

**Case C-363/20**

**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:**

5 August 2020

**Referring court:**

Fővárosi Törvényszék (Budapest High Court, Hungary)

**Date of the decision to refer:**

29 June 2020

**Applicant:**

MARCAS MC Szolgáltató Zrt.

**Defendant:**

Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága (Appeals Directorate of the National Tax and Customs Authority, Hungary)

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**Subject matter of the main proceedings**

Administrative-law action against an administrative decision by the Appeals Directorate of the National Tax and Customs Authority

**Purpose and legal basis of the request for a preliminary ruling**

Accounting principles applied to the accounting treatment of royalty income – Decision declaring the existence of a tax debt adopted by the tax authority in the context of an ex-post check on a tax return – Right to a fair trial in the context of a tax inspection – Legal certainty – Prohibition of abuse of rights – Tax fine – Proportionality – Set-off of a tax debt declared in the year in question against an overpayment determined in a supplementary declaration for the previous year – Extension of an inspection by the tax authority to cover the year before or after the year under inspection – Protection of legitimate expectations – Conduct of the tax authority providing grounds for a legitimate expectation

Legal basis: Article 267 TFEU

## Questions referred

- 1) Is a practice adopted by a Member State's tax authority pursuant to which, in the context of an ex-post check on a taxpayer's return – where no breach of any specific accounting principle or substantive rule of law on the part of the taxpayer was detected in respect of the tax under inspection, and there was no change in the amount of tax due as compared with the amount stated in the returns for the years during which the economic activity took place – the tax authority finds, without giving reasons, that the taxpayer is liable for additional tax purely on the grounds that, in preparing the return, he did not have regard to [certain] principles in the Member State's Law on Accounting as required by the tax authority, but instead used his discretion to base the return on other principles which he considered applicable to accounts for his economic activity, compatible with the right to a fair trial, recognised as a general principle of law in Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter') and with the general principles of legal certainty, proportionality and protection of legitimate expectations?
- 2) In the light of the right to a fair trial established in Article 47 of the Charter and the general principles of legal certainty, proportionality and protection of legitimate expectations enshrined as general principles of EU law, can Article 2(3) and Article 31 of Directive 78/660/EEC (the Fourth Directive) be interpreted as meaning that, in the case of an economic activity which relates to several financial years, if the tax authority replaces the accounting principles chosen by the taxpayer with other accounting principles and, as a result, makes a change to an accounting entry which also affects the returns for adjacent years, the tax authority must extend its inspection to cover the other financial years to which the economic activity relates and which are therefore also affected by the findings in respect of the period under inspection? When carrying out an ex-post check on the taxpayer's return for a particular year, must the tax authority take into account the entries that were amended in a supplementary declaration for the year prior to the year under examination, which resulted in an overpayment by the taxpayer due to the fact that he paid tax before the date on which it became due; or is a declaration by the tax authority that the taxpayer has a tax debt, in spite of the existence of an overpayment, compatible with the aforesaid principles and with the prohibition of abuse of rights in Article 54 of the Charter?
- 3) Is it proportionate to sanction the choice of a potentially incorrect accounting method by declaring the existence of a difference in the amount of tax due, which is classed as a debt, having regard to the fact that this also entails the imposition of a fine — even if only for 10% of the amount — and a late payment surcharge, if the tax in dispute was paid before it was due and has throughout the entire proceedings been recorded as an overpayment in the applicant's tax account, with the result that there has been no loss of revenue to the Exchequer, and there is no evidence of an abuse?

- 4) Can the principle of (protection of) legitimate expectations be interpreted as meaning that the objective basis for an expectation, that is, the taxpayer's expectation with respect to accounting treatment, is well founded if the tax authority has previously carried out an inspection of the taxpayer in the course of which it found that the keeping of receipts, books and records complied with requirements — even if there was no explicit statement to this effect or it is merely implicit in the tax authority's conduct — or is the taxpayer entitled to rely on the principle of legitimate expectations only if the tax authority carries out an ex-post check on the tax returns which results in a closed period, the check covers all types of taxes, and the tax authority expressly approves the taxpayer's accounting practices? Is the tax authority acting in accordance with the principles of legal certainty and protection of legitimate expectations if, in subsequent decisions, it attributes certain legal and tax consequences to accounting irregularities and does not accept that the applicant had grounds to believe that its earlier accounting practice was correct, on the grounds that the earlier inspection was purely formal or not comprehensive, or that there was no express approval?

#### **Provisions of EU law cited**

- Seventh Council Directive 83/349/EEC of 13 June 1983 based on the Article 54(3)(g) of the Treaty on consolidated accounts (OJ 1983 L 193, p. 1, 'the Seventh Council Directive'), Articles 16 and 17.
- Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies (OJ 1978 L 222, p. 11, 'the Fourth Council Directive'), Articles 2 and 31.
- Charter of Fundamental Rights of the European Union, Articles 47 and 54.

#### **Provisions of national law cited**

- A társasági adóról és az osztalékadóról szóló 1996. évi LXXXI. törvény (Law LXXXI of 1996 on corporation tax and dividend tax, 'the TAO'), Articles 1 and 7. Article 1 provides that this Law must be interpreted having regard to and in accordance with the provisions of the a számvitelről szóló 2000. évi C. törvény (Law C of 2000 on Accounting, 'the Law on Accounting'). Departures from the Law on Accounting intended to ensure a true and fair overall view may not give rise to changes in tax liabilities. Pursuant to Article 7(1)(s), the result before tax is to be reduced by an amount equal to 50% of income recorded as pre-tax income in respect of royalties for the financial year.
- Law on Accounting, Articles 15 and 16. These provisions establish the basic principles to be applied by the taxable person in preparing accounts and

keeping accounting records; these include, among many others, accruals-based accounting principles.

- Az adózás rendjéről szóló 2003. évi XCII. törvény (Law XCII of 2003 on General Taxation Procedures, ‘the former LGPT’), Articles 44, 49, 87, 165, 170 and 171. Article 44 refers to the manner in which books and records are to be kept and the requirement for them to be documented. Article 49 addresses the scope for taxpayers to amend a tax return through self-correction. Article 87 lists the forms of inspection and states that where the purpose of an inspection is to carry out ex-post checks on a return, it gives rise to a period closed with an inspection. Article 165 addresses the surcharge for late payment of tax. Article 170 defines the concept of tax debt and stipulates that any overpayments of tax must be taken into account. Article 171 makes provision for reductions in tax fines.

### **Brief summary of the facts and the main proceedings**

- 1 The applicant, MARCAS MC Szolgáltató Zrt. (‘MARCAS MC’), granted its affiliated undertakings use of its trade mark in exchange for a royalty. Under the settlement arrangements, MARCAS MC issued quarterly invoices based on estimates by the affiliated undertakings of sales figures for that quarter. MARCAS MC included a correction in the invoices to reflect the difference between the estimated figures for the previous quarter and the actual sales figures, with the relevant amount being either deducted from or added to the sum invoiced for the current quarter.
- 2 On 11 March 2014 the first-tier tax authority began an inspection of MARCAS MC in respect of the period from January 2010 to December 2013. According to the inspection report, drawn up on 24 July 2015, the inspection solely concerned the royalty transactions and, based on an examination of the documents and the returns, it was concluded that the practices followed by MARCAS MC complied with the provisions of the former LGPT and the inspection was closed.
- 3 On 18 September 2014 the first-tier tax authority launched an inspection of MARCAS MC in respect of the 2013 financial year with the purpose of carrying out ex-post checks on the returns. This inspection covered all taxes and state subsidies. The authority concluded that the way in which MARCAS MC accounted for the settlement of royalty payments did not comply with the accruals-based accounting principles established in the Law on Accounting because, among other things, the invoice for the first quarter of 2013 had included a reduction in royalties to take account of royalty payments already included in the invoice for the fourth quarter of 2012 (which were too high, when compared with actual figures). In its decision of 4 April 2016 the first-tier tax authority ruled that MARCAS MC owed additional tax and imposed a fine of 50% of the tax debt plus a late payment surcharge.

- 4 Following the decision by the first-tier tax authority, MARCAS MC initiated a self-correction procedure in respect of its tax liabilities for 2011 and 2012. The self-correction showed that its tax liability was less than the amount stated in the tax return for 2012, and it left the difference in its tax account as an overpayment.
- 5 Following an appeal by MARCAS MC, the second-tier tax authority ('the Appeals Directorate') reduced the amount of the fine to 10% of the tax debt.
- 6 MARCAS MC lodged an appeal against the second-tier decision. The court which heard the case quashed the contested decision and ordered the Appeals Directorate to issue a new second-tier decision. Under the new procedure, the decision adopted by the second-tier tax authority on 22 August 2018 amended the first-tier decision so as to reduce the fine to 10% of the tax debt and to reduce the amount of the late payment surcharge, but it confirmed the first-tier decision in all other respects.

#### **Main arguments of the parties to the main proceedings**

- 7 MARCAS MC asserts a breach of the principles of legal certainty and right to a fair trial, arguing that the principles in the Law on Accounting should be considered in the round, whereas the Appeals Directorate only considered the accruals-based accounting principles. For the year in question, the Appeals Directorate should have taken into account certain entries that had been amended by the supplementary return for the previous year; in other words, MARCAS MC had satisfied its tax obligation before payment became due. MARCAS MC also asserts a breach of the principle of (protection of) legitimate expectations because, in view of the findings of previous inspections, it had grounds to believe that its actions continued to comply with legal requirements, and therefore it could not be expected to change practices to which the tax authority had not previously objected.
- 8 According to the Appeals Directorate, all the principles established in the Law on Accounting must be applied, and the taxpayer's actions are also capable of having breached all of those principles. In its opinion, MARCAS MC is misinterpreting the principles in question. The Appeals Directorate also notes that the findings in the earlier inspection report were purely formal, because they referred only to compliance with the provisions of the former LGPT.

#### **Brief summary of the reasons for the request for a preliminary ruling**

- 9 The purpose of the proceedings is to determine the taxable amount and the rate of corporation tax. In Hungary, the TAO establishes that, for corporation tax purposes, the taxable amount is the accounting profit calculated in accordance with the Law on Accounting, although the TAO establishes a series of corrective factors to be applied to that accounting profit. In the opinion of the referring court, an examination of the accounting treatment of financial transactions relating to



2013 must have regard to the Fourth and Seventh Council Directives (which were still in force during the tax year under inspection) and the Law on Accounting which transposed the directives into Hungarian law.

- 10 With regard to the jurisdiction of the Court of Justice of the European Union ('the Court of Justice') to reply to the questions referred for a preliminary ruling, the referring court notes that its questions are based on general principles of EU law which have essentially been developed by the case-law of the Court and which are also now enshrined in Article 6 TEU.
- 11 According to the judgment of the Court of Justice of 26 February 2013, *Åkerberg Fransson* (C-617/10, EU:C:2013:105), where national courts are called upon to review whether fundamental rights are complied with by a national provision or measure which applies EU law and, in this context, are required to interpret the Charter, they may, and in some cases must, make a reference to the Court of Justice for a preliminary ruling under Article 267 TFEU. According to the case-law of the Court of Justice established in the judgment of 6 October 1982, *Cilfit and Others* (C-283/81, EU:C:1982:335), a reference will be necessary provided that the question raised is relevant, the provision of EU law in question has not already been interpreted by the Court of Justice, or the correct application of EU law is not so obvious as to leave no scope for any reasonable doubt.
- 12 With regard to the first two requirements, the referring court notes that the question of whether the way in which the tax authority applies the principles in the Law on Accounting complies with Articles 2(3) and 31(1) of the Fourth Council Directive affects the substance of the case, and the questions are therefore relevant. While the Court of Justice has developed very extensive case-law concerning the principles of legal certainty, the right to a fair trial and proportionality, that case-law is based on completely different points of fact and law, and therefore it can be said that the provisions of EU law in question have not already been interpreted by the Court of Justice.
- 13 With regard to breach of the principle of (protection of) taxpayers' legitimate expectations, according to the case-law of the Court of Justice, whether or not this principle can be relied on depends on whether the expectations are well founded (objective aspect) and whether the person in question actually relies on the continuation of the existing situation (subjective aspect). Thus, the primary consideration of the Court of Justice is, firstly, whether there is an objective basis for the individual's expectations which could justifiably have led him to have certain expectations, and secondly, whether that expectation has been expressed in some form. The case-law of the Hungarian courts on this matter is not consistent. The view of the referring court is that, in the absence of any relevant legislative change, a taxpayer cannot be expected to change his accounting practices in respect of transactions if, following a comprehensive inspection, the tax authority has not objected to those practices. By contrast, the Kúria (Supreme Court, Hungary) has stated that it is possible to assert a right on grounds of legitimate expectation which guarantees protection from future changes, or to claim more

favourable treatment, only where there is reliance on some positive statement or factual circumstance. Thus, since the tax authority did not issue a statement, it cannot be concluded that it has assessed the taxpayer's accounting practices as being correct. Therefore, with regard to the objective and subjective requirements of the principle of protection of legitimate expectations, the practice followed in this Member State does not satisfy the doctrine of *acte clair* established in the judgment of 6 October 1982, *Cilfit and Others* (C-283/81, EU:C:1982:335); that is to say, there is no correct application of the law that leaves no scope for any reasonable doubt. The problem of legal interpretation that arises in applying the principle of legitimate expectations undoubtedly affects the decision on the substance of the case, and therefore it is relevant and cannot be resolved without a reference for a preliminary ruling.

- 14 In its observations on the first and second questions referred, the referring court notes that the Law on Accounting does not establish a hierarchy of accounting principles. All the standards are subject to a single principle which requires that the books be kept in such a way as to ensure that the financial information prepared from those books presents a true and fair view of the company's assets, financial position and income. On that basis, the taxable amount for corporation tax can only be the actual profit or loss from the company's activities. For these purposes, the taxpayer is entitled to choose, from among the various available options, the accounting method that is best suited to achieve that objective and best reflects its operations. Whatever accounting method is used, it must be capable of showing the actual profit or loss generated by activities.
- 15 The tax authority based its findings solely on the accruals-based accounting principles, without taking account of the set of closely inter-related principles detailed in the Law on Accounting and the Fourth Council Directive or the accounting policy followed by MARCAS MC, but it did not uncover any other irregularity. The referring court draws attention to the practice followed by the national tax authority under which, where an economic activity extends into the previous or following financial year, it adopts a general rule that uses different accounting principles from those chosen by the taxpayer as the basis for the assessment; in other words, it amends an entry, thereby generating a difference in tax which is classed as a tax debt in the year under examination, with an overpayment of tax in the previous or following year, but no change in the total tax due over the two consecutive years in question, since the tax authority is not challenging the total amount of tax due. While, in law, the tax authority may extend its inspection to cover the years immediately before or after the year under inspection, which are also affected by the principle that has been adopted, it does not do so. If the inspection were to examine several financial years, no discrepancy in the amount of tax due would be identified.
- 16 While the taxpayer can use the tax self-correction procedure to invoke the overpayment generated in the year that is not under inspection, this only relieves it of the requirement to pay twice the difference in tax; it does not absolve it from the fine and the late payment surcharge.

- 17 In its observations on the third and fourth questions referred, the referring court notes that payment of the sum identified as a tax debt was made to the tax authority even before it fell due. Moreover, when carrying out the inspection for the year in question, the tax authority did not take into account the facts and statements set out in the supplementary return, nor the amendments for the financial year to which that return relates. The result in the present case is that the inspection does not reflect the actual profit or loss on the activities of MARCAS MC, because the company has not been able to set off the debt for 2013 against the overpayment for 2012.
- 18 With regard to the principle of legitimate expectations, the referring court notes that, following the previous inspection of MARCAS MC, the tax authority noted in its report that the accounts kept by MARCAS MC complied with the provisions of the former LGPT. Consequently, the tax authority had not only implicitly taken note of the accounting practices followed by MARCAS MC, but had found that they complied with the law. Moreover, that inspection was solely and expressly concerned with an economic activity identical to the one at issue in these proceedings.
- 19 Furthermore, the former LGPT ascribes different legal effects to the different checks: ex-post checks on tax returns result in a closed period, the legal effect of which is that, once the check has been initiated, the taxpayer is no longer able to take advantage of the tax self-correction procedure, and the tax authority is unable to carry out further checks; however, other types of checks do not have the same legal effect and, if an irregularity is detected, the tax authority may initiate an ex-post check.
- 20 In this context, the differences of opinion between the Hungarian courts can be summarised by stating that in the view of the referring court the objective requirement for applying the principle of protection of legitimate expectations is satisfied if, in the course of any tax inspection carried out in respect of previous years, the tax authority does not object to the taxpayer's accounting practices in relation to something which is subsequently deemed unlawful, whereas the Supreme Court does not regard even the findings of an ex-post check that results in a closed period as grounds for a legitimate expectation. In view of the situation, the referring court is seeking clarification of whether the fact that the tax authority has not commented on an accounting practice followed by the taxpayer, that is to say, it has not objected to the practice in question, can be considered to provide the objective ground for a legitimate expectation on the part of the taxpayer that an accounting practice to which the tax authority has not objected complies with legal requirements, or whether in all cases such an expectation requires a positive act, measure or decision on the part of the tax authority. An answer is also needed to the question whether, with regard to the applicability of the principle of protection of legitimate expectations, the legal form or nature of the action or silence on the part of the authority that gives rise to the taxpayer's legitimate expectation has any relevance, and whether, in order to be able to apply the aforesaid principle, the taxpayer must take some positive action in reliance on a



constant legal environment, or whether, for the subjective requirement to be met, it is also sufficient for the taxpayer not to change his practice, in the expectation that it remains correct.

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