

Case C-734/19**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:**

4 October 2019

Referring court:

Tribunalul București (Regional Court, Bucharest, Romania)

Date of the decision to refer:

27 September 2019

Applicant:

ITH Comercial Timișoara SRL

Defendants:

Agenția Națională de Administrare Fiscală – Direcția Generală Regională a Finanțelor Publice București (National Agency for Fiscal Administration – Regional Directorate-General of Public Finances, Bucharest, Romania)

Agenția Națională de Administrare Fiscală — Direcția Generală Regională a Finanțelor Publice București — Administrația Sector 1 a Finanțelor Publice (National Agency for Fiscal Administration – Regional Directorate-General of Public Finances, Bucharest – Public Finance Office, Sector 1, Romania)

Subject of the main proceedings

Administrative action for the annulment of a tax assessment giving notice of an obligation to pay VAT

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

Pursuant to Article 267 TFUE, the referring court seeks interpretation of the provisions of Directive 2006/112/EC on the common system of value added tax

and of the principles of legal certainty, the protection of legitimate expectations, non-discrimination and tax neutrality.

Questions referred

1.1. Do the provisions of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, in particular Articles 167 and 168 thereof, and the principles of legal certainty, the protection of legitimate expectations, non-discrimination and tax neutrality permit or preclude that the right of a taxable person to deduct VAT in relation to certain investment expenditure which the taxable person incurs with the intention of allocating it for the purpose of carrying out of a taxable transaction should be forfeited in the event that the planned investment is subsequently abandoned?

1.2. Do those same provisions and principles permit or preclude that the right of deduction should, in the event that the investment is abandoned, be called into question even in circumstances other than those where the taxable person is guilty of abuse or fraud?

1.3. Do those same provisions and principles permit or preclude an interpretation to the effect that the circumstances in which the right of deduction may be called into question in the event that the investment is abandoned include:

1.3.1. the subsequent materialisation of a risk that the investment project will not be completed, which the taxable person was aware when incurring the investment expenditure, such as the fact that a public authority has not approved an urban development plan necessary for the completion of the investment project;

1.3.2. a change in economic circumstances over time, such that the planned investment is no longer viable as it was when the project was commenced?

1.4. Are the provisions of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax and the general principles of EU law to be interpreted as meaning that, in the event that the investment is abandoned:

1.4.1. there is a presumption of abuse or fraud justifying the calling into question of the right of deduction, or must the tax authorities demonstrate such abuse or fraud, and

1.4.2. such abuse or fraud may be demonstrated by simple presumption, or is objective evidence required?

1.5. Do the provisions of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax and the general principles of EU law permit or preclude that, in the event that the investment is abandoned, abuse or

fraud justifying the calling into question of the right of deduction should be taken into consideration in circumstances where the taxable person is unable to make any use whatsoever, not even private use, of the goods or services in respect of which it has deducted VAT?

1.6. Are the provisions of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax and the general principles of EU law to be interpreted as meaning that, in the event that the investment is abandoned, circumstances arising subsequent to the taxable person's incurring expenditure, such as (i) an economic crisis (ii) the materialisation of a risk that the investment project will not be completed that was present at the time the investment expenditure was incurred (for example, the fact that a public authority has not approved an urban development plan necessary for the completion of the investment project) or (iii) a change in the viability projections for the investment, are circumstances beyond the control of the taxable person which may be taken into consideration in determining whether the taxable person acted in good faith?

1.7. Are the provisions of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, in particular Articles 184 and 185, and the principles of legal certainty, the protection of legitimate expectations, non-discrimination and tax neutrality to be interpreted as meaning that the abandonment of the investment project constitutes a case requiring the adjustment of VAT?

In other words, where the right to deduct VAT relating to certain investment expenditure which the taxable person has incurred with the intention of allocating it to the carrying out of a taxable transaction is called into question, in the event that the investment is subsequently abandoned, should the VAT adjustment mechanism be applied?

1.8. Do the provisions of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax permit or preclude national legislation which provides that the right to deduct VAT relating to investments that are abandoned is retained in two cases only, those cases being identified by summary reference to two judgments of the Court of Justice: (i) where, because of circumstances beyond the control of the taxable person, the taxable person never uses the goods or services for the purposes of its economic activity, as the Court ruled in its judgment in Case C-37/95, *Belgian State v Ghent Coal Terminal NV*, and (ii) in other cases in which purchased goods or services in respect of which the right of deduction has been exercised are not used for the purposes of the taxable person's economic activities for objective reasons beyond the taxable person's control, as the Court ruled in Case C-110/94, *Intercommunale voor zeewaterontzilting (INZO) v Belgian State*?

1.9. Do the provisions of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, the principle of legal certainty and the principle of the protection of legitimate expectations permit or preclude that tax

authorities may withdraw approvals, contained in previous tax inspection reports or in previous decisions on administrative tax appeals, recognising that:

- 1.9.1. an individual has purchased goods or services with the intention of using them for the purposes of a taxable transaction;
 - 1.9.2. the suspension or abandonment of an investment project was brought about by a particular set of circumstances beyond the control of the taxable person?
- 2.1. Do the provisions of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, in particular Article 28 thereof, permit or preclude the application of the mechanism imposing the rules governing commissioning other than in the case of an agency agreement without representation?
 - 2.2. Are the provisions of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, in particular Article 28 thereof, to be interpreted as meaning that the mechanism imposing the rules governing commissioning is applicable where a taxable person constructs a building in accordance with the specifications and business requirements of another legal person, with the intention of retaining ownership of the building and merely letting it once it is finished to the other legal person?
 - 2.3. Are the same provisions to be interpreted as meaning that, in the situation described above, the builder must invoice the investment expenditure relating to the construction of the building to the legal person to which it is to let the building once it is finished and must collect the corresponding VAT from that legal person?
 - 2.4. Are the same provisions to be interpreted as meaning that, in the situation described above, the builder is under an obligation to invoice the investment expenditure and collect the corresponding VAT even if it stops the construction work definitively because of a drastic reduction in the economic activity of the person to which the building was to have been let, resulting from the latter's imminent insolvency?
 - 2.5. Are the provisions of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax and the general principles of EU law to be interpreted as meaning that tax authorities may reclassify transactions carried out by a taxable person without having regard to the terms of the contracts which it has concluded, even if the contracts in question are not colourable?
 - 2.6. Do the provisions of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax and, in particular, the principle of legal certainty and the principle of the protection of legitimate expectations, permit tax authorities to withdraw approvals, contained in previous tax inspection reports or

in previous decisions on administrative tax appeals, of a taxable person's right to deduct VAT, or do they preclude them from doing so?

Provisions of EU law cited

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, in particular Article 9(1) and Articles 28, 63, 167, 168, 184 and 185.

Provisions of national law cited

A. Legea nr. 571/2003 privind codul fiscal (Law No 571/2003 establishing the Tax Code), published in *Monitorul Oficial al României*, Part I, No 927 of 22 December 2003, as amended ('the 2003 Tax Code'):

- Article 11 provides that, when establishing the amount of a tax, the tax authorities may disregard a transaction that has no economic purpose or may reclassify the form of a transaction or activity so as to reflect the economic content of the transaction or activity;
- Article 128(1) and (2) defines 'supplies of goods' and provides that where, in connection with a supply of goods, a taxable person acts in his own name but on behalf of another person, as an intermediary, he is deemed to have purchased or supplied those goods himself;
- Article 129(1) to (3) defines 'supplies of services' and provides that where a taxable person acting in his own name but on behalf of another person takes part in a supply of services, he is deemed to have received or supplied those services himself;
- Article 138 provides, in substance, that the taxable amount is to be reduced in the event that a contract for the supply of goods or the provision of services is cancelled, in whole or in part, before the contract is performed, but invoices relating to it have been issued in anticipation of the contract;
- Article 145(2) provides for a right to deduct VAT relating to purchases if those purchases are intended to be used for the purposes, inter alia, of taxable transactions;
- Article 148(1) provides that the initial deduction is to be adjusted, inter alia, where, after the VAT return is made, some change occurs in the matters taken into consideration after the amount to be deducted has been determined, including in the cases referred to in Article 138 of the 2003 Tax Code.

B. Normele metodologice de aplicare a Codului fiscal 2003, aprobate prin Hotărârea Guvernului nr. 44/2004, (Rules governing the application of the 2003 Tax Code, approved by Government Decision No 44/2004, 'the Implementing

Rules’) published in the *Monitorul Oficial al României*, Part I, No 112 of 6 February 2004, as amended:

- In accordance with Point 6(3), in the supply of goods, a taxable person who acts as agent (*comisionar*), and receives invoices in his own name from his principal as seller, or, as the case may be, from a supplier and who issues invoices in his own name for the account of his principal as purchaser, or, as the case may be, for the account of his customer or client, is deemed to act in his own name but on behalf of his principle. For tax purposes, the agent is deemed to be a purchaser and reseller of the goods, irrespective of the fact that he is acting on behalf of the seller or purchaser. Where, in accordance with a contract, the agent acts in the name of and on behalf of his principal as agent (*mandatar*) but receives or issues invoices in his own name, the agent is then deemed to be a purchaser/reseller for VAT purposes;
- Point 7(2) provides that the provisions of Point 6(3) apply also in the case of the supply of services;
- Point 19(4) provides, in substance, that, where expenditure incurred for another person is *re-invoiced*, that is to say, where a taxable person receives an invoice or other document in his own name for a supply of goods or the provision of services for the benefit of another person and then re-invoices the value of that supply or provision, the rules governing commissioning apply, in accordance with Points 6 and 7. In such case, the taxable person has the right to deduct the tax relating to the purchase of goods or services that is to be re-invoiced and is under an obligation to collect the value added tax on the taxable transactions;
- Point 45(6) provides, in substance, that:
 - in the case of buildings that are under construction but are then not finished, pursuant to a decision to abandon the investments, which have been written off and then recorded in the expense account, the right to deduct is retained if, due to circumstances beyond the control of the taxable person, the taxable person has never made use of the goods or services for the purposes of carrying on its economic activity, as the Court ruled in its judgment of 15 January 1998, *Belgian State v Ghent Coal Terminal NV* (C-37/95, EU:C:1998:1);
 - the right of deduction may also be retained in other situations in which purchased goods or services in respect of which the right of deduction has been exercised are not used for the purposes of the taxable person’s economic activity for objective reasons outside the taxable person’s control, as the Court ruled in its judgment of 29 February 1996, *Intercommunale voor zeewaterontziltting (INZO) v Belgian State* (C-110/94, EU:C:1996:67);
 - in the case of the purchase of land with buildings, a taxable person has the right to deduct the VAT relating to that purchase if he provides

proof of his intention, confirmed by objective evidence, that the area of land on which the buildings were built continues to be used for the purposes of his taxable transactions, such as the construction of other buildings for the purposes of taxable transactions, as the Court ruled in its judgment of 29 November 2012, *Gran Via Moinești* (C-257/11, EU:C:2012:759);

- Point 71 provides, in substance, in the case of tangible or intangible assets that were being created but are then not completed or finalised, the value of those assets that is written off and then recorded in the expense account, where the contracts are cancelled before their term, constitutes a non-deductible expense, if the value of the assets is not realised by way of sale or disposal.

Outline of the facts and the main proceedings

- 1 The factual situation which gave rise to the main proceedings is the applicant's failure to complete two building projects which it had begun in 2006 and 2007 in accordance with the agreements which it had entered into with a company that manufactures lifts and escalators ('the lift company').
- 2 In 2006, the applicant purchased a plot of land on which it intended to build a factory for making lifts and ancillary products. Subsequently, the building was to have been let to the lift company for a period of ten years ('the Dragomirești Vale project').
- 3 By means of a sale and purchase agreement concluded in December 2007, the applicant purchased from the lift company real estate consisting in a plot of land and the building in which the lift company was carrying on its business. The purpose of the transaction was to enable the applicant to build an office block and shopping centre on the plot of land ('the Calea Giulești project') and to enable the lift company to reduce its own costs by moving into the premises that were to have been built as part of the Dragomirești Vale project.
- 4 Between 2008 and 2010, in connection with the Dragomirești Vale project, the applicant incurred expenditure in connection with various preparatory steps, such as applying for a building permit and concluding various technical consultancy agreements for the purpose of securing that permit, project planning, the construction of a number of preliminary buildings and the supply of site management services. That expenditure amounted to a total of RON 942 471, on which VAT of RON 226 193 was charged, in relation to which the applicant exercised its right of deduction.
- 5 In connection with the Calea Giulești project, the applicant incurred expenditure in obtaining the permit required for the demolition of the existing buildings on the land where the lift company was carrying on its business and in applying for a building permit. That expenditure amounted to a total of RON 71 268, on which

VAT of RON 13 541, was charged, in relation to which the applicant exercised its right of deduction.

- 6 In 2008, against the background of the economic crisis and the protraction of discussions with the public authorities involved in the grant of the necessary permits, the applicant suspended the Calea Giulești project.
- 7 Against the same background, the lift company found itself forced to lease premises at a rent lower than the rent it had agreed with the applicant for the lease of the lift manufacturing factory that was to have been built. In those circumstances, the applicant also suspended the Dragomirești Vale project and leased a building which it then sublet to the lift company for a period of seven years at a rent lower than the rent originally agreed upon. In an addendum to the 2007 sale and purchase agreement, the lift company certified that the applicant had fulfilled completely and in due time its obligations relating to the move.
- 8 On 26 May 2016, the applicant decided to cancel the investments associated with the Calea Giulești project and to enter them in its financial statements for 2015. The applicant nevertheless obtained the permit authorising the demolition of the existing buildings on the land that had previously belonged to the lift company and planning consent for the preparation of the documentation relating to the permits for the completion of the project.
- 9 In 2009 and 2013, the tax authorities carried out tax inspections in relation to the applicant's activities during the period 27 March 2006 to 30 June 2012, including its investment expenditure for the two building projects, checking whether it complied with VAT law. In the tax inspection reports the authorities recorded that the applicant had deducted and collected VAT during the period covered by the inspection in accordance with VAT law. In addition, one of the tax inspection reports expressly mentioned that the applicant's financial position had prevented it from completing the two projects.
- 10 In 2016, in connection with another tax inspection, the tax authorities examined the period from 1 July 2012 to 30 June 2016. In the tax inspection report they stated that the applicant had incorrectly deducted VAT amounting to RON 13 541 relating to the investment expenditure for the Calea Giulești project and that it must collect from the lift company VAT of RON 226 193 in connection with the investment expenditure incurred for the Dragomirești Vale project, which the applicant should have re-invoiced to the lift company.
- 11 In the tax assessment notice that was issued on the basis of that tax inspection report, the applicant was required to pay additional VAT of RON 239 734. The applicant challenged the tax inspection report and the tax assessment notice, first in administrative proceedings and subsequently in the judicial proceedings which led to the present case, seeking reimbursement of the sum thus paid together with interest.

Essential arguments of the parties to the main proceedings

- 12 The applicant asserts that it was under no obligation to collect the additional RON 226 193 in VAT and that the tax authorities acted contrary to the law in refusing to deduct VAT in the sum of RON 13 541, reported in its VAT declaration for December 2015 as a negative amount with the option of reimbursement. The applicant maintains that it abandoned to the two building projects in question because of supervening events over which it had no control, and that that rules out any possibility of abuse or fraud.
- 13 The defendants assert that the resolution of the dispute depends on the referring court's determination of whether the right to deduct the VAT remains independently of the reasons for which the investments were abandoned. It maintains that the refusal of the application for reimbursement of VAT in the sum of RON 226 193 was in accordance with the law.
- 14 In so far as the Calea Giulești project is concerned, the defendants maintain that, while they had accepted that the applicant had purchased the services relating to that project with the intention of using them for the purpose of carrying out taxable transactions, the VAT paid on those services must be adjusted pursuant to Article 148 of the 2003 Tax Code and Point 45 of the Implementing Rules, because the applicant's intentions had changed and it had subsequently abandoned the project.
- 15 The defendants submit that the applicant would have retained the right of deduction only if its abandonment [of the project] had been due to objective reasons, consisting in circumstances beyond its control that had arisen after the sums in question had been invested. The applicant has failed to prove such objective reasons. It had been aware of the factors that might prevent the project from being completed and it had freely assumed the risk.
- 16 In the defendants' opinion, the applicant's complaint cannot be upheld on the basis of the judgment in *INZO*, because it had decided to record investment expenditure before completing any feasibility study such as might have indicated that the project was not viable.
- 17 In so far as concerns the Dragomirești Vale project, while the defendants acknowledged that the applicant was entitled to deduct VAT paid on services associated with that project, and that the applicant had purchased those services in its own name, they nevertheless took the view that the purchases in question were made on behalf of the lift company, since the building that was to have been built and let to the lift company was tailored to the particular needs of the lift company.
- 18 The defendants point out that, although they had reclassified the transaction between the applicant and the lift company so as to be able to apply the mechanism imposing the rules governing commissioning, they had subsequently taken the view that the applicant should re-invoice the lift company for all of the

costs of the services purchased and collect from the lift company the VAT corresponding to the cost of those services.

Summary of the reasons for the reference

- 19 In the first place, in so far as the Calea Giulești project is concerned, the referring court considers it necessary to clarify whether the provisions of Directive 2006/112 may be interpreted as meaning that any person that purchases goods or services with the intention of using them for the purpose of carrying out a taxable activity acquires the corresponding right to deduct the VAT, and retains that right even if the goods or services are not subsequently used for the purpose initially intended, because of supervening circumstances beyond the taxable person's control, which rule out the possibility of abuse or fraud on its part, as the Court of Justice held in *INZO* (C-110/94, EU:C:1996:67).
- 20 In the second place, with regard to the Dragomirești Vale project, the referring court considers it necessary to clarify whether the provisions of Directive 2006/112, in particular Article 28 of the directive, permit or preclude the application of the mechanism imposing the rules governing commissioning even in the absence of an agency agreement without representation.
- 21 The referring court therefore wishes to establish, first of all, whether or not the provisions in question are to be interpreted as meaning that the rules governing commissioning apply where a taxable person constructs a building in accordance with the business needs of another legal person, intending to retain ownership of the building and merely let it once it is finished to the other legal person.
- 22 Next, the referring court seeks to establish whether the same provisions are to be interpreted as meaning that, in a situation such as that in the present case, the builder must re-invoice the investment expenditure relating to the construction of the building to the legal person to which the building is to be let once it is finished and collect the corresponding VAT from that legal person, and also whether the builder is required to re-invoice the investment expenditure and collect the corresponding VAT even if it stops the construction work definitively because of a drastic reduction in the other legal person's economic activity as a result of the latter's imminent insolvency.
- 23 Lastly, the referring court wishes to establish whether the provisions of Directive 2006/112 and the general principles of EU law are to be interpreted as meaning that tax authorities are entitled to reclassify transactions carried out by a taxable person without having regard to the terms of the contracts which it has concluded, even if the contracts in question are not colourable. It also seeks to establish whether the provisions of the directive and, in particular, the principle of legal certainty and the principle of the protection of legitimate expectations, permit the tax authorities to revoke a previous acknowledgment of a taxable person's right to deduct VAT or preclude them from doing so.