

Case C-358/20**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:**

30 July 2020

Referring court:

Judecătoria Oradea (Romania)

Date of the decision to refer:

9 July 2020

Applicant:

Promexor Trade SRL

Defendant:

Direcția Generală a Finanțelor Publice Cluj – Administrația Județeană a Finanțelor Publice Bihor

Subject matter of the main proceedings

Application by which the applicant, Promexor Trade SRL, requests that the referring court, the Judecătoria Oradea (District Court, Oradea, Romania), in respect of the defendant, the Direcția Generală Regională a Finanțelor Publice Cluj – Administrația Județeană a Finanțelor Publice Bihor (Regional Directorate-General of Public Finances of Cluj – Regional Public Finance Administration of Bihor), annul the order for payment of 19 April 2019 and the enforcement order of 19 April 2019, issued in enforcement proceedings brought against the applicant, and annul the credit instrument and the enforcement concerned.

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

An interpretation of Article 5(4) TEU, Articles 1, 167 to 169, 176 to 180, 214(1), 250, 272 and 273 of Directive 2006/112/EC, and of the principles of neutrality, effectiveness, sincere cooperation, certainty of legal relations and protection of legitimate expectations, is sought pursuant to Article 267 TFEU.

Questions referred

1. Do the provisions of Directive 2006/112/EC and the principle of fiscal neutrality preclude national legislation by which a Member State requires a citizen to collect and pay VAT to the State for an indefinite period without, however, at the same time granting him the right to deduct VAT on the ground that the VAT code had been revoked since no transactions subject to VAT had been indicated in the VAT returns filed for six consecutive months/two consecutive calendar quarters?
2. With regard to the circumstances of the main proceedings, are the principle of legal certainty, the principle of legitimate expectations, the principle of proportionality and [the principle] of sincere cooperation, as set out in Directive 2006/112/EC, compatible with national legislation or with a practice of the tax authority according to which, although the Member State normally allows a legal person, on request, to re-register for VAT purposes following automatic revocation of the VAT code, in certain specific circumstances a taxpayer may not request re-registration for VAT purposes, for purely formal reasons, whilst being obliged to collect and pay VAT to the State, for an indeterminate period, without, however, at the same time being granted the right to deduct VAT?
3. With regard to the circumstances of the main proceedings, are the principle of legal certainty, the principle of legitimate expectations, the principle of proportionality and [the principle] of sincere cooperation, as set out in Directive 2006/112/EC, to be interpreted as prohibiting the imposition on a taxpayer of a requirement to collect and pay VAT for an indefinite period and without granting the right to deduct VAT, without, in the particular case, the tax authority in question verifying the substantive requirements relating to the right to deduct VAT and without there being any fraud on the part of the taxpayer?

Provisions of EU law cited

Treaty on European Union, Articles 5(4) and 4(3)

Directive 2006/112/EC on the common system of value added tax (VAT), as amended by Directive 2010/45/EU, Articles 1(1), 167 to 169, 176 to 180, 214(1) and 250, 272 and 273

Provisions of national law cited

Legea nr. 571/2003 privind Codul fiscal (Law No 571/2003 establishing the Tax Code), in force until 31 December 2015

Article 153(9)(e), which essentially provides that the competent tax authorities are to revoke the registration of a taxable person for VAT purposes if, in the tax returns filed for six consecutive months, no purchases of goods/services or

supplies of goods/services made in the course of those reference periods have been indicated.

Article 153(9¹)(d), under which, following revocation of registration for VAT purposes, the competent tax authorities are to register taxable persons for the purposes of VAT at their request, in the case provided for in paragraph 9(e), on the basis of a declaration of honour stating that they will carry out economic activities. Furthermore, taxable persons in such a situation cannot apply the provisions relating to the exemption threshold for small undertakings.

Article 11(1³), under which taxpayers whose registration for VAT purposes has been revoked, are not, for the period in question, to enjoy the right to deduct VAT on purchases made, but are to be liable to pay VAT collected in respect of taxable transactions carried out during that period. As regards purchases of goods and/or services made during the period in which the relevant person has no valid VAT code, which are intended for transactions to be made after the VAT registration date and which give rise to the right to deduct, adjustments are to be made in favour of the taxable person, by means of inclusion in the first tax return submitted by the taxable person following the registration for VAT purposes or, as the case may be, in a subsequent return, in respect of tax relating to the following: (a) goods stored and services not used at the time of the registration, as certified on the basis of an inventory; (b) tangible fixed assets, including capital assets for which the adjustment period for the deduction has not expired, and tangible fixed assets in the process of implementation, as certified on the basis of inventory, which are owned by him at the time of registration.

Article 145, which provides that the right to deduct is to arise at the time when the tax becomes chargeable [paragraph 1], that every taxable person has the right to deduct tax on purchases where they are intended for certain transactions expressly provided for [paragraph 2], and that, under certain conditions, the right to deduct tax is to be granted for purchases made by a taxable person before he is registered for the purposes of VAT [paragraph 4].

Legea nr. 227/2015 privind Codul fiscal (Law No 227/2015 establishing the Tax Code), in force as from 1 January 2016

Article 11(8), which essentially provides that taxable persons whose registration for VAT purposes has been revoked are not, for the period in question, to enjoy the right to deduct VAT on purchases made, but are to be liable to pay VAT collected in respect of taxable transactions carried out during that period. In the case of registration for the purposes of VAT, under Article 316(12) a taxable person is to exercise the right to deduct as regards purchases of goods and/or services made during the period in which his VAT identification code was revoked, by means of inclusion in the first tax return filed after registration or, as the case may be, in a subsequent return, even if the invoice does not contain the VAT identification code of the taxable person. After registration for tax purposes pursuant to Article 316(12), as regards supplies of goods/services made during the

period in which the VAT identification code was revoked, taxable persons are to issue invoices including separately the VAT collected during the period in question.

Article 316(12)(d), which essentially corresponds to Article 153(9¹)(d) of Law No 571/2003

Article 297(1), (4) and (6), which reproduces the provisions of Article 145(1), (2) and (4) of Law No 571/2003

Succinct presentation of the facts and the main proceedings

- 1 On 30 April 2014 the defendant ordered, by way of a decision, the automatic revocation of the applicant's registration for purposes of VAT on the ground that no transactions subject to VAT had been indicated in the VAT returns filed for six consecutive months. As from May 2014, since it no longer held a valid code, the applicant issued tax invoices without VAT.
- 2 In the course of April 2019, the applicant was informed by the defendant that a tax inspection covering the period from 1 April 2014 to 31 December 2017 was imminent. In order to avoid payment of a fine for failure to file tax returns within the prescribed periods, the applicant decided to file retroactively the return relating to the VAT collected, as taxable persons whose VAT identification code has been revoked are required to do.
- 3 On the basis of the content of the respective returns and without carrying out additional checks, the defendant, on 19 April 2019, issued an enforcement order and initiated enforcement proceedings against the applicant by issuing the order dated 19 April 2019.
- 4 The tax inspection took place on 11 June 2019; the inspection body took the view that, as regards the period under investigation, the applicant had filed VAT returns correctly.
- 5 After the date on which the inspection was completed, but within the time limit, the applicant filed, on 31 July 2019, adjusted returns in the amount of 0.

The essential arguments of the parties to the main proceedings

- 6 The applicant claims that, although there are tax remedies in the event of revocation of a taxpayer's VAT identification code, in the sense that after re-registration as a taxable person for the purposes of VAT a company has the opportunity to enjoy, retroactively, deduction of VAT in respect of the period during which it did not possess a VAT code, these are not actually available to the applicant.

- 7 It submits that a taxpayer whose VAT code has been revoked, but who, for various reasons, does not re-register, has no remedy available to him. Consequently, maintaining his obligation to pay VAT for an indefinite period, in a situation where he no longer has any type of enjoyment resulting from his status as a taxable person for the purposes of VAT, is contrary to the principles laid down in this regard in the case-law of the Court of Justice.
- 8 The defendant contends that the VAT returns to be submitted by taxable persons whose VAT identification code has been revoked were duly filed by the applicant and made on his honour. Under the legislation in force, adjustment of an income tax return is no longer possible after the tax inspection has been completed.

Succinct presentation of the reasons for the request for a preliminary ruling

- 9 The referring court raises the issue of the compatibility of the national legislation applicable to the dispute with the principles resulting from Directive 2006/112 and the case-law of the Court of Justice in a case where, following revocation of registration for the purposes of VAT, the taxpayer no longer has the right to deduct VAT on the purchases made, but remains subject to the obligation to pay the VAT collected, and with no time limit being laid down in relation to the obligation to collect.
- 10 Although the right to deduct can be exercised retroactively after re-registration for purposes of VAT, the applicant does not actually have that possibility since it does not satisfy a formal requirement inasmuch as its director is a partner in another company which is subject to insolvency proceedings.
- 11 Since it is unable even to avail itself of the exemption regime applicable to small undertakings, the applicant is precluded, for an indefinite period, from the right to deduct VAT without being able to enjoy the VAT system.
- 12 Regarding the principle of fiscal neutrality, the referring court refers to the judgments in *Elida Gibbs* (C-317/94), *Kraft Foods Polska* (C-588/10), *Zabrus Siret* (C-81/17), *Gamesa Wind România* (C-69/17), *Dobre* (C-159/17) and *Astone* (C-332/15), stating that the circumstances underlying those judgments are nevertheless different from those of the present case.
- 13 The applicant's inability to re-register for purposes of VAT and thus to enjoy the right to deduct is, in the view of the referring court, tantamount to failure to comply with a formal requirement. In addition, it was not impossible for the tax authorities to verify that the substantive requirements of the right to deduct were satisfied.
- 14 Regarding the principle of proportionality, the referring court states, with reference to the judgments in *Collée* (C-146/05) and *Salomie and Oltean* (C-183/14), that an absolute refusal of the right to deduct may appear

disproportionate in the case of the applicant since there is no fraud and the substantive requirements were not verified by the tax authority.

- 15 Since, in the present case, the defendant did not verify that the substantive requirements were satisfied and the applicant is thus required *sine die* to collect the VAT, being in a continuous situation of uncertainty as it is unaware of the extent of its obligations and does have available to it a legal instrument enabling it to enjoy the VAT system, the referring court raises, with reference to the judgment in *Ireland v Commission* (325/85), the issue of infringement of the principles of legal certainty and protection of legitimate expectations and, from the point of view of the obligations imposed on States by Directive 2006/112, of the principle of sincere cooperation.

WORKING DOCUMENT