

Taxes Paid in Violation of EU Law: How Far Back Can a Taxpayer Claim Reimbursement?

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1. INTRODUCTION

The number of instances in which a tax law or regulation of an EU Member State is held by the European Court of Justice (ECJ) to be incompatible with EU law or is belatedly recognized as such by the national tax authorities themselves is steadily increasing. Yet, from the perspective of a particular taxpayer, this information is not enough. Crucially, he must know how far back, and how, he can claim reimbursement of such taxes which he paid in the past.

In the last two years, the ECJ handed down two judgements which significantly reinforce the position of taxpayers in this respect. This article reviews (a) the situations in which the incompatibility of a national tax with EU law can be established and (b) the ECJ's case law regarding the procedural time limits within which a taxpayer may seek reimbursement of a tax that he previously paid and that later turns out to be incompatible with EU law (pursuant to proceedings in which the taxpayer was not involved). The article also examines the changes brought about by the judgements handed down by the ECJ on 13 January 2004 in the case of *Kühne & Heitz* (see 3.) and on 2 October 2003 in the case of *Weber's Wine World* (see 4.).

2. GENERAL PRINCIPLES

2.1. Establishing incompatibility

The incompatibility of a tax with EU law may be established as a result of infringement proceedings or as a result

of a request for a preliminary ruling from the ECJ. Various situations must be distinguished with respect to the circumstances in which the incompatibility of a national tax with EU law may be established.

(a) *First situation.* The incompatibility of a tax with EU law arises as a result of infringement proceedings successfully brought by the European Commission against a Member State in the ECJ. Such proceedings may be brought against a Member State for failure to fulfil its obligations under the EC Treaty because the Member State has brought into force – or kept in force – domestic tax provisions which are incompatible either with the EC Treaty or with general principles of EU law. Such proceedings may also be brought if a Member State has failed to implement a directive into its domestic legislation in a timely fashion or has failed to implement it adequately. In all these cases, the judgement in which the ECJ declares the action brought by the European Commission to be well founded is handed down without any taxpayers being involved in the proceedings.

The ECJ's judgement will impose an obligation on the Member State concerned to amend its domestic legislation so as to make it compatible with EU law. If the Member State fails to do so in a timely manner, it may be condemned again by the ECJ, this time under the penalty of a daily fine.

(b) *Second situation.* The ECJ may hand down a judgement in answer to a request for a preliminary ruling addressed to it by a national court. In such a case, the national court concerned has been apprised of proceedings between a taxpayer and the national tax authorities in the course of which the taxpayer alleged that a specific provision of domestic tax law is incompatible with the general principles of EU law, with a provision of the EC Treaty, or with a directive that imposes on the Member State concerned clear and unconditional obligations which it failed to implement into its domestic law in a timely and adequate way.

This situation differs from the first in that the judgement handed down by the ECJ does not impose a specific obligation on the Member State concerned to amend its legislation. The purpose of the ECJ's judgement is to enlighten the national court concerned regarding the proper interpretation which must be given to a rule of EU law. Thereafter, it is up to the national court to apply that rule of EU law to settle the dispute before the court.

In practice, however, the second situation leads to the same result as the first, namely: if other taxpayers raise the

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same argument before the national courts of the same Member State – or before the national courts of the other Member States whose domestic legislation is similar – those national courts will necessarily have to follow the interpretation already given by the ECJ in answer to the request for a preliminary ruling which was previously addressed to it. As a result, having regard to the primacy of EU law over domestic law, the various national jurisdictions concerned will apply the rule of EU law as interpreted by the ECJ and will consequently refuse to enforce a rule of domestic tax law which is incompatible with EU law.

(c) *Third situation.* A national legislature may take the initiative to amend a specific domestic tax provision in a way that is favourable to taxpayers without indicating the reasons for the generous initiative. In practice, the reason for such a move is very often to “nip in the bud” the threat that otherwise the European Commission may bring infringement proceedings against the Member State concerned in the ECJ.

The third situation is, in the author’s view, a pernicious one. Specifically, in such a case, only taxpayers “in the know” will be aware that the reason why the domestic tax provision previously in force was amended or repealed is that it was contrary to EU law, even though the ECJ never ruled on the issue. Consequently, they – and they only – will be able to institute in a timely manner the necessary proceedings to seek reimbursement of the taxes they paid in the past.

2.2. “Retroactivity” is the rule

In its judgement of 15 September 1998 in *Edis* (Case C-231/96), the ECJ stated (Paras. 15 and 16):

It is settled case-law that the interpretation which ... the [ECJ] gives to a rule of [EU] law clarifies and defines where necessary the meaning and scope of that rule as it must be or ought to have been understood and applied from the time of its coming into force. It follows that the rule thus interpreted may, and must, be applied by the [national] courts even to legal relationships arising and established before the judgment [of the ECJ] ruling on the request for interpretation

According to the same case-law ... it is only exceptionally that the [ECJ] may limit the effects of a judgment ruling on a request for interpretation

In such exceptional cases, the ECJ will nonetheless state that its judgement may be relied upon not only by the particular taxpayers who asked the national court to request a preliminary ruling from the ECJ, but also by other individuals or companies from the same or other Member States who had invoked the benefit of the relevant EU rule in national proceedings before the ECJ’s judgement was delivered.

2.3. Time limits – the rule

As to when the statute of limitations starts to run, the general rule was laid down by the ECJ in the *Edis* judgement. In that case, the key question raised by the Italian court was whether (*Edis* judgement, Para. 13):

[EU] law prohibits a Member State from resisting actions for repayment of charges levied in breach of a provision of [EU] law by relying on a time-limit under national law where the application of that time-limit would restrict the effects in time of a preliminary ruling by the [ECJ] interpreting that provision [of EU law].

Before answering that question, the ECJ was at pains to underline that (*Edis* judgement, Paras. 17-19):

whilst the effects of a judgment of the [ECJ] providing an interpretation [of a rule of EU law] normally date back to the time at which the rule [of EU law thus] interpreted came into force, it is also necessary, if that interpretation is to be applied by the national court to facts predating that judgment [of the ECJ], for the detailed procedural rules governing legal proceedings under national law to have been complied with as regards matters both of form and of substance The application of those detailed rules must not therefore be confused with a limitation on the effects of a judgment of the [ECJ] ruling on a request for interpretation of a provision of [EU law]. The consequence of such a limitation is to deprive litigants, who would normally be in a position, under their national procedural rules, to exercise the rights conferred on them by the [EU] provision concerned, of the right to rely on it in support of their claims It is also clear from settled case-law that, *in the absence of [EU] rules governing the refund of national taxes levied though not due*, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from [EU law], provided, however, that such rules are not less favourable than those governing similar domestic actions and do not render virtually impossible or excessively difficult the exercise of rights conferred by [EU law]. (emphasis added)

Thus, as a rule, if a tax was levied in violation of EU law, a taxpayer will be able to successfully bring an action for recovery of the tax only by following the national procedural rules which govern the recovery of taxes levied though not due, including the time limits applicable to such actions.

In particular, if the national rules governing the statute of limitations provide that the limitation period starts to run from the date the tax was paid, that rule will apply with respect to the recovery of taxes which may have been paid many years before they were eventually held to be incompatible with EU law. As a result, many claims for reimbursement will be time-barred.

Put another way, the statute of limitations will not start to run from the time the ECJ held the tax to be incompatible with EU law. Nor will it start to run from the time the domestic tax law of the relevant Member State was amended to make the law compatible with EU law.

Nevertheless:

- assuming the taxpayers are still within the time limit provided by national law to bring an action for recovery, it is not permissible that they be faced with national procedural rules that specifically limit, or make exceptionally difficult, the reimbursement of only those taxes which the ECJ held to be incompatible with EU law; and

- a national legislature may not, in principle, change the procedural rules after the ECJ rendered its judgement in order to *specifically* restrict or make more difficult the recovery of taxes which the ECJ held to have been levied in violation of EU law, to the exclusion of other taxes which continue to be subject to more favourable recovery rules.

2.4. The exception

In its judgement delivered on 25 July 1991 in *Emmott* (Case C-208/90), the ECJ laid down a different principle, albeit in the social security field. Specifically, according to the *Emmott* judgement, the fact that the provisions of a directive were not properly (or timely) implemented by a Member State prevents that Member State from relying on the time limits provided by its domestic law as long as the Member State has not properly implemented the provisions of that directive into its domestic legislation. Otherwise, a defaulting Member State would be able to profit from its non-compliance.

Even though the *Emmott* judgement was delivered in respect of a directive on social security matters, its reasoning may clearly be transposed to tax matters. This is what the petitioner in *Edis* unsuccessfully argued before the ECJ.

The ECJ, while refusing to apply in *Edis* the solution applied in *Emmott*, was at pains to stress that the solution in *Emmott* was “justified by the particular circumstances of that case, in which a time-bar had the result of depriving the plaintiff ... of any opportunity whatever to rely on her right to equal treatment under a [EU] directive” (*Edis* judgement, Para. 46; see the references quoted there).

It is therefore worth summarizing the nature of the “particular circumstances”. Mrs Emmott, an Irish national, had approached the Irish authorities with a view to lodging a claim regarding certain social security payments on the ground that the payments were not in conformity with an EU directive which should have been implemented into Irish law. Mrs Emmott was, however, dissuaded by the Irish authorities from pressing such a claim because the directive was in the process of being implemented into national law. When this was done and Mrs Emmott requested the supplementary social security payments on the basis of the directive (from the date on which it should have been implemented into Irish law), the Irish authorities told her that the claim was time-barred.

It is in this context that the ECJ, in the *Edis* judgement (Para. 48), took care to underline that:

having regard to the documents before the [ECJ] and the arguments presented at the hearing, it does not appear that the conduct of the Italian authorities, in conjunction with the existence of the contested time-limit, had the effect in this case, as it did in *Emmott*, of depriving the plaintiff company [Edis] of any opportunity of enforcing its rights before the national courts.

Thus, according to the ECJ, the conduct of the Italian tax authorities in respect of the recovery of taxes sought by *Edis* was in contrast to the conduct of the Irish social security authorities in the *Emmott* case.

3. KÜHNE & HEITZ – IMPLICATIONS

The ECJ’s judgement of 13 January 2004 in *Kühne & Heitz* (Case C-453/00) concerns the obligation to review earlier administrative decisions based on an erroneous interpretation of EU law. The importance of the *Kühne & Heitz* judgement is evidenced by the fact that the ECJ’s press service deemed it appropriate to publish a press release immediately following delivery of the judgement (Press Release IBCJE-04-07 dated 13 January 2004).

The facts of the *Kühne & Heitz* case may be summarized as follows. From December 1986 to December 1987, Kühne & Heitz, a Dutch firm, exported quantities of poultry meat to non-EU countries. In the declarations lodged with the Dutch customs authorities, Kühne & Heitz listed the goods as falling under the sub-heading “legs and cuts of legs” of poultry of the customs tariff. On the basis of these declarations, the Dutch Restitution Bureau paid export refunds to Kühne & Heitz at the rate relevant for that sub-heading. If the poultry meat exported had failed to qualify as “legs and cuts of legs” and had instead been classified as “other poultry products”, a lower rate of export refund would have been payable.

In 1990, the Dutch Restitution Bureau carried out checks at the premises of Kühne & Heitz. The Bureau took the view that the poultry meat products exported by Kühne & Heitz in previous years should have been classified under the sub-heading “other poultry products”, not “legs and cuts of legs”, and consequently that the export refunds received by Kühne & Heitz were at a rate higher than the rate to which it was properly entitled. As a result, the Dutch Restitution Bureau claimed reimbursement from Kühne & Heitz of the “excess payments” it received in the past. In addition, the Bureau prohibited Kühne & Heitz from classifying future exports under the sub-heading “legs and cuts of legs”.

Kühne & Heitz lodged an appeal against that decision in the Dutch Administrative Court. The Court rejected the arguments put forward by Kühne & Heitz and affirmed the decision of the Dutch Restitution Bureau. It should be noted that Kühne & Heitz did not request in the course of the proceedings that the Dutch Administrative Court refer a question to the ECJ for a preliminary ruling on the proper interpretation of the sub-heading “legs and cuts of legs” of poultry.

The judgement of the Dutch Administrative Court dismissing the appeal of Kühne & Heitz was delivered on 22 November 1991.

On 5 October 1994, the ECJ delivered a judgement in answer to a request for a preliminary ruling by the same Dutch Administrative Court on the proper interpretation of the sub-heading “legs and cuts of legs” of poultry. The Dutch Administrative Court had been urged to do so by another Dutch poultry meat exporter, a company called Voogd. In *Voogd* (Case C-151/93), the ECJ held that “a leg to which a piece of back remains attached must ... be described as a leg” for purposes of the relevant customs sub-heading.

From the ECJ's judgement in *Voogd*, it followed that the ruling made by the Dutch Restitution Bureau in 1990 regarding Kühne & Heitz and the subsequent judgement of the Dutch Administrative Court in 1991 rejecting the appeal of Kühne & Heitz against that ruling were both based on an erroneous interpretation of the relevant customs sub-heading.

Kühne & Heitz therefore requested the Dutch Restitution Bureau to rescind its 1990 ruling and to refund the sums which Kühne & Heitz had been forced to reimburse the Bureau on the basis of the latter's erroneous interpretation of the relevant customs sub-heading. Kühne & Heitz also requested that it be indemnified for the fact that, starting from 1991, it had in effect been compelled by the Dutch Restitution Bureau to (wrongly) list its poultry exports under the sub-heading "other poultry products" instead of "legs and cut of legs" of poultry, which would have entitled it to higher export refunds. The Dutch Restitution Bureau rejected the requests of Kühne & Heitz.

Kühne & Heitz thereupon appealed the ruling to the Dutch Administrative Court. This time, the Court was moved to request a preliminary ruling from the ECJ on the question: Was the Dutch Restitution Bureau obliged, as a matter of EU law, to rescind its earlier ruling now that it appeared that the ruling was based on an erroneous interpretation of the relevant customs sub-heading, having regard to the fact that, under Dutch administrative law, it is in principle always possible for a Dutch administrative body to reopen a final administrative decision, provided the interests of third parties are not adversely affected?

In its judgement in *Kühne & Heitz* (Para. 24), the ECJ recalled:

legal certainty is one of a number of general principles recognised by [EU] law ...; that finality of an administrative decision, which is acquired upon expiry of the reasonable time-limits for legal remedies or by exhaustion of those remedies, contributes to such legal certainty and that it follows that [EU] law does not require that administrative bodies be placed under an obligation, in principle, to reopen an administrative decision which has become final in that way.

The ECJ nonetheless answered in the affirmative the question referred to it by the Dutch Administrative Court. The ECJ did so in the following terms (*Kühne & Heitz* judgement, Paras. 27 and 28):

The principle of cooperation arising from Article 10 [of the EC Treaty] imposes on an administrative body an obligation to review a final administrative decision, where an application for such review is made to it, in order to take account of the interpretation of the relevant provision given in the meantime by the [ECJ] where

- under national law, it has the power to reopen that decision;
- the administrative decision in question has become final as a result of a judgment of a national court ruling at final instance;
- that judgment is, in the light of a decision given by the [ECJ] subsequent to it, based on a misinterpretation of [EU] law which was adopted without a question being referred to the [ECJ] for a preliminary ruling under Article 234(3) [of the EC Treaty]; and
- the person concerned complained to the administrative body immediately after becoming aware of that decision of the [ECJ].

It is true that the ECJ, in affirming that principle in *Kühne & Heitz*, took great care to underline that it did so having regard to the particular circumstances of the case.

Those circumstances, however, may easily be transposed to the tax field. Specifically, as a rule, the rescinding of a decision of the tax authorities, when it appears that the decision was based on an interpretation of EU law which subsequently turned out to be erroneous, will not negatively affect the rights of third parties. Barring exceptional circumstances, the only rights at issue in tax disputes are those of a taxpayer who is resisting a demand for the payment of taxes or is claiming repayment of taxes and the rights of the tax authorities, which are the converse of the rights of the taxpayer.

In conclusion, a taxpayer may find the ECJ's judgement in *Kühne & Heitz* particularly helpful in persuading the national tax authorities to rescind a ruling which set aside the taxpayer's earlier claim that a particular tax was levied in violation of EU law when it subsequently turns out that the taxpayer's position was well founded.¹

4. WEBER'S WINE WORLD – IMPLICATIONS

The ECJ's judgement of 2 October 2003 in *Weber's Wine World* (Case C-147/01) concerned the equivalence of remedies between the recovery of unconstitutional taxes and the recovery of taxes levied in violation of EU law. In *Weber's Wine World*, the ECJ was apprised of a request for a preliminary ruling addressed to it by an Austrian court. The request pertained to the compatibility (or otherwise) with EU law of a provision of Austrian tax law which shortened the time limits applicable for claiming reimbursement of all taxes levied though not due.

According to the ECJ's judgement in *Weber's Wine World* (Para. 103), the legislation, on the face of it, satisfied the *Edis* jurisprudence:

it has consistently been held that in the absence of [EU] law rules on the recovery of national charges levied though not due, it is for the domestic legal system of each Member State to lay down the detailed procedural rules governing such actions for repayment, provided however, that they are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the [EU] legal order (principle of effectiveness).

The Austrian legislation, however, provided that the shorter time limit was not applicable when the cause for repayment lay in a ruling by the Austrian Constitutional Court holding the relevant tax to be contrary to the Austrian Constitution. In its judgement in *Weber's Wine World* (Para. 107), the ECJ's stated:

... the principle of equivalence precludes the application of national provisions which allow taxable persons to obtain

1. Not considered here is the question whether the tax authorities may open themselves to a claim for damages if they disregard the request of a taxpayer in "*Kühne & Heitz* circumstances". In this respect, see the ECJ's judgement of 28 June 2001 in *Larsy* (Case C-118/00). Even though the case concerned pension matters, the ECJ's ruling is easily transposable to tax matters.

repayment of a charge levied though not due only where those provisions lay down more advantageous conditions where the claim for repayment is based on a declaration of unconstitutionality by a national court than those applicable to [taxpayers] who, following a judgment of the [ECJ], seek repayment of a charge levied in breach of [EU] law.

In other words, the exception to the general statute of limitations in tax matters which may exist in a specific Member State with respect to the repayment of taxes that its constitutional court held to have been levied in violation of

the national constitution must also apply with respect to taxes that were levied in violation of EU law as interpreted by the ECJ.

This may have far-reaching consequences. In Belgium, for example, a claim for reimbursement of past taxes may be lodged within six months of the publication in the *Belgian Official Journal* of the judgement of the Belgian Constitutional Court declaring unconstitutional the law pursuant to which the tax was levied. No doubt, Belgium is not unique in this respect.