H&I 2024/87

Gemeente Dinkelland. No obligation to pay interest on VAT refund after errors made in the taxable person's accounts. Court of Justice

CJ 22-02-2024, C-674/22 (Uitspraak), m.nt. Marie Lamensch (Gemeente Dinkelland)

Instantie	Court of Justice of the European Union
Datum	22 februari 2024
Magistraten	C. Lycourgos, O. Spineanu-Matei, J.-C. Bonichot, S. Rodin, L.S. Rossi
Zaaknummer	C-674/22
Noot	Marie Lamensch
Roepnaam	Gemeente Dinkelland
JCDI	JCDI:ADS957382:1
Vakgebied(en)	Invordering / Invorderingsrente en betalingskorting Omzetbelasting / Aftrek en teruggaaf
Brondocumenten	Uitspraak, Court of Justice of the European Union, 22-02-2024 Beroepschrift, Court of Justice of the European Union, 31-10-2022
Wetingang	Invorderingswet 1990 Article 28c; Council Directive 2006/112/EC Article 9, 168, 173, 183, 203, 250

Essentie

Judgment of the Court of Justice in the case Gemeente Dinkelland. EU law must be interpreted as not requiring the payment of interest to a taxable person as from the payment of an amount of VAT which is subsequently refunded by the tax authority, where that refund results, in part, from the finding that that taxable person, due to errors in its accounts, did not fully exercise its right to deduct input VAT for the years concerned and, in part, from an amendment, with retroactive effect, of the detailed rules for calculating the deductible VAT relating to the general costs of that taxable person where those rules are established under the sole responsibility of that taxable person.

Samenvatting

Facts and question referred to the CJ

The Dinkelland municipality carries out both non-economic activities, i.e., activities which it performs in its capacity as a public authority, and economic activities. Therefore, for each invoice issued to it which includes VAT, the municipality must determine whether the goods or services acquired are attributable to a non-economic activity or an economic activity and, in the latter case, whether it is entitled to deduct input VAT.

An allocation key is applied for general costs, which is determined by the Dinkelland municipality.

In 2016, the Dinkelland municipality changed the allocation key for its general costs, partly due to changes in the national legislation on municipal accounting, which increased the right to deduct VAT, and partly due to the

Alle (auteurs-)rechten op dit document berusten bij Wolters Kluwer Nederland B.V. of haar licentiegevers en worden uitdrukkelijk voorbehouden. Dit document is gegenereerd op 03.05.2024.
Kijk voor meer informatie over de diensten van Wolters Kluwer op www.wolterskluwer.nl.

correction of errors in the characterisation of certain services and in the accounting of certain debit or credit entries. As a result, the Dinkelland municipality lodged a refund request for a total amount of EUR 705,943.00, which was accepted by the tax authorities. The Dinkelland municipality also claimed the payment of interest in the amount of EUR 75,498.00, which the tax administration rejected.

The Dinkelland municipality brought an action against that decision before the rechtbank Gelderland (District Court, Gelderland, Netherlands), which referred questions to the Court of Justice of the European Union (hereinafter: "CJ"). In essence, the referring court asked the CJ whether EU law must be interpreted as meaning that it requires the payment of interest to a taxable person as from the payment of an amount of VAT, which is subsequently refunded by the tax authority, where that refund results, in part, from the finding that that taxable person, due to errors in its accounts, did not fully exercise its right to deduct input VAT for the years concerned and, in part, from an amendment, with retroactive effect, of the detailed rules for calculating the deductible VAT relating to that taxable person's general costs.

CJ judgment

The CJ first recalled a few principles:

- The principle that Member States are required to reimburse taxes levied in breach of EU law with interest derives from EU law itself. However, an amount of VAT cannot be regarded as having been levied 'in breach of EU law' when the taxable person has wrongly failed to exercise his right to deduct.
- The principle of effectiveness cannot have the effect of depriving the taxable person of appropriate compensation for the damage caused by the undue payment of the tax.
- As regards the calculation of the allocation key, while respecting the principles underlying the common system of VAT, it is for the Member States to establish methods and criteria enabling taxable persons to make the necessary calculations. Member States must exercise their discretion in such a way as to ensure that the deduction is made only in respect of that part of the VAT which relates to the transactions in respect of which VAT is deductible. They must, therefore, ensure that the calculation of the proportion between economic and non-economic activities objectively reflects the actual share of input expenditure allocated to each of those two activities.

The CJ then noted that it is not apparent from the file that any inaccuracy in the tax classification of certain activities initially established by the Dinkelland municipality, which was amended retroactively as a result of factual and conceptual changes, is due to the applicable national legislation or to a requirement of the tax authorities. Rather, the CJ found that the allocation key initially used by the Dinkelland municipality for the years 2012 to 2016 was determined under the sole responsibility of the latter and, accordingly, that the deductible VAT calculated on the basis of this allocation key is not an amount levied 'in breach of EU law'.

The CJ also noted that even in the absence of an amount 'levied in breach of EU law', the VAT system's fiscal neutrality principle requires that a financial loss incurred on account of a refund of excess VAT be compensated through the payment of default interest. However, the obligation to pay such interest only exists where the refund of the excess VAT is not made within a reasonable period of time.

Based on the above, the CJ ruled that EU law must be interpreted as not 'requiring the payment of interest to a taxable person as from the payment of an amount of VAT which is subsequently refunded by the tax authority, where that refund results, in part, from the finding that that taxable person, due to errors in its accounts, did not fully exercise its right to deduct input VAT for the years concerned and, in part, from an amendment, with retroactive effect, of the detailed rules for calculating the deductible VAT relating to the general costs of that taxable person where those rules are established under the sole responsibility of that taxable person'.

Uitspraak

Alle (auteurs-)rechten op dit document berusten bij Wolters Kluwer Nederland B.V. of haar licentiegevers en worden uitdrukkelijk voorbehouden. Dit document is gegenereerd op 03.05.2024.
Kijk voor meer informatie over de diensten van Wolters Kluwer op www.wolterskluwer.nl.

JUDGMENT OF THE COURT (Fourth Chamber)

22 February 2024[1]

(Reference for a preliminary ruling - Taxes levied in breach of EU law - Obligation to refund value added tax (VAT) and to pay interest on that amount - Refund resulting from errors made in the taxable person’s accounts - Refund resulting from the retroactive amendment of the detailed rules for calculating the deductible VAT relating to the taxable person’s general costs)

In Case C-674/22, ECLI:EU:C:2024:147,

REQUEST for a preliminary ruling under Article 267 TFEU from the rechtbank Gelderland (District Court, Gelderland, Netherlands), made by decision of 26 October 2022, received at the Court on 31 October 2022, in the proceedings

Gemeente Dinkelland

v

Ontvanger van de Belastingdienst/Grote ondernemingen, kantoor Zwolle,

THE COURT (Fourth Chamber),

composed of C. Lycourgos (Rapporteur), President of the Chamber, O. Spineanu-Matei, J.-C. Bonichot, S. Rodin and L.S. Rossi, Judges,

Advocate General: G. Pitruzzella,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Gemeente Dinkelland, by D. van der Zijden, tax advisor,
- the Netherlands Government, by M.K. Bulterman and J.M. Hoogveld, acting as Agents,
- the European Commission, by J. JokubauskaitÄ— and W. Roels, acting as Agents,

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

gives the following

Judgment

1

This request for a preliminary ruling concerns the interpretation of EU law on the obligation of Member States to pay interest on the refunded value added tax (VAT) amount levied in breach of EU law.

2

The request has been made in proceedings between the Gemeente Dinkelland (Dinkelland municipality, Netherlands) and the Ontvanger van de Belastingdienst/Grote ondernemingen, kantoor Zwolle (Collector of the Tax Authority for Large Businesses, Zwolle office, Netherlands) (‘the tax authority’), concerning the latter's

Alle (auteurs-)rechten op dit document berusten bij Wolters Kluwer Nederland B.V. of haar licentiegevers en worden uitdrukkelijk voorbehouden. Dit document is gegenereerd op 03.05.2024.
Kijk voor meer informatie over de diensten van Wolters Kluwer op www.wolterskluwer.nl.

refusal to pay recovery interest to the Dinkelland municipality on an amount of VAT refunded to that municipality.

Legal context

European Union law

3
Article 9 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') states:

'1. '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.

2. In addition to the persons referred to in paragraph 1, any person who, on an occasional basis, supplies a new means of transport, which is dispatched or transported to the customer by the vendor or the customer, or on behalf of the vendor or the customer, to a destination outside the territory of a Member State but within the territory of the Community, shall be regarded as a taxable person.'

4
Article 168 of the directive reads as follows:
'In so far as the goods and services are used for the purposes of the taxed transactions of a taxable person, the taxable person shall be entitled, in the Member State in which he carries out these transactions, to deduct the following from the VAT which he is liable to pay:

(a) the VAT due or paid in that Member State in respect of supplies to him of goods or services, carried out or to be carried out by another taxable person;

(b) the VAT due in respect of transactions treated as supplies of goods or services pursuant to Article 18(a) and Article 27;

(c) the VAT due in respect of intra-Community acquisitions of goods pursuant to Article 2(1)(b)(i);

(d) the VAT due on transactions treated as intra-Community acquisitions in accordance with Articles 21 and 22;

(e) the VAT due or paid in respect of the importation of goods into that Member State.'

5
Article 173 of that directive provides:

'1. In the case of goods or services used by a taxable person both for transactions in respect of which VAT is deductible pursuant to Articles 168, 169 and 170, and for transactions in respect of which VAT is not deductible, only such proportion of the VAT as is attributable to the former transactions shall be deductible.

The deductible proportion shall be determined … for all the transactions carried out by the taxable person.

2. Member States may take the following measures:

Alle (auteurs-)rechten op dit document berusten bij Wolters Kluwer Nederland B.V. of haar licentiegevers en worden uitdrukkelijk voorbehouden. Dit document is gegenereerd op 03.05.2024.
Kijk voor meer informatie over de diensten van Wolters Kluwer op www.wolterskluwer.nl.

…

(c) authorise or require the taxable person to make the deduction on the basis of the use made of all or part of the goods and services;

…'

6
As provided in Article 183 of the VAT Directive:
'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.'

7
Article 203 of the VAT Directive reads as follows:
'VAT shall be payable by any person who enters the VAT on an invoice.'

8
Article 250(1) of that directive states:
'Every taxable person shall submit a VAT return setting out all the information needed to calculate the tax that has become chargeable and the deductions to be made including, in so far as is necessary for the establishment of the basis of assessment, the total value of the transactions relating to such tax and deductions and the value of any exempt transactions.'

Netherlands law

9
Article 28c of the Invorderingswet 1990 (Law on Tax Collection of 1990) ('the Collection Law') provides:

'1. If the collector is required, pursuant to a decision of the inspector, to refund an amount of tax because the amount in question has been levied in breach of EU law, recovery interest shall be paid to the taxpayer at his or her request.

2. The recovery interest referred to in paragraph 1 shall be calculated as simple interest for the period starting on the day following that on which the charge or tax was paid, settled or remitted and ending on the day preceding that of the refund and shall be based on the amount which will be refunded or which has been refunded to the taxpayer. By way of derogation from the first sentence, the recovery interest referred to in paragraph 1 shall not be calculated with respect to the days for which tax interest is paid under Chapter VA of [the Algemene wet inzake rijksbelastingen (General Law on State Taxes)] or for which recovery interest is paid pursuant to Article 28b.

…'

10
According to Article 30ha of the Algemene wet inzake rijksbelastingen (General Law on State Taxes), if a decision to refund is not adopted within eight weeks of receipt of the refund application, interest is to be granted for the period starting eight weeks after the receipt of the refund application and ending 14 days after the date of the decision to refund. Where the refund relates to a position adopted by the tax authority concerning the payment of the tax paid by way of a tax return, interest shall also be paid for the period starting on the day following the date of payment and ending 14 days after the date of the decision to refund. In other cases, there is no need to pay interest.

11
The Wet op het BTW-compensatiefonds (Law on the VAT compensation fund) is applicable only to

Alle (auteurs-)rechten op dit document berusten bij Wolters Kluwer Nederland B.V. of haar licentiegevers en worden uitdrukkelijk voorbehouden. Dit document is gegenereerd op 03.05.2024.
Kijk voor meer informatie over de diensten van Wolters Kluwer op www.wolterskluwer.nl.

municipalities, to provinces and to regional public bodies authorised to grant public transport concessions. Under that law, those public entities are entitled to a contribution from the VAT compensation fund ('the BCF') in order to offset the VAT relating to the goods and services which they use in the course of non-economic activities.

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

12

The Dinkelland municipality carries out both non-economic activities, in particular activities which it performs in its capacity as a public authority, and economic activities. The latter may be either subject to VAT or exempt from VAT.

13

As regards its economic activities, the Dinkelland municipality is a taxable person within the meaning of Article 9 of the VAT Directive. Therefore, provided that the conditions laid down in Article 168 of that directive are satisfied, that municipality has the right to deduct the VAT charged to it by its suppliers of goods and services.

14

As regards its non-economic activities, the Dinkelland municipality is not regarded as a taxable person for VAT purposes and, therefore, does not have the right to deduct input VAT, but it is entitled to a contribution from the BCF, which allows it to offset the VAT paid or payable by it.

15

Thus, for each invoice issued to it which includes VAT, that municipality must determine whether the goods or services acquired are attributable to a non-economic activity or to an economic activity and, in the latter case, whether it is entitled to deduct input VAT.

16

The general costs of that municipality, which cannot be directly attributed to a particular activity, may give rise, in part, to a deduction of VAT and, in part, to a contribution from the BCF. The respective scopes of that deduction and of that contribution are established by the Dinkelland municipality, on the basis of its accounts, by applying an input tax allocation key.

17

For the years 2012 to 2016, that municipality paid VAT and received contributions from the BCF on the basis of its returns.

18

Following amendments to the national legislation on municipal accounting, applicable from 14 April 2016, and the amendment of the classification for tax purposes of some of its activities, the Dinkelland municipality developed a new input VAT allocation key, in accordance with which the entitlement to a contribution from the BCF was reduced and the right to deduct that VAT was increased.

Alle (auteurs-)rechten op dit document berusten bij Wolters Kluwer Nederland B.V. of haar licentiegevers en worden uitdrukkelijk voorbehouden. Dit document is gegenereerd op 03.05.2024.
Kijk voor meer informatie over de diensten van Wolters Kluwer op www.wolterskluwer.nl.

19

In addition, that municipality had its accounts examined, which revealed errors in the classification of certain services provided by it and in the entry of certain debit or credit line items.

20

The corrections made to the accounts of the Dinkelland municipality for those two reasons led to a recalculation of the VAT owed and of the deductible input VAT for the years 2012 to 2016. On that basis, on 29 September 2017, the municipality applied for a refund of part of the VAT paid in respect of those years.

21

By decision of 1 July 2020, the tax authority refunded the amount claimed, for a total of EUR 705 943. On the basis of Article 30ha of the General Law on State Taxes, the tax authority also paid tax interest, in the amount of EUR 75 498, calculated on the amount refunded, in respect of the period starting eight weeks after receipt of the refund application and ending 14 days after notification of the decision to refund.

22

On 31 July 2020, the Dinkelland municipality applied for payment of the recovery interest provided for in Article 28c of the Collection Law, calculated on the amount refunded, in respect of a period starting on the date of payment of the VAT. The tax authority rejected that application by a decision of 9 September 2020, confirmed by a decision of 15 July 2021, rejecting the municipality's complaint.

23

The Dinkelland municipality brought an action against that decision before the rechtbank Gelderland (District Court, Gelderland, Netherlands), which is the referring court.

24

That court notes that the tax authority did not apply Article 28c of the Collection Law, adopted following the judgment of 18 April 2013, *Irimie* (C-565/11, EU:C:2013:250), and which provides that, where a tax levied in breach of EU law is refunded, interest must be paid to the taxable person in respect of a period starting on the day following the payment of that tax.

25

Unlike the tax authority, the referring court considers that a refund resulting from an increase in the input VAT the deduction of which was not claimed previously, does indeed relate to an amount ‘levied’ within the meaning of Article 28c of the Collection Law. Nevertheless, that court is uncertain whether the amount refunded in the present case was levied in breach of EU law.

26

According to that court, the tax authority cannot be held responsible for errors made in the accounts of the Dinkelland municipality. However it follows from paragraph 56 of the judgment of 28 April 2022, *Gräfendorfer Geflügel- und Tiefkühlfeinkost Produktions and Others* (C-415/20, C-419/20 and C-427/20, EU:C:2022:306), that the obligation to pay interest on the amount refunded results from the unavailability, during a given period of time, of the amount wrongly paid, irrespective of any fault on the part of the taxable person.

Alle (auteurs-)rechten op dit document berusten bij Wolters Kluwer Nederland B.V. of haar licentiegevers en worden uitdrukkelijk voorbehouden. Dit document is gegenereerd op 03.05.2024.
Kijk voor meer informatie over de diensten van Wolters Kluwer op www.wolterskluwer.nl.

27

As regards the amendment of the input VAT allocation key, the referring court asks whether, given that the VAT refund resulting from that amendment is essentially the result of the change in the accounting rules applicable to municipalities, the unavailability of that amount could be regarded as arising from a breach of EU law.

28

In those circumstances, the rechtbank Gelderland (District Court, Gelderland) decided to stay the proceedings and to refer the following questions to the Court of Justice 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?'

Consideration of the questions referred

29

By its two questions, which it is appropriate to answer together, the referring court asks, in essence, whether EU law must be interpreted as meaning that it requires the payment of interest to a taxable person as from the payment of an amount of VAT which is subsequently refunded by the tax authority, where that refund results, in part, from the finding that that taxable person, due to errors in its accounts, did not fully exercise its right to deduct input VAT for the years concerned and, in part, from an amendment, with retroactive effect, of the detailed rules for calculating the deductible VAT relating to that taxable person's general costs.

30

Where a Member State has levied charges in breach of the rules of EU law, individuals are entitled to reimbursement not only of the tax unduly levied but also of the amounts paid to that State or retained by it which relate directly to that tax. That also includes losses constituted by the unavailability of sums of money as a result of a tax being levied prematurely (judgments of 12 December 2006, *Test Claimants in the FII Group Litigation*, C-446/04, EU:C:2006:774, paragraph 205, and of 23 April 2020, *Sole-Mizo and Dalmandi MezÅ'gazdasági*, C-13/18 and C-126/18, EU:C:2020:292, paragraph 35 and the case-law cited).

31

It is clear from that case-law that the principle of the obligation of Member States to repay with interest amounts of tax levied in breach of EU law follows from that law (judgment of 23 April 2020, *Sole-Mizo and Dalmandi MezÅ'gazdasági*, C-13/18 and C-126/18, EU:C:2020:292, paragraph 36 and the case-law cited).

32

Alle (auteurs-)rechten op dit document berusten bij Wolters Kluwer Nederland B.V. of haar licentiegevers en worden uitdrukkelijk voorbehouden. Dit document is gegenereerd op 03.05.2024.
Kijk voor meer informatie over de diensten van Wolters Kluwer op www.wolterskluwer.nl.

In a situation of repayment of a tax levied by a Member State in breach of EU law, the principle of effectiveness requires that the national rules referring, in particular, to the calculation of interest which may be due should not lead to depriving the taxpayer of an adequate indemnity for the loss occasioned through the undue payment of the tax (see, to that effect, judgments of 19 July 2012, *Littlewoods Retail and Others*, C-591/10, EU:C:2012:478, paragraph 29, and of 23 April 2020, *Sole-Mizo and Dalmandi MezÅ‘gazdasági*, C-13/18 and C-126/18, EU:C:2020:292, paragraph 43 and the case-law cited).

33

That loss depends, inter alia, on the duration of the unavailability of the sum unduly levied in breach of EU law and thus occurs, in principle, in the period between the date of the undue payment of the tax at issue and the date of repayment thereof (judgment of 18 April 2013, *Irimie*, C-565/11, EU:C:2013:250, paragraph 28).

34

Therefore, in order to determine whether EU law requires the payment of interest to a taxable person from the payment of an amount of VAT which is subsequently refunded, it is necessary to determine whether that amount must be regarded as having been ‘levied in breach of EU law’, within the meaning of the case-law referred to in paragraphs 30 to 33 above.

35

In the first place, an amount of VAT levied because the taxable person has not exercised its right to deduct constitutes an amount ‘levied’ or ‘collected.

36

In the second place, as regards the concept of a ‘breach of EU law’, first, where the taxable person invoices VAT in error, it is levied not in breach of EU law, but pursuant to Article 203 of the VAT Directive, which provides that VAT is to be payable by any person who enters the VAT on an invoice (see, to that effect, judgment of 13 October 2022, *HUMDA*, C-397/21, EU:C:2022:790, paragraph 34 and the case-law cited).

37

In addition, under Article 250(1) of the VAT Directive, every taxable person must submit a VAT return setting out all the information needed to calculate the tax that has become chargeable and the deductions to be made. Accordingly, the tax authority does not act in breach of EU law when it levies an amount of VAT on the basis of that return, even if the taxable person, for its own reasons, has not provided the information necessary to establish the extent of its right to deduct, provided for in Article 168 of that directive, and thus has not exercised that right.

38

Therefore, an amount of VAT cannot be regarded as being levied ‘in breach of EU law’ because the taxable person erroneously failed to exercise its right of deduction.

39

Secondly, an amount of VAT refunded on account of the amendment, with retroactive effect, of the detailed rules for calculating the deductible VAT relating to a taxable person's general costs can be regarded as having been levied ‘in breach of EU law’, within the meaning of the case-law referred to in paragraphs 30 to 33 above, only if the initial rules for that calculation, which formed the basis for the levy of that amount, are

Alle (auteurs-)rechten op dit document berusten bij Wolters Kluwer Nederland B.V. of haar licentiegevers en worden uitdrukkelijk voorbehouden. Dit document is gegenereerd op 03.05.2024.
Kijk voor meer informatie over de diensten van Wolters Kluwer op www.wolterskluwer.nl.

incompatible with EU law on account of the applicable national legislation or a requirement on the part of the tax authority.

40

In that regard, it should be observed that, under Article 168 of the VAT Directive, input VAT is deductible only where the goods or services for which it has been paid are used for the purposes of taxed transactions.

41

The amounts of input VAT paid in respect of general costs correspond to the acquisition of goods and services used for the taxable person's activities as a whole.

42

Therefore, a distinction must be drawn between, on the one hand, the allocation of those amounts of VAT according to whether the general costs relate to economic activities or non-economic activities and, on the other hand, where those costs relate to economic activities, their allocation according to whether they relate to taxed transactions, in respect of which VAT is deductible, or to exempt transactions in respect of which VAT is not deductible.

43

As regards the allocation of amounts of input VAT according to whether the relevant expenditure relates to economic activities or to non-economic activities, it should be borne in mind that input VAT relating to the acquisition of goods and services by a taxable person cannot give rise to a right to deduct in so far as those goods and services have been used for activities which, in view of their non-economic nature, do not fall within the scope of the VAT Directive (see, to that effect, judgment of 16 September 2021, *Balgarska natsionalna televizia*, C-21/20, EU:C:2021:743, paragraph 54 and the case-law cited).

44

The provisions of the VAT Directive do not include rules relating to the methods or criteria which the Member States are required to apply when adopting provisions permitting the allocation of input VAT according to whether the relevant expenditure relates to economic activities or to non-economic activities (see, by analogy, judgment of 13 March 2008, *Securenta*, C-437/06, EU:C:2008:166, paragraph 33).

45

In those circumstances, and so that taxpayers can make the necessary calculations, it is for the Member States to establish methods and criteria appropriate to that aim and consistent with the principles underlying the common system of VAT (see, by analogy, judgment of 13 March 2008, *Securenta*, C-437/06, EU:C:2008:166, paragraph 34).

46

Accordingly, the Member States must exercise their discretion in such a way as to ensure that deduction is made only for that part of the VAT proportional to the amount relating to transactions in respect of which VAT is deductible. They must therefore ensure that the calculation of the proportion of economic activities to non-economic activities objectively reflects the part of the input expenditure actually to be attributed, respectively, to those two types of activity (see, by analogy, judgment of 13 March 2008, *Securenta*, C-437/06, EU:C:2008:166, paragraph 37).

Alle (auteurs-)rechten op dit document berusten bij Wolters Kluwer Nederland B.V. of haar licentiegevers en worden uitdrukkelijk voorbehouden. Dit document is gegenereerd op 03.05.2024.
Kijk voor meer informatie over de diensten van Wolters Kluwer op www.wolterskluwer.nl.

47

When exercising that discretion, the Member States have the right to apply, as necessary, any appropriate allocation key (see, by analogy, judgment of 13 March 2008, *Securenta*, C-437/06, EU:C:2008:166, paragraph 38).

48

As regards the allocation of input VAT according to whether the relevant expenditure relates to transactions in respect of which VAT is deductible or to transactions in respect of which VAT is not deductible, it is apparent from Article 173(1) of the VAT Directive that only such proportion of the VAT is deductible as is attributable to transactions in respect of which VAT is deductible. Under Article 173(2)(c) of that directive, Member States may authorise or require the taxable person to make the deduction on the basis of the use made of all or part of the goods and services.

49

Therefore, provided that the requirements set out in paragraphs 43 to 48 above are complied with, EU law does not preclude a Member State from authorising or requiring a taxable person to establish, by means of an allocation key drawn up under its responsibility, the detailed rules for calculating the deductible VAT relating to its general costs.

50

In the present case, the calculation of the deductible VAT relating to the general costs of the Dinkelland municipality is the result of a key, established by that municipality on the basis of its accounts, enabling those costs to be allocated between the non-economic activities and the economic activities of that municipality and, as regards the economic activities, between taxable transactions, in respect of which VAT is deductible, and exempt transactions, in respect of which VAT is not deductible. The municipality obtained a refund of the amount of VAT in question on account of the retroactive application of a new allocation key to the years 2012 to 2016.

51

In response to a request for clarification, which the Court sent on 19 July 2023, the referring court stated that, under Netherlands legislation, actual use is the criterion for attributing goods and services, including those relating to general costs, to a non-economic activity or to an economic activity and, as regards the latter, to transactions in respect of which VAT is deductible.

52

Accordingly, there is nothing to indicate that the Netherlands legislation at issue in the main proceedings does not comply with the requirements set out in paragraphs 43 to 48 above.

53

That said, it is also apparent from the referring court's response to the request for clarification that that legislation does not specify the detailed rules for determining the actual use of goods and services covered by general costs. The national legislation on municipal accounting in force until 2016 allowed, unlike the legislation which amended it, the general costs to be attributed to the main activities. The municipalities enjoyed a certain degree of discretion in implementing that attribution.

Alle (auteurs-)rechten op dit document berusten bij Wolters Kluwer Nederland B.V. of haar licentiegevers en worden uitdrukkelijk voorbehouden. Dit document is gegenereerd op 03.05.2024.
Kijk voor meer informatie over de diensten van Wolters Kluwer op www.wolterskluwer.nl.

54

The referring court also noted that, although consultations took place between the Dinkelland municipality and the tax authority in the interests of legal certainty, no agreement had been concluded between them, the tax authority having merely accepted the methodology consisting of determining the actual use of the goods and services on the basis of that municipality's accounts. Moreover, the methodology implemented pursuant to the national legislation on municipal accounting in force until 2016 does not reflect incorrectly the actual use of goods and services as a matter of principle.

55

Furthermore, it is not apparent from the referring court's response to that request for clarification that any inaccuracy in the initial tax classification of certain activities - which was retroactively amended because of factual and conceptual changes - was due to the applicable national legislation or to a requirement of the tax authority.

56

It follows from the foregoing, subject to the checks to be carried out by the referring court, that the allocation key initially used by the Dinkelland municipality for the years 2012 to 2016 was established under the sole responsibility of that municipality.

57

Therefore, in the light of the considerations referred to in paragraph 39 above, the amount of deductible VAT calculated on the basis of that allocation key does not constitute an amount levied 'in breach of EU law' within the meaning of the case-law referred to in paragraphs 30 to 33 above.

58

Finally, it should be borne in mind that, even in the absence of an amount 'levied in breach of EU law', within the meaning of the case-law referred to in paragraphs 30 to 33 above, reference should be made to Article 183 of the VAT Directive where a VAT debt must, in view of its nature, be regarded as 'excess' VAT within the meaning of that provision.

59

In that regard, the Court has held 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 be compensated through the payment of default interest. However, the obligation to pay such interest only exists where the refund of the excess VAT is not made within a reasonable period of time (see, to that effect, judgment of 12 May 2021, *technoRent International and Others*, C-844/19, EU:C:2021:378, paragraph 40).

60

In the present case, in the event that that provision is applicable, which it is for the referring court to assess, it should be noted that, in the event that the time limit applicable for the processing of an application for a VAT refund by the tax authority is a period of eight weeks, such as that laid down in Article 30ha of the General Law on State Taxes, that period does not appear unreasonable, within the meaning of the case-law referred to in paragraph 59 above, for the tax authority to deal with an application for a VAT refund, including the actual refund transactions.

Alle (auteurs-)rechten op dit document berusten bij Wolters Kluwer Nederland B.V. of haar licentiegevers en worden uitdrukkelijk voorbehouden. Dit document is gegenereerd op 03.05.2024.
Kijk voor meer informatie over de diensten van Wolters Kluwer op www.wolterskluwer.nl.

61

In the light of all the foregoing considerations, the answer to the questions referred is that EU law must be interpreted as not requiring the payment of interest to a taxable person as from the payment of an amount of VAT which is subsequently refunded by the tax authority, where that refund results, in part, from the finding that that taxable person, due to errors in its accounts, did not fully exercise its right to deduct input VAT for the years concerned and, in part, from an amendment, with retroactive effect, of the detailed rules for calculating the deductible VAT relating to the general costs of that taxable person where those rules are established under the sole responsibility of that taxable person.

Costs

62

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 (Fourth Chamber) hereby rules:

In the light of all the foregoing considerations, the answer to the questions referred is that EU law must be interpreted as not requiring the payment of interest to a taxable person as from the payment of an amount of value added tax (VAT) which is subsequently refunded by the tax authority, where that refund results, in part, from the finding that that taxable person, due to errors in its accounts, did not fully exercise its right to deduct input VAT for the years concerned and, in part, from an amendment, with retroactive effect, of the detailed rules for calculating the deductible VAT relating to the general costs of that taxable person where those rules are established under the sole responsibility of that taxable person.

[Signatures]

Noot

Auteur: Marie Lamensch
Unsurprisingly, the Court of Justice of the European Union (hereinafter: "CJ") ruled that EU law does not impose an obligation to pay interest on an amount of VAT which is refunded by the tax authorities, when this refund results from:

- in part, the finding that that taxable person, as a result of errors made in his accounts, did not fully exercise his right to deduct input VAT for the years concerned;
- in part, an amendment, with retroactive effect, of the detailed rules for calculating the deductible VAT relating to the general expenses of that taxable person where those detailed rules are drawn up under the sole responsibility of the latter.

In other words, when a taxable person mistakenly deducts too low an amount of VAT during a taxable period, that person is certainly entitled to a refund (provided the conditions for the refund are met). However, that person is not entitled to the payment of interest on top of the refund.

This judgment is not really surprising. Had the CJ decided otherwise, deducting too little VAT would have become an attractive investment for the taxable person.

Footnotes

Alle (auteurs-)rechten op dit document berusten bij Wolters Kluwer Nederland B.V. of haar licentiegevers en worden uitdrukkelijk voorbehouden. Dit document is gegenereerd op 03.05.2024.
Kijk voor meer informatie over de diensten van Wolters Kluwer op www.wolterskluwer.nl.

[1] Language of the case: Dutch.

Alle (auteurs-)rechten op dit document berusten bij Wolters Kluwer Nederland B.V. of haar licentiegevers en worden uitdrukkelijk voorbehouden. Dit document is gegenereerd op 03.05.2024.
Kijk voor meer informatie over de diensten van Wolters Kluwer op www.wolterskluwer.nl.