



Vastuvõtmise kuupäev : 14/12/2022

Case C-674/22

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

31 October 2022

Referring court:

Rechtbank Gelderland (Netherlands)

Date of the decision to refer:

26 October 2022

Applicant:

Gemeente Dinkelland

Defendant:

Ontvanger van de Belastingdienst/Grote ondernemingen, kantoor
Zwolle

Subject matter of the main proceedings

At issue in the main proceedings is whether the applicant has a right to the reimbursement of recovery interest on turnover tax refunds because of the possibility that tax was levied in breach of EU law.

Subject matter and legal basis of the request for a preliminary ruling

The request for a preliminary ruling pursuant to Article 267 TFEU concerns the question of whether default interest must be paid in respect of a refund of tax levied in breach of EU law if that refund results from administrative errors on the part of the taxable person or from recalculations arising from a change in the law.

Questions referred for a preliminary ruling

1. Must the legal rule that default interest must be reimbursed because there is a right to a refund of taxes levied in breach of EU law be interpreted as

meaning that, where a taxable person has been granted a refund of turnover tax, default interest must be reimbursed to that taxable person in a situation where:

- a. the refund is the result of administrative errors on the part of the taxable person, as described in this ruling, and for which the inspector cannot be blamed in any way;
 - b. the refund is the result of a recalculation of the allocation key for the deduction of turnover tax on general costs, under the circumstances described in this ruling?
2. If question 1 is answered in the affirmative, from what day is there a right to the reimbursement of default interest?

Provisions of EU law relied on

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax.

Provisions of national law relied on

Invorderingswet 1990 (Law on Tax Collection of 1990), Article 28c.

Wet op de omzetbelasting 1968 (Law on Turnover Tax of 1968).

Wet op het btw-compensatiefonds (Law on the VAT Compensation Fund).

Succinct presentation of the facts and procedure in the main proceedings

- 1 The applicant is a Netherlands municipality. As such, in addition to activities in its capacity as a public authority, it also carries out economic activities. The latter activities are subject to the ordinary tax regulations under Directive 2006/112 (‘the VAT Directive’) and the Law on Turnover Tax of 1968 in relation to the payment of turnover tax and the deduction of input tax (the VAT paid on the purchase of goods and services relating to economic activities). On activities other than economic activities, the municipality levies turnover tax or is charged such tax by companies in exactly the same way. In the latter case, however, the municipality can recover this tax under the Law on the VAT Compensation Fund (‘the BCF’) subject to certain exceptions.
- 2 The applicant’s turnover tax returns for the years 2012 to 2016 apparently required retrospective adjustment. This resulted in a tax refund which the inspector approved and which was subsequently paid to the applicant. The dispute concerns whether default interest must also be paid on this amount.

- 3 Of relevance here is the cause of the adjustments to the turnover tax returns. In the first instance, these were the result of changes in the calculation of the contributions that the applicant received from the BCF in the event that the turnover tax did not relate to economic activities. Since it is not always easy to determine whether the activities concerned are economic or non-economic, the applicant applies an apportionment key indicating the portion of the input tax paid that is deductible and the part that entitles it to a contribution from the BCF. Due to certain legislative changes, the applicant's administrative procedures had to be adjusted with effect from 2016. This also changed the method of calculating the apportionment key and, consequently, the calculation of the tax deduction. Only in 2020 did the tax authorities approve the new calculation method and the resulting deduction.
- 4 In the course of this adjustment of the municipal administrative procedures, the applicant also discovered several administrative errors that also affected the turnover tax refund. These errors are not in themselves in dispute. The tax inspector approved the corrected returns. However, the existence of administrative errors on the part of the applicant is relevant to the question of whether payment of default interest can be claimed.
- 5 When claiming payment of default interest, the Netherlands distinction between tax interest and recovery interest must be taken into account. Tax interest is charged by the tax authorities if, at the end of a tax period, too little tax has been paid. There is a right to its reimbursement if the processing of a refund request has taken more than eight weeks or if, broadly speaking, the refund is the result of the inspector's actions. In principle, this tax interest is calculated for the period starting three months after the start of the year following the year in which the tax was paid.
- 6 The same rules apply to a contribution from the BCF. As a result, a municipality that has wrongly deducted input tax but is entitled to a higher contribution from the BCF must in principle pay tax interest, but will not be reimbursed the tax interest on the corresponding additional amount of BCF contribution. Conversely, tax interest must be paid on a repayment of funds received from the BCF, but a corresponding turnover tax refund is paid without tax interest.
- 7 Recovery interest is charged if an assessment is paid late. Conversely, this interest is reimbursed if a refund is not paid out to the taxable person quickly enough and, exceptionally, in the case of refunds following the revision of an assessment.
- 8 According to the Court of Justice of the European Union ('the Court'), where tax has been levied in breach of EU law, interest must be paid, as is apparent from the judgment of 18 April 2013, *Irimie*, C-565/11, ECLI:EU:C:2013:250, paragraphs 20 to 23. Following this judgment, the Netherlands legislature stipulated in Article 28c of the Law on Tax Collection ('the IW') that recovery interest would be reimbursed if tax was levied in breach of EU law. It is the Ontvanger van de belastingdienst (the Receiver of the Customs and Tax

Administration), the defendant in this case, who is responsible for doing so and not the tax inspector, who determines the assessments.

- 9 Such recovery interest is paid from the day on which the tax was remitted. Thus, it is only the reimbursement of recovery interest resulting from tax levied in breach of EU law that offers the applicant in the present case the possibility of receiving a full reimbursement of interest. Tax interest comes into play only in so far as it is attributable to the inspector's actions and even then for a more limited period.
- 10 In the present case, on 31 July 2020, the applicant requested the reimbursement of recovery interest under Section 28c IW on the turnover tax refunds granted. After the defendant rejected that request, the applicant filed a notice of objection, which the defendant also rejected. The applicant then lodged an appeal with the referring court.

The essential arguments of the parties in the main proceedings

- 11 According to the applicant, recovery interest must be paid because the condition laid down in Article 28c IW that the 'tax has been levied in breach of Union law' has been fulfilled. It points, inter alia, to the Court's judgment of 19 July 2012, *Littlewoods Retail*, C-591/10, ECLI:EU:C:2012:478, where it was held that interest was payable because an incorrect taxable amount had been applied when calculating VAT.
- 12 First, the defendant is of the view that there is no question of a refund of tax previously levied, as required by section 28c IW. The refunds relate solely to input tax to be repaid to the applicant. The applicant had wrongly not deducted that input tax. The case does not concern the refund of turnover tax due. Second, in so far as it does concern a refund of previously levied tax, the defendant is of the view that there is no question of tax having been levied in breach of EU law.

Succinct presentation of the reasoning in the request for a preliminary ruling

- 13 According to the referring court, it is immaterial that the refunds granted relate primarily to input tax that was wrongfully not initially deducted. Indeed, it makes no difference to the final amount of tax to be paid whether less turnover tax has to be paid or indeed, whether more input tax may be deducted. Both situations result in a lower tax return and only that is relevant to the question of whether tax has been levied.
- 14 According to the referring court, in determining whether that tax was levied in breach of EU law, a distinction must be drawn between the corrections resulting from administrative errors and those resulting from the recalculation of the apportionment key.

- 15 It is not disputed that the inspector cannot be blamed for the applicant's administrative errors. The question is whether interest should nevertheless be paid as the applicant believes it should, relying on the *Littlewoods Retail* judgment. According to the referring court, however, it is not clear from that judgment whether the error at issue there was to be attributed solely to the applicant in that case or also to the UK tax authorities.
- 16 The cases leading to the Court's judgment of 28 April 2022, *Gräfendorfer Geflügel und Tiefkühlfeinkost*, C-415/20, C-419/20 and C-427/20, EU:C:2022:306, concerned the question of whether, for the purposes of the payment of interest, the nature of the infringement of EU law is relevant. According to the referring court, the Court found, inter alia, that the right to payment of interest is the expression of a general principle the application of which is not limited to certain breaches of EU law. However, it cannot be ascertained from the Court's case-law whether, when determining whether default interest should be reimbursed, it is relevant whether the person concerned can be blamed for initially paying too much tax. It does not seem unreasonable to the referring court in the present case to adopt an exception to the general rule requiring the reimbursement of interest on the ground that the tax authority played no role whatsoever in determining the amount of turnover tax due. After all, the turnover tax payable is calculated in the first instance by the taxable person him- or herself.
- 17 By contrast, the corrections that resulted solely from the recalculation of the apportionment key were not only the result of mistakes made by the applicant. Those corrections were necessary in the first instance following a legislative change that came into force in 2016. Due to lengthy deliberations within the tax administration, the inspector only approved the new calculation method in 2020, also agreeing to apply this new method for the years from 2012 onwards.
- 18 Having regard to that, there are reasonable doubts as to how the term 'tax levied in breach of EU law' must be interpreted when reimbursing default interest. The referring court therefore refers questions on that term for a preliminary ruling. It also wishes to ascertain the period for which default interest must be paid.