAT payable or paid in the course of all its economic activities. The common system of VAT therefore ensures neutrality of taxation of all economic activities, whatever their purpose or

results, provided that those activities are themselves, in principle, subject to VAT (judgment of 6 October 2022, *Vittamed technologijos*, C-293/21, EU:C:2022:763, paragraph 39 and the case-law cited).

25 As the Court has repeatedly held, it is clear that the right to deduct is an integral part of the VAT scheme and may not, in principle, be limited. In particular, the right to deduct is exercisable immediately in respect of all the taxes charged on input transactions (judgment of 6 October 2022, *Vittamed technologijos*, C-293/21, EU:C:2022:763, paragraph 40 and the case-law cited).

26 Under the first paragraph of Article 179 of the VAT Directive, the taxable person is to make the deduction by subtracting from the total amount of VAT due for a given tax period the total amount of VAT in respect of which, during the same period, the right of deduction has arisen and is exercised.

27 The first paragraph of Article 183 of that directive specifies that, where, for a given tax period, the amount of deductions exceeds the amount of VAT due, the Member States may either make a refund or carry the excess forward to the following period.

28 In the first place, as regards the concept of 'following period' referred to in that provision, as the European Commission stated in its written observations, it is apparent from the use of those words in the singular that that concept must be understood as referring to the tax period immediately following the tax period in which the amount of the deductions exceeds that of the VAT due. In addition, in accordance with Article 252 of the VAT Directive, the duration of a tax period is to be determined by each Member State within the limits laid down in the second paragraph of that article, without it being apparent from that article or from Article 183 of that directive that that duration, or the succession of tax periods, depends on the exercise by a taxable person of an economic activity for all or part of a given tax period.

29 That said, it is apparent from the case-law of the Court that the deferral of the refund of excess VAT over several tax periods following that in which the excess arose is not necessarily irreconcilable with that provision (see, to that effect, judgments of 18 October 2012, *Mednis*, C-525/11, EU:C:2012:652, paragraph 25 and the case-law cited, and of 10 February 2022, *Philips Orăştie*, C-487/20, EU:C:2022:92, paragraph 26 and the case-law cited).

30 Nevertheless, it must be borne in mind that it is the existence of an economic activity which establishes the status of 'taxable person', to whom the VAT Directive gives the right to deduct (see, by analogy, judgment of 3 March 2005, *Fini H*, C-32/03, EU:C:2005:128, paragraph 19). In order to have a right to deduct, it is necessary, inter alia, that the interested party be a 'taxable person' within the meaning of that directive (see, to that effect, judgment of 21 March 2018, *Volkswagen*, C-533/16, EU:C:2018:204, paragraph 41 and the case-law cited).

31 Under Article 9(1) of the VAT Directive, 'taxable person' is to mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity. Under Article 213(1) of the VAT Directive, the taxable person must state when that person's economic activity ceases to the tax authority; that authority must then invalidate the VAT identification number issued to that taxable person, in accordance with Article 23(a) of Regulation No 904/2010.

32 Consequently, an operator who ceases economic activity also ceases to be a taxable person liable for VAT. The loss of the status of 'taxable person' by an operator as a result of that cessation of activity means that there is no continuity of the tax periods as required by the first paragraph of Article 183 of the VAT Directive, since there is no following period, within the meaning of that provision, for that operator, or, assuming that that operator resumes an economic activity, a previous period, since that activity will be new.

33 It follows that, while the first paragraph of Article 183 of the VAT Directive allows excess VAT to be carried forward to several tax periods following the one in which the excess was generated, the cessation of the economic activity of the taxable person concerned results in there being no following period, within the meaning of the first paragraph of Article 183 of the VAT Directive, to which that excess may be carried forward.

34 Furthermore, as the Commission submits, giving an economic operator the possibility of carrying forward, after resumption of an economic activity, excess VAT declared when the previous activity ceased could encourage abuse and the establishment of artificial arrangements by economic operators. Such an operator, who, for whatever reason, has failed to comply with the time limit laid down by the national legislation for requesting a refund of excess VAT after ceasing economic activity, could claim to be resuming an economic activity with the main or exclusive purpose of requesting that that excess be carried forward. Such a possibility of deferral could also be contrary to the principle of legal certainty, as the Court has previously indicated that the possibility of exercising the right to deduct VAT without any temporal limit would be contrary to that principle, which requires the tax position of the taxable person, having regard to his or her or its rights and obligations vis-à-vis the tax authority, not to be open to challenge indefinitely (see, to that effect, judgment of 12 April 2018, *Biosafe – Indústria de Reciclagens*, C-8/17, EU:C:2018:249, paragraph 36 and the case-law cited).

35 In the present case, it is apparent from the order for reference that the fact that Modexel had ceased its economic activity resulted in it no longer being subject to VAT, which it is, however, for the referring court to ascertain, and that the excess VAT could not be carried forward to a following period, within the meaning of the first paragraph of Article 183 of the VAT Directive, on account of there being no continuity between the tax period corresponding to the month in which that company ceased its activity, namely February 2015, and the tax period corresponding to the month in which that company resumed its activity, namely May 2016.

36 In the second place, as noted in paragraph 27 of the present judgment, the first paragraph of Article 183 of the VAT Directive nevertheless provides that the Member States may, in accordance with conditions which they must determine, either make a refund or carry the excess VAT forward to the following period.

37 It is apparent from the order for reference that, in principle, the Portuguese legislation combines those two methods of refunding excess VAT, but that, if an operator ceases all economic activity, that operator may request a refund of the excess before the end of a 12-month period beginning from the period in which the excess arose.

38 First, it must be recalled that Article 183 of the VAT Directive cannot be interpreted as meaning that refunding and carrying forward are mutually exclusive (judgment of 12 May 2011, *Enel Maritsa Iztok 3*, C-107/10, EU:C:2011:298, paragraph 47).

39 Second, it is 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 (judgment of 12 May 2021, *technoRent International and Others*, C-844/19, EU:C:2021:378, paragraph 37 and the case-law cited).

40 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 2021, *technoRent International and Others*, C-844/19, EU:C:2021:378, paragraph 38 and the case-law cited).

41 Furthermore, the procedural autonomy of the Member States in implementing the right to a refund of excess VAT provided for in Article 183 of the VAT Directive is circumscribed by the principles of equivalence and effectiveness (see, to that effect, judgment of 10 February 2022, *Philips Orăştie*, C-487/20, EU:C:2022:92, paragraph 24).

42 Thus, a limitation period the expiry of which has the effect of penalising a taxable person who has not been sufficiently diligent and has failed to claim a refund of VAT, by making it forfeit its right to that refund, cannot be regarded as incompatible with the regime established by the VAT Directive in so far as, first, that limitation period applies in the same way to analogous rights in tax matters founded on domestic law and to those founded on EU law (principle of equivalence) and, second, it does not in practice render impossible or excessively difficult the exercise of the right to a refund of VAT (principle of effectiveness) (see, by analogy, judgment of 12 September 2024, *NARE-BG*, C-429/23, EU:C:2024:742, paragraph 52).

43 While it is for the national court to determine whether national measures are compatible with EU law, the Court may, however, provide it with any helpful guidance to resolve the dispute before it (judgment of 14 February 2019, *Nestrade*, C-562/17, EU:C:2019:115, paragraph 36 and the case-law cited).

44 As regards the principle of equivalence, it should be noted that the Court does not have before it any evidence which might raise uncertainty as to the compliance of the legislation at issue in the main proceedings with that principle.

45 As regards the principle of effectiveness, it is apparent from the order for reference that, according to the tax authority, Modexel should have requested a refund of the excess VAT within 12 months from the date on which it ceased its economic activity.

46 In that regard, it is for the referring court to ascertain the time limit within which Modexel had to request a refund of the excess VAT declared when it ceased its activity, the Portuguese Government having stated in its written observations that the time limit applicable in the present case is four years. A limitation period of 12 months from the period in which the excess VAT arose, as stated in the order for reference, does not seem liable to make it impossible or excessively difficult in practice for a taxable person or a former taxable person to assert his or her or its right to a refund of excess VAT. The same conclusion applies a fortiori in the case of a limitation period of four years.

47 In the present case, it is in no way apparent from the order for reference that Modexel sought to assert its right to a refund of excess VAT, declared when it ceased its economic activity, before the end of that 12-month period, and encountered difficulties in that regard. In those circumstances, it must be held that, subject to verification by the referring court, the exercise by Modexel of its right to a refund of VAT was not rendered impossible or excessively difficult in practice.

48 In the light of the foregoing considerations, the answer to the questions referred is that the first paragraph of Article 183 of the VAT Directive must be interpreted as not precluding national legislation which provides that, where a taxable person ceases economic activity, that person may not carry excess VAT, declared at the time of that cessation of activity, forward to a following period and may recover that amount only by requesting a refund within 12 months from the date on which that activity ceased, provided that the principles of equivalence and effectiveness are observed.

Costs

49 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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 (Eighth Chamber) hereby rules:

The first paragraph of Article 183 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax

must be interpreted as not precluding national legislation which provides that, where a taxable person ceases economic activity, that person may not carry excess value added tax, declared at the time of that cessation of activity, forward to a following period and may recover that amount only by requesting a refund within 12 months from the date on which that activity ceased, provided that the principles of equivalence and effectiveness are observed.

[Signatures]