

**Case C-519/21**

**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:**

24 August 2021

**Referring court:**

Curtea de Apel Cluj (Romania)

**Date of the decision to refer:**

28 June 2021

**Appellant:**

ASA

**Respondent:**

Direcția Generală Regională a Finanțelor Publice Cluj

**Parties joined as guarantors:**

BP

MB

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**Subject matter of the main proceedings**

Administrative appeal seeking annulment of a VAT assessment notice issued following the establishment of the sale of immovable property by natural persons

**Subject matter and legal basis of the request**

Interpretation of various provisions of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (VAT), and the principles of proportionality, VAT neutrality and legal certainty

## Questions referred for a preliminary ruling

(1) Can VAT Directive 2006/[1]12 in general, and Articles 9, 12, 14, 62, 63, 65, 73 and 78 in particular, be interpreted, in a specific context such as that of the dispute in the main proceedings, as meaning [that]:

- as regards the occurrence of the chargeable event in the case of taxable transactions involving the supply of immovable property and the method for determining the relevant taxable amount, natural persons who are parties to a contract relating to an association without legal personality [concluded] with the taxable person liable for tax on output transactions which he should have collected, *also have the status of taxable person* since the association contract was not registered with the tax authorities before the activity commenced but was presented to them before the administrative acts relating to taxation were issued?

(2) Can VAT Directive 2006/112 in general, and Articles 167, 168(a), 178(a) and 179 in particular, and the principles of proportionality and neutrality, be interpreted, in a specific context such as that of the dispute in the main proceedings, as:

(a) recognising the possibility of conferring the right of deduction on a taxable person, where he does *not* owe tax or has not paid *personally the input VAT* on goods and services used in connection with the taxable transactions, and the VAT is due/paid at the preceding stage by natural persons *in respect of whom the status of taxable person has not been established*, but who are parties to a contract relating to an association without legal personality [concluded] with the taxable person liable for tax on output transactions which he should have collected, since the association contract was not registered with the tax authorities before the activity commenced?

(b) recognising the possibility of conferring the right of deduction on a taxable person, in a specific context such as that of the dispute in the main proceedings, where he does *not* owe tax or has not paid *personally the input VAT* on goods and services used in connection with the taxable transactions, and the VAT is due/paid at the preceding stage by a natural person *in respect of whom the status of taxable person has been established*, who is party to a contract relating to an association without legal personality and who, together with the taxable person, intends also to exercise, or could exercise, his own right of deduction, and the latter are liable for tax on output transactions which they should have collected, since the association contract was not registered with the tax authorities before the activity commenced?

(3) In the event that that the answer to the questions is in the negative and/or in the light of the principle of legal certainty:

is a claim by the taxable person, who is liable for VAT and related charges, admissible *against natural persons in respect of whom the status of taxable person has not been established* and who are parties to a contract relating to an

association without legal personality [concluded] with the taxable person liable for tax on output transactions which he should have collected, since the association contract was not registered with the tax authorities before the activity commenced, *in order to obtain the proportion [of tax] which was laid down for the distribution of profits accruing to those persons under the association contract in relation to the liability for VAT and related charges imposed on the taxable person?*

### **Provisions of European Union law and case-law relied on**

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1), as amended by Council Directive 2009/162/EU of 22 December 2009 (OJ 2010 L 10, p. 14) ('Directive 2006/112'), in particular Articles 2, 9, 11, 12, 14, 62, 63, 65, 73, 78, 167, 168, 178, 179, and 213

Judgments of the Court of Justice, C-368/09, *Pannon Gép Centrum*; C-280/10, *PolSKI Trawertyn*; C-85/11, *Commission v Ireland*; C-324/11, *Toth*; C-271/12, *Petroma Transport and Others*; C-424/12, *Fatorie*; C-183/14, *Salomie and Oltean* and C-664/16, *Vădan*

### **Provisions of national law relied on**

**1. Legea nr. 571/2003** privind Codul fiscal (Law No 571/2003 establishing the Tax Code), published in Monitorul Oficial No 927 of 23 December 2003, as subsequently amended and supplemented, in the version in force at the material time ('the Codul fiscal').

'**Article 86** – Rules relating to associations without legal personality

...

(2) Within each association without legal personality, set up in accordance with the law, the members are required to conclude association contracts in writing on commencement of the activity, containing, inter alia, the following information:

- (a) the contracting parties;
- (b) the scope of the of activity and the registered office of the association;
- (c) the members' contribution in the form of goods and rights;
- (d) the percentage of each member's share in the association's profit or loss in proportion to its contribution;
- (e) the designation of the member responsible for fulfilling the association's obligations towards the public authorities;

(f) the conditions for termination of the association. The members' contributions set out in the association contract shall not be considered as income for the association. The association contract shall be registered with the competent tax authority within 15 days from the date of its conclusion. The tax authority shall have the right to refuse registration of contracts if they do not contain the information required under this paragraph.

...

(5) The annual profit/loss made within the association shall be distributed to the members in proportion to the percentage share corresponding to their contribution, pursuant to the association contract.

(6) The tax treatment of the income earned by the association, in cases other than an association with a legal person, shall be determined in the same way as for the category of income under which it is classified.

(7) The profit/loss accruing to a natural person, resulting from an association with a Romanian legal person which is micro-enterprise not assuming legal personality, determined in accordance with the rules laid in Title VI, shall be treated, for the purposes of the taxation of the natural person, in the same way as self-employment income, from which the compulsory contributions are deducted in order to obtain the net income.

...

## **Title VI – Value added tax**

### **Article 125**

Value added tax is an indirect tax payable to the State budget and collected in accordance with the provision of this Title.

### **Article 125<sup>1</sup>:**

(1) Pursuant to this Title, the following terms and expressions shall have the following meaning:

...

5. 'taxable amount' shall mean the consideration for the supply of taxable goods or the provision of taxable services, of taxable importations or taxable intra-Community acquisitions of goods, determined in accordance with Chapter VII;

...

18. 'taxable person' shall mean a person as provided for in Article 127(1). It shall include natural persons, groups of persons, public institutions, legal persons and any other body capable of carrying on an economic activity.

...

20. 'non-taxable person' shall mean a person who does not satisfy the conditions laid down in Article 127(1) to be regarded as a taxable person;

...

**Article 126 – Taxable transactions**

(1) For the purposes of the tax, transactions in Romania which cumulatively satisfy the following requirements shall constitute taxable transactions:

(a) transactions which, pursuant to Articles 128 to 130, constitute, or are treated in the same way as, the supply of goods or the provision of services for consideration, relevant for VAT purposes;

(b) the place of supply of the goods or of the provision of services shall be deemed to be Romania, in accordance with Articles 132 and 133;

(c) the supply of goods or the provision of services shall be carried out by a taxable person, as defined in Article 127(1), acting as such;

(d) the supply of goods or the provision of services shall be connected with one of the economic activities provided for in Article 127(2);

...

**Article 127 – Taxable persons and economic activity**

(1) 'Taxable person' shall mean any person who, independently, carries on in any place any economic activity, as referred to in paragraph 2, whatever the purpose or results of that activity.

(2) For the purposes this Title, any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions, shall be regarded as 'economic activity'. Economic activity shall include, in particular, the exploitation of tangible or intangible property on a continuing basis for the purposes of obtaining income therefrom.

...

(8) Under the conditions and within the limits laid down in the rules, a group of taxable persons established in Romania, which are legally independent but maintain close organisational, financial and economic relations with one another, shall be regarded as a 'single taxable person'.

(9) The member or partner of an association or organisation without legal personality shall be regarded as a separate taxable person in respect of economic activities which are not carried out on behalf of that association or organisation.

(10) Associations shall not give rise to a separate taxable person. Joint ventures, consortia or other forms of association with commercial purposes which do not have legal personality and are set up in accordance with law shall be regarded as partnerships.

...

**Article 128** – Supply of goods

(1) ‘Supply of goods’ shall mean the transfer of the right to dispose of tangible property as owner’.

(2) A taxable person acting in his own name but on behalf of another person, as an intermediary in a supply of goods shall be deemed to have acquired and supplied those goods himself, under the conditions laid down in law.

...

**Article 134** – Chargeable event and chargeability – Definitions

(1) ‘Chargeable event’ shall mean the occurrence by virtue of which the legal conditions necessary for VAT to become chargeable are fulfilled.

(2) VAT shall become ‘chargeable’ when the tax authority becomes entitled under the law, at a given moment, to claim the tax from the person liable to pay, even though the time of payment may be deferred.

(3) Chargeability of the payment of the tax shall mean the date when the person is required to pay the tax to the State budget pursuant to Article 157(1). That date shall also determine the point in time from which default interest for the failure to pay the tax shall begin to accrue.

...

**Article 134<sup>1</sup>** – Chargeable event for the supply of goods and the provision of services

(1) The chargeable event shall occur on the date on which the goods are supplied or the services are provided, unless otherwise provided in this Chapter.

...

(3) As far as the supply of immovable goods is concerned, the chargeable event shall occur at the time when the legal formalities governing the transfer of ownership from the vendor to the purchaser are completed.

...

**Article 134<sup>2</sup>** – Chargeability for supplies of goods and the provision of services

(1) The VAT shall become chargeable on the date on which the chargeable event occurs.

(2) By way of derogation from paragraph 1, VAT shall become chargeable:

(a) on the date on which an invoice is issued, before the date on which the chargeable event occurs;

(b) the date on which the payment on account is received, in respect of advances paid before the date on which the chargeable event occurs. Payments on account received for the payment of imports and value added tax on imports and payments on account for exempt or non-taxable transactions shall be an exception to these provisions. The payments on account shall correspond to the partial or full payment of the value of the goods or services effected before the date on which the goods were supplied or the services were provided;

...

**Article 137** – Taxable amount as regards the supply of goods and the provision of services in the national territory

(1) The taxable amount of value added tax shall comprise:

(a) in respect of the supply of goods or the provision of services, other than those referred to in subparagraphs (b) and (c) below, the taxable amount shall include everything which constitutes consideration obtained or to be obtained by the supplier, in return for the supply, from the customer, the beneficiary or a third party, including subsidies directly linked to the price of the supply.

...

(2) The taxable amount shall include the following:

(a) taxes and charges, unless otherwise provided under the law, excluding the VAT itself;

(b) incidental expenses, such as commission, packing, transport and insurance costs, charged by the supplier/provider to the customer. Expenses invoiced by the supplier of goods or the provider of services to the customer, which are covered by a separate agreement and are linked to the supply of goods or provision of services at issue, shall be regarded as incidental expenses.

...

**Article 145** – Scope of the right of deduction

(1) A right of deduction shall arise at the time when the tax becomes chargeable.

(2) Every taxable person shall be entitled to deduct the tax on acquisitions, if they are intended to be used for the following transactions:

(a) taxable transactions;

...

(4) In accordance with the conditions laid down in legislation, a taxable person shall be entitled, before his registration for VAT purposes in accordance with Article 153, to deduction of the tax on acquisitions.

**Article 146** – Conditions for exercise of the right of deduction

(1) In order to be able to exercise the right of deduction, the taxable person must satisfy the following conditions:

(a) in respect of tax due or paid on supplies of goods or services which have been or are to be carried out, possession of an invoice containing the information referred to in Article 155(5);

(b) in respect of tax on goods which have been or are to be supplied or services which have been or are to be provided, but on which the taxable person is liable for tax, in accordance with Article 150(1)(b) to (g):

1. possession of an invoice containing the information referred to in Article 155(5) or documents referred to in Article 155<sup>1</sup>(1); and

2. recording of the tax as tax collected in the return for the tax period during which the tax becomes chargeable;

...

**Article 147<sup>1</sup>** – Exercise of the right of deduction by means of a tax return

(1) Any taxable person registered for VAT purposes in accordance with Article 153 shall be entitled to deduct, from the full amount of the VAT collected for a given tax period, the full amount of VAT for which, in the same period, the right of deduction has arisen and may be exercised, in accordance with Articles 145 to 147.

(2) Where the conditions and formalities for exercise of the right of deduction in the tax period are not satisfied or where the supporting documents required under Article 146 for the purposes of proving the tax are not produced, the taxable person may exercise the right of deduction by means of his tax return for the tax period in which those conditions and formalities are satisfied or by means of a subsequent return, but for not more than five consecutive years, reckoned from 1 January of the year following the year in which the right of deduction arose.



(3) Rules shall set out the conditions for the application of paragraph 2 where the right of deduction is exercised more than three consecutive years after the year in which that right arises.

(4) The right of deduction shall be exercised even where no tax has been collected or where the tax to be deducted exceeds that collected for the tax period referred to in paragraphs 1 and 2.

...

#### **Article 153** – Registration of taxable persons for VAT purposes

(1) A taxable person who is established in Romania in accordance with Article 125<sup>1</sup>(2)(b) who carried on or intends to carry on economic activity involving taxable transactions and/or VAT-exempt transactions with deductibility, shall be required, for VAT purposes, to seek registration with the competent tax authority ... .

...

(6) The competent tax authorities shall register for VAT purposes, in accordance with this article, all persons who are required, pursuant to the provisions of this Title, to seek registration, in accordance with paragraphs 1, 2, 4 or 5.

(7) Where the taxable person required to register in accordance with paragraphs 1, 2, 4 or 5 does not apply for registration, the competent tax authorities shall register him on their own initiative.

...

#### **Article 156** – Registration of transactions

(1) Taxable persons established in Romania must keep correct and complete records of all transactions carried out in the performance of their economic activities.

...

(5) In the case of a partnership that is not a taxable person, the statutory rights and obligations relating to the tax shall be referable to the partner who registers the income and outgoings, on the basis of the contract between the parties'.

**2. Hotărârea Guvernului nr. 44/2004** pentru aprobarea Normelor metodologice de aplicare a Legii [nr.] 571/2003 privind Codul fiscal (Government Decision No 44/2004 approving the detailed rules for applying Law 571/2003 promulgating Tax Code) published in *Monitorul Oficial al României*, Part I, No. 112 of 6 February 2004, as subsequently amended and supplemented, in the version in force at the material time.

‘Detailed rules for applying Article 86(2) of the Codul fiscal

**Paragraph 184** Both associations without legal personality, whose establishment and operation are governed by special rules, that is to say family associations, outpatient clinics, associated medical practices, societies of doctors, associated law practices, societies of lawyers, associated notarial practices, partnerships set up in accordance with the law, and any association without legal personality set up in accordance with the law and any association without legal personality set up under the Codul civil (Civil Code), shall be subject to the obligation to conclude and register an association contract.

**Paragraph 45**, implementing Article 145 of the Codul fiscal

‘(1) In accordance with Article 145(4) of the Tax Code, any taxable person shall be entitled to deduct the tax as from the time when he forms the intention of carrying on an economic activity. ... The intention of the taxable person must be assessed on the basis of objective factors, such as the fact that he begins to incur expenses and/or to make preparatory investments necessary for the start-up of the economic activity. ...

(2) For exercise of the right of deduction referred to in paragraph 1 the following conditions must be satisfied:

- (a) the property is intended to be used for transactions that give rise to the right of deduction;
- (b) the taxable person must be in possession of an invoice or other legally approved document showing the amount of the VAT relating to the property acquired.
- (c) the period specified in Article 147<sup>1</sup>(2) of the Codul fiscal must not be exceeded.

**Paragraph 46**, implementing Article 146 of the Codul fiscal

(1) Justification for the deduction of the tax shall be based exclusively on the originals of the documents referred to in Article 146(1) of the Codul fiscal or on other documents containing at least the information referred to in Article 155(5) of the Codul fiscal, with the exception of the simplified invoices referred to in Paragraph 78. ...

**Paragraph 48**, implementing Article 147<sup>1</sup> of the Codul fiscal

Pursuant to Article 147<sup>1</sup>(3) of the Codul fiscal, the taxable person shall apply for deduction by registered letter, accompanied by the originals of the invoices or other documentary evidence of the right of deduction, to the competent tax authorities, which shall respond within 30 working days following the date of the registered letter. The taxable person shall exercise the right of deduction in the tax

return referred to in Article 156<sup>2</sup> of the Codul fiscal, in respect of the tax period in which that person was authorised by the competent tax authorities to deduct the tax.

...

**Paragraph 66**, implementing Article 153 of the Codul fiscal

(1) Where a person is required to apply for registration under the conditions laid down in Article 153(1), (2), (4), (5) or (7) of the Codul fiscal, the registration shall be considered valid as from:

...

(d) from the first day of the month following notification of the administrative act of registration to the taxable person, in the case referred to in Article 153(7) of the Codul fiscal.

...

(2) Pursuant to Article 153(1) of the Codul fiscal, the economic activity shall be deemed to have commenced at the time when the person formed the intention of carrying on that activity. The intention of the person must be assessed on the basis of objective factors, such as the fact that he has begun to incur expenses and/or to make preparatory investments necessary for the start-up of the economic activity.

...'

**3. Codul de procedură fiscală, Ordonanța Guvernului nr. 92/2003** (Tax Procedure Code, Government Order No 92/2003), published in Monitorul Oficial No 513, of 31 July 2007, in the version in force at the material time

‘ ...

**Article 17** – Subjects of the legal relationship under tax law

...

(2) A taxable person is any natural or legal person or any other entity without legal personality required to pay taxes, charges, contributions and other amounts payable to the consolidated general budget under the conditions laid down in law.

...

**Article 91** – Subject matter, time limit and time from which the limitation period on the right to establish tax obligations begins to run

(1) The limitation period for the right of the tax authority to establish tax obligations shall be five years, unless otherwise provided by law.

(2) The limitation period for the right provided for in paragraph 1 shall begin to run from 1 January of the year following that in which the tax claim arose in accordance with Article 23, unless otherwise provided for by law.

(3) The limitation period for the right to establish tax obligations shall be 10 years where they are attributable to criminal conduct.

(4) The period referred to in paragraph 3 shall run from the date on which the act constituting an offence punishable as such by a final judgment was committed’.

**4. Codul civil** (Civil Code) of 26 November 1864, published in Monitorul Oficial No 271/04.12.1864, in the version in force at the material time – Articles 1171, 1173, first paragraph, 1174, 1175 (authentic instrument), 1294 (sale), 1532, and 1546 (authority)

**5. Codul de procedură civilă** (Code of Civil Procedure), published in Monitorul Oficial No 45 of 24 February 1948:

’ ...

#### **Article 60**

(1) A party may join as guarantor another person against whom he could bring proceedings if the application for joining or the claim for damages are unsuccessful:

...’.

#### **Succinct presentation of the facts and procedure in the main proceedings**

- 1 On 14 November 2006, the appellant, and its ‘sister’ undertaking, PP, who are equal half owners of a plot of land with a surface area of 5 448 m<sup>2</sup>, concluded an association contract with the members BP and MB, who are natural persons, with a view to building an apartment complex intended for sale.
- 2 Under the association contract, the two owners were to contribute by providing the land, whilst the members BP and MB were to provide the building materials and bear the construction costs. Furthermore, the decisions relating to the design, obtaining authorisations and all the administrative documents necessary, completion of all the formalities and steps for registering in the land register the property and the flats contained therein, and the sale to natural/legal persons of the flats in the blocks to be built, were to be taken by common agreement between the four associated parties. The investment was to be recovered by selling the flats and each amount received was to be divided, with 40% going to the appellant and PP, to recover the value of the land, and 60% to BP to MB, to meet the costs related to the construction of the property. Following recovery of the value of the

investments, the profits were to be distributed in proportion to each member's share, that is to say: the appellant and PP, 16.67% each, BP 33%, and MB 33%. The parties did not appoint an associate director and did not register the association contract with the tax authorities before the activity commenced.

- 3 A complex of eight buildings with 56 flats was built on that land. Goods and services were purchased for the construction of the property complex and tax invoices were issued in the name of the members BP, MB and PP. The appellant produced invoices for electricity services issued in its name and paid by BP.
- 4 Following a tax inspection carried out by representatives of the respondent, the inspection bodies found that 53 flats had been sold, of which 13 flats were wholly owned by the appellant and sold in its own name, 14 flats were wholly owned by PP and sold in its own name, and 26 flats were half-owned jointly by the appellant and PP and sold by both of them. In the notarised sales and purchase contracts, only the appellant and PP are listed as the owners of the flats disposed of. No mention is made in those contracts of the association contract, the members BP and MP, or the VAT. It is stated, however, that the stated sale price is the actual price, that it was set by mutual agreement between the contracting parties, and that it was received in full by the sellers before the contract was signed.
- 5 The inspection bodies considered that the sale of the flats constituted a taxable transaction and, since some of the goods sold were in joint ownership, it was considered, when determining the VAT threshold, that this activity was carried out by a taxable person in the form of an association with commercial purposes, without legal personality, as provided for in Article 125<sup>1</sup>(1)(18) of the Codul fiscal. It was found that the receipts of the appellant and the member PP had exceeded the VAT exemption ceiling and it was held that the appellant should have been registered as a taxable person for VAT purposes as from 1 July 2008.
- 6 On the basis of the tax inspection report, it was established that, in respect of the sales of flats concluded after 1 July 2008, the appellant had received the amount of 2 827 830 Romanian lei (RON). The 2011 assessment notice placed a tax liability on the appellant totalling **RON 1 019 556**, made up of: (a) **RON 537 287** by way of VAT, (b) **RON 401 676** by way of interest on VAT, and (c) **RON 80 593** in VAT-related late payment penalties. The appellant's 'sister' undertaking, the member PP, was also issued with an assessment notice, which is the subject of separate legal proceedings.
- 7 The appellant lodged an administrative appeal against the 2011 tax assessment and, after that appeal was dismissed, brought an action before the administrative court. The appellant raised substantive complaints against the tax assessment relating, inter alia, to its status as a taxable person, as well as complaints relating to the method for calculating the VAT due, the right of deduction and the proportionality of the ancillary tax liabilities. The appellant also joined as guarantors the members BP and MB, requesting that, if the tax claim established by the assessment notice is confirmed against it, the parties joined as guarantors

be ordered to pay the amount of RON 679 703.99, representing two-thirds of the amount thereof.

- 8 The case is currently at the third procedural stage, after the judgment delivered at first instance was appealed before the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice; hereinafter: the 'Înalta Curte de Casație și Justiție' or the 'Înalta Curte'), which allowed the appeal, set aside the judgment under appeal, and referred the case back twice for re-examination. Most of the complaints raised by the appellant, including those relating to the appellant's status as a taxable person, were upheld by a final decision.
- 9 Now, according to the rules of procedure of the Înalta Curte, the referring court must rule on the substance of the application for joining, re-examine the appellant's right to deduct VAT, and clarify the relevance of the association contract in that regard. The Înalta Curte de Casație și Justiție held that the court adjudicating on the substance had erred in considering the subject matter of the application for joining since the appellant had relied on the existence of an obligation to pay compensation as the parties joined as guarantors had obtained two thirds of the income from the activity carried on, whereas the appellant had, in the context of its application for joining, not relied on the existence of an obligation on the two parties joined as guarantors towards the tax authority, which would have led to a reduction in the amount of tax payable by the appellant, as established in the assessment notice at issue.

#### **The essential arguments of the parties in the main proceedings**

- 10 As regards the application for joining, the appellant claims, in essence, that it submitted the association contract to the tax authorities at the time the tax inspection was initiated and that, although the members BP and MB had kept the accounts, concluded contracts with the buyers, dealt with promotion and advertising and collected the profits made, the tax authorities held only it and the member PP liable for all the amounts representing the sales prices of the flats. However, having regard to the terms of the association contract, the appellant takes the view that the tax liabilities must also be borne proportionally (the share of the members BP and MP is 33% each, whilst that of the appellant ASA and the member PP is 16.67% each). As regards the right of deduction, it may also be exercised in respect of expenses incurred before the start of the economic activity and expenditure incurred by the members.
- 11 The respondent stated that it had taken account of the association contract but that, under the notarised sales and purchase contracts, the owners of the properties, that is to say the persons who received the income from the sale thereof, are the appellant in the proceedings and PP, there being no mention of the members BP and MP in the sales and purchase contract. As regards the right of deduction, the respondent noted that the applicant was legally bound to register as a taxable

person for VAT purposes and had to comply with Articles 145 and 146 of the Codul fiscal.

- 12 The parties joined as guarantors, BP and MP, argue that the appellant and the member PP alone held ownership of the land and the flats disposed of and obtained income by virtue of the price of the disposal thereof. However, they do not have the status of taxable persons and cannot be held liable for part of a tax claim which was not established against them. Moreover, the association contract is also a civil law contract to which the provisions of the Codul fiscal do not apply.

### **Succinct presentation of the reasoning in the request for a preliminary ruling**

#### *First question*

- 13 The referring court observes that the tax authorities took account of the association contract in holding that the economic activity was carried on by a taxable person in the form of an association for commercial purposes, without legal personality, but, at the time of the taxation, the members BP and MB were not regarded as parties to the legal relationship and no assessment notices relating to VAT on the transfer of the immovable property were issued against them.
- 14 *Under one scenario*, it could be held that the natural persons party to an association contract who are not the owners and sellers of the flats, that is to say BP and MB, do not have the status of taxable persons within the meaning of Article 9 of the VAT Directive. In this regard, the referring court applied Articles 128, 134<sup>1</sup>(3), and 137(1) of the Codul fiscal, which correspond to Articles 2, 63 and 73 of the VAT Directive, under which the chargeable event in respect of the disposal of immovable property is the transfer of title from the owner-seller to the buyer, and the taxable amount is the remuneration actually received.
- 15 The notarised sales and purchase contracts, which mention the appellant as the owner of the property sold and state that the price formed part of the appellant's assets, without mentioning the existence of the association contract, are enforceable *erga omnes*. Therefore, the members' contribution to the performance of the construction works and the authority given by the appellant to the members for the purposes of concluding the sale are irrelevant.
- 16 *Under another scenario*, given that the association contract was submitted to the tax authorities at the time that the inspection was started and they acknowledged the existence of that contract, failure to take it into account could lead to the establishment of a tax situation which did not correspond to reality and to selective taxation of the association's members. Even though the association contract does not comply fully with Article 86 of the Codul fiscal concerning indication of the association's registered office, the designation of a member responsible for fulfilling the association's obligations to public authorities, or

registration with the competent tax authority, those shortcomings appear to relate to the formal, and not the substantive, requirements of the association.

- 17 The provisions of Articles 9 and 11 of the VAT Directive in conjunction appear to allow persons regarded jointly, who are closely linked financially, economically and organisationally, to meet the definition of single taxable persons or VAT group even if the latter also includes non-taxable persons. In the light of the tasks of the members BP and MB under the association contract, and the fact that, according to the invoices for the purchase of materials and services necessary for construction of the building complex, most of the materials and services were purchased by them, and in view of their shares in the association contract, it could be considered that those two members should also have been regarded as taxable persons since a private individual who purchases goods for the purposes of carrying on an economic activity acts as a taxable person.
- 18 The referring court considers that, in the light of the second paragraph of Article 11 of the VAT Directive, taxation of the appellant and the member PP alone goes further than is necessary to ensure the correct collection of the VAT and the prevention of evasion, since it may also result in the loss of VAT collected in the event of the insolvency of one of the persons deemed to be taxable.

*Second question*

- 19 *Under one scenario*, as regards the scope of the right of deduction enjoyed by the appellant, in the light of the principle of VAT neutrality the appellant's right to deduct VAT on investment transactions carried out with the context of the association, including VAT arising from tax invoices issued in respect of the members BP, MB and PP, should not be refused out of hand on the sole ground that the appellant did not personally owe or pay input tax on the goods and services used in connection with the taxable transactions. According to the judgments of the Court of Justice of the European Union in Case C-137/02, *Faxworld*, and in Case C-280/10, *Polski Trawertyn*, on the basis of the premiss that a private individual who purchases goods and services with a view to carrying on an economic activity and takes preparatory steps, purchases those goods as a taxable person, it could be held, in the context at issue, that the purchase was made by any member of the association for the person whom the tax authorities regarded as a taxable person.
- 20 The issue of the proportionality of the right to deduct VAT arises in the context in which the member PP, a 'sister' undertaking of the appellant, also sought relief for VAT due or paid at the preceding stage. Moreover, it could also be considered that the possibility of granting the applicant a right of deduction in respect of the VAT due or paid at the preceding stage by the other partner should not be recognised, since, as it is subject to individual taxation, it must be granted a full personal right to deduct the VAT which it paid at a preceding stage.



- 21 However, the appellant cannot be refused the right to deduct the VAT arising from tax invoices issued in the name of the members BP and MB since, in the light of Article 91 del Codul de procedură fiscală (Tax Procedure Code; hereinafter: the ‘Codul de procedură fiscală’), the tax authorities can no longer reclassify the transaction at issue in this case as an economic activity subject to VAT in relation to the members BP and MB, and the association can no longer be regarded, by the tax authorities, as a single taxable person, and there can be no question, in the light of Article 168(a) of the VAT Directive, that those members can exercise a right of deduction.
- 22 Since it is, in principle, for the national courts and authorities to refuse the right of deduction if it is being relied on for fraudulent or abusive ends, it is also necessary to clarify whether it is possible to refuse the right of deduction on the ground that, at the time the flats were sold, the appellant made no mention of the members BP and MB or the association contract.
- 23 *Under another scenario*, on the basis of the judgment of the Court of Justice of the European Union in Case C-664/16, *Vădan*, given that only the appellant and the member PP have the status of taxable persons, whereas the members BP and MB do not, it can be held that the appellant is unable to deduct VAT from invoices issued in the name of the member PP, which, in turn, has asserted the right of deduction in the proceedings, since the right of deduction cannot be exercised twice and the appellant has not paid input tax in relation to those invoices. The VAT in the invoices issued in the name of the members BP and MB cannot be deducted by the appellant because, on the one hand, the appellant did not pay the input VAT and, on the other hand, those members do not have the status of taxable person, and thus the substantive conditions for granting the right to deduct VAT, laid down in Article 168(a) of the VAT Directive, have not been fulfilled in the present case.

*Third question*

- 24 On the basis of the judgment of the Court of Justice of the European Union in Case C-424/12, *Fatorie*, paragraph 46, the referring court considers that it is necessary to answer this question too since it could be held that a person is indirectly challenging the tax situation of natural persons whose status as taxable persons has not been established in a context where, under Article 91 of the Codul de procedură fiscală, the tax authorities can no longer reclassify the transaction in the present case as an economic activity subject to VAT vis-à-vis the members BP and MB.
- 25 This interpretation follows from the fact that, by the application for joining, the appellant requested that the parties joined as guarantors, BP and MB, should be ordered to pay an amount equal to two thirds of the tax claim against the appellant, as established by the assessment notice.

- 26 Thus, it could be inferred from the way in which the application for joining is worded that the appellant is seeking to amend the contested assessment notice, requesting in practice a finding that the appellant is a taxable person, liable to pay tax, also in respect of the parties joined as guarantors as regards the two-thirds share of the tax claim, by way VAT and charges. If the court were to find for the first time that the two parties joined as guarantors are obliged to pay some of the VAT and charges, as a result of their continuous economic activity, this would mean that they would be deprived of the rights conferred by the Codul de procedură fiscală on taxable persons during a tax inspection (right to be heard, right of defence, right of deduction, etc.).

WORKING DOCUMENT