

Case C-558/19

Request for a preliminary ruling

Date lodged:

23 July 2019

Referring court:

Tribunalul Cluj (Romania)

Date of decision to refer:

3 July 2019

Applicant:

Impresa Pizzarotti & C SPA Italia Sucursala Cluj

Defendant:

Agenția Națională de Administrare Fiscală — Direcția Generală de
Administrare a Marilor Contribuabili

[omissis]

TRIBUNALUL CLUJ

SECȚIA MIXTĂ DE CONTENCIOS ADMINISTRATIV ȘI FISCAL, DE

**CONFLICTE DE MUNCĂ ȘI ASIGURĂRI SOCIALE (Regional Court,
Cluj, Romania — Mixed Section for Administrative and Tax, Labour and
Social Security Disputes)**

[omissis]

Public hearing of 3 July 2018

[omissis]

The administrative and tax case between the applicant IMPRESA PIZZAROTTI & C SPA ITALIA SUCURSALA CLUJ (Impresa Pizzarotti & C SPA Italia, Cluj branch) and the defendant AGENȚIA NAȚIONALĂ DE ADMINISTRARE FISCALĂ — DIRECȚIA GENERALĂ DE ADMINISTRARE A MARILOR CONTRIBUABILI (National Tax Administration Office — Directorate-General

for the Administration of Large-scale Taxpayers, Romania), concerning a complaint against a fiscal administrative act, has been registered.

[omissis]

[omissis] On 2 July 2018, the applicant placed on the case-file a hearing note concerning the defendant's procedural status with which the latter had requested that the application for a reference for a preliminary ruling to the Court of Justice of the European Union ('the Court of Justice') be dismissed.

In the light of the defendant's procedural status [the applicant] notes that it reworded the question to the effect that, if Articles 11(2) and 29(3) of the Codul fiscal ('the Romanian Tax Code') were interpreted as the tax authority argues, they would infringe Articles 49 and 63 TFEU [omissis] in that it would be found that transfers of money between a company branch resident in one Member State and the parent company resident in another Member State constituted transactions that could be subject to the rules on transfer pricing.

THE CLUJ REGIONAL COURT

In deliberating on the request for a reference for a preliminary ruling to be made to the Court of Justice and having examined the documents in the case, hereby finds as follows:

1. Circumstances of the case — Procedural context — Facts

The Cluj Regional Court was seised at first instance of the application (i) for annulment of decision [omissis] of 23 November 2017 concerning the administrative complaint brought against the notice of assessment [omissis] of 20 September 2017 [omissis] [and (ii) for annulment of the] notice of assessment [omissis] of 20 September 2017, issued by the Directorate-General for the Administration of Large-scale Taxpayers, which established in respect of the applicant additional corporation tax in the amount of 297 141.92 Romanian lei (RON) and an additional taxable amount of RON 1 857 137. **[OR. 1]**

It was noted that the applicant company was the subject of a tax inspection relating to corporation tax, in the period from 29 July 2016 to 11 September 2017, by the Activitatea de Inspecție Fiscală (service for tax inspection activities) of the Directorate-General for the Administration of Large-scale Taxpayers, which led to the drawing up of the tax inspection report [of] [omissis] 20 September 2017, which formed the basis for the notice of assessment [of] [omissis] 20 September 2017 establishing in respect of that company additional payment obligations amounting to RON 297 141.92 and an additional taxable amount of RON 1 857 137.

During the tax inspection it was found that the applicant Impresa Pizzarotti & C SPA Italia Sucursala Cluj had concluded, as lender, two loan agreements with SC Impresa Pizzarotti & C SPA Italia [as borrower]: the agreement [omissis] [of]

6 February 2012 concerning the granting of a loan by [the lender] of EUR 11 400 000, and the agreement [omissis] [of] 9 March 2012 concerning the granting of a loan by [the lender] of EUR 2 300 000. Those amounts were loaned for an initial period of one year, which could be extended by an addendum to the agreement. The loan agreements do not contain any clause regarding the receipt of interest by the applicant. As at 1 January 2013, the outstanding amount to be repaid was EUR 11 250 000. The two loans in question were repaid in full by 9 April 2014.

In the light of those considerations, and having regard to Articles 11(2) and 29(3) of Legea nr. 571/2003 privind Codul fiscal (Law No 571/2003 establishing the Tax Code), the tax inspection authorities concluded that the applicant company is a person related to the parent company, that the loans granted constitute transfers which should, in accordance with the rules on transfer pricing, have been effected at the market price, namely the average interest rate of the Banca Națională a României (National Bank of Romania), and that, as a result, additional tax of RON 297 141.92 must be paid and an additional taxable amount of RON 1 857 137 established.

By Decision No 114/23.11.2017, issued by the Directorate-General for the Administration of Large-scale Taxpayers, the complaint brought by the applicant concerning the amount at issue was rejected as unfounded and the action in the tax proceedings brought by the applicant against that decision was entered in the register of the Cluj Regional Court on 15 December 2017.

The applicant argues that the provisions of law on which the tax authority relies infringe Articles 49 TFEU and 63 TFEU in so far as they provide that transfers of money [between a] company branch resident in one Member State and the parent company resident in another Member State constitute transactions which may be subject to the rules on transfer pricing, since those rules are not applicable where a company branch and the parent company are situated in the territory of the same State.

In conclusion, the applicant considers that the action of the authorities infringes EU law.

2. *Law*

The Cluj Regional Court considers that the point of law under consideration in the administrative proceedings concerns the lawfulness of the fiscal administrative acts establishing corporation tax on transactions involving the transfer of financial resources between a branch and the parent company where they are resident in two different Member States.

In this context, it is necessary to clarify whether this method of determining the tax liability constitutes a correct application of EU law for the purposes of Articles 49 and 63 TFEU.

3. In deliberating on the requests for a reference to be made, the Regional Court Cluj concluded that in order for the case to be resolved properly [omissis] it is necessary to refer to the Court of Justice fundamental points which arise in connection with the question referred. [OR. 2]

4. [omissis]

5. *Relevant provisions of law and case-law*

I. *Provisions of national law applicable to the dispute*

Law No 571/2003 establishing the Tax Code

– Article 7 — Definitions of general terms

‘(1) For the purposes of this Code, with the exception of Title VI, the terms and expressions listed below shall have the following meanings:

...

20. *person — any natural or legal person;*

21. *related persons — one person is related to another where the relationship between them is defined by at least one of the following cases:*

...

(c) *a legal person is related to another legal person if at least:*

(i) *the first legal person directly or indirectly holds, including the shares held by the related persons, at least 25% of the value/number of the shares of capital or voting rights of the other legal person, or if it controls that legal person;*

(ii) *the second legal person directly or indirectly holds, including the shares held by the related persons, at least 25% of the value/number of the shares of capital or voting rights of the first legal person;*

(iii) *a third person directly or indirectly holds, including the shares held by the related persons, at least 25% of the value/number of shares of capital or voting rights of both the first and second legal person;*

...

32. *transfer — any sale, assignment or alienation of the right of ownership, the exchange of a right of ownership for services or for another right of ownership, and the transfer of fiduciary assets in connection with a trust transaction within the meaning of the Civil Code.’*

– Article [11] — Special provisions for the application of the Tax Code

‘(2) In connection with a transaction between Romanian and related persons not resident in Romania, and between related Romanian persons, the tax authorities may adjust the amount of income or expenditure of each person, as necessary, to reflect the market price of the goods or services supplied as part of the transaction. In establishing the market price of the transactions between related persons, the most appropriate of the following methods shall be used: ...’

– Article 29 — Income of a permanent establishment

‘(3) The taxable profit of a permanent establishment shall be determined by regarding it as a separate person and applying the rules on transfer pricing when establishing the market price of a transfer between a foreign legal person and its permanent establishment. Where the permanent establishment does not have an invoice for the expenditure attributed to it by its headquarters, [OR. 3] the other supporting documents must contain evidence that the costs have actually been incurred and reasonably attributed to the permanent establishment, the rules on transfer pricing being applied.’

II. EU law:

Treaty on the Functioning of the European Union

Article 49

(ex Article 43 TEC)

‘Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.’

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.’

Article 63

(ex Article 56 TEC)

1. Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.

2. *Within the framework of the provisions set out in this Chapter, all restrictions on payments between Member States and between Member States and third countries shall be prohibited.*'

6. *Reasons leading the referring court to make a reference for a preliminary ruling*

[omissis]

In the present case, the court is called upon to establish the lawfulness of the fiscal administrative acts issued by the tax authority which established in respect of the applicant additional tax liabilities in the form of corporation tax because it transferred liquid assets to the parent company in Italy and the tax authority considered that, in the light of the national legislation referred to above, such transactions must be regarded as transactions between related persons to which the rules on transfer pricing apply. The tax authorities took this view because Article 11(2) of the Romanian Tax Code, cited above, provides that transactions between Romanian persons and related persons not resident in Romania are to be subject to the rules on transfer pricing and the concept of 'Romanian person' includes the branch which is a permanent establishment of a person not resident in Romania in the light of Article 29(3) of the Romanian Tax Code.

On the other hand, if such transactions had been effected between a branch and [a] parent company in Romania, they could not have been classified as transactions subject to the rules on transfer pricing, since the Romanian Tax Code does not regard branches as separate persons where they are not a permanent establishment of a non-resident legal person.

The Cluj Regional Court considers that the right of establishment laid down in Article 49 TFEU is restricted in the case under consideration in the present proceedings, since transfers of liquid assets between a branch resident in a Member State and the non-resident parent company [OR. 4] are effected under more onerous conditions than the same type of transfers which take place between a branch and the parent company which are located in the same State Member.

On those grounds, given that the Court of Justice has yet to rule on this matter and the dispute must be resolved at first instance, and in the light of Article 267 TFEU, the Cluj Regional Court considers it necessary to refer the matter to the Court of Justice [omissis].

[omissis]

ON THOSE GROUNDS

IN THE NAME OF THE LAW

ORDERS

That the following question be referred to the Court of Justice for a preliminary ruling under Article 267 TFEU:

Do Articles 49 and 63 of the Treaty on the Functioning of the European Union preclude national legislation such as that at issue in the present case (Articles 11(2) and 29(3) of Legea nr. 571/2003 privind Codul fiscal (Law No 571/2003 establishing the Romanian Tax Code)), which provides that a bank transfer of money from a company branch resident in one Member State to the parent company resident in another Member State may be reclassified as a revenue-generating transaction, with the consequent obligation to apply the rules on transfer pricing, whereas, if the same transaction had been effected between a company branch and a parent company, both of which were resident in the same Member State, that transaction could not have been reclassified in the same way and the rules on transfer pricing would not have been applied?

[omissis]

WORKING DOCUMENT