

**Case C-242/19****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:**

20 March 2019

**Referring court:**

Tribunalul București (Regional Court, Bucharest, Romania)

**Date of the decision to refer:**

18 January 2019

**Applicant:**

CHEP Equipment Pooling NV

**Defendants:**

Agencia Națională de Administrare Fiscală — Direcția Generală Regională a Finanțelor Publice București — Serviciul soluționare contestații

Agencia Națională de Administrare Fiscală — Direcția Generală Regională a Finanțelor Publice București — Administrația fiscală pentru contribuabili nerezidenți

**Subject-matter of the main proceedings**

Administrative action seeking (i) the annulment of the decision of 11 October 2016 issued by the Direcția Generală Regională a Finanțelor Publice București — Serviciul soluționare contestații (Regional Directorate-General for Public Finance of Bucharest — Complaints Office), which rejected as unfounded the tax-related complaint made by the applicant, (ii) the annulment of the decision of 14 April 2016 on the refund of value added tax to taxable persons not established in Romania but established in another Member State of the European Union, issued by the Direcția Generală Regională a Finanțelor Publice București — Administrația fiscală pentru contribuabili nerezidenți (Regional Directorate-General for Public Finance of Bucharest — Tax Authority for Non-resident Taxpayers), and (iii) the refund to the applicant of an amount of RON 185 822.23.

## **Subject matter and legal basis for the request for a preliminary ruling**

An interpretation is requested, pursuant to Article 267 TFEU, of Articles 17 and 214(1) of Directive 2006/112 and Articles 2(1) and 3 of Directive 2008/9.

## **Questions referred**

(1) Does the transport of pallets from one Member State to another Member State, for the purposes of their subsequent rental in the latter Member State to a taxable person established and registered for VAT purposes in Romania, constitute a non-transfer in accordance with Article 17(2) of Directive [2006/112/EC]?

(2) Irrespective of the answer to the first question, is the taxable person under Article 9(1) of Directive 2006/112/EC, who is not established in the Member State of refund but in the territory of another Member State, considered a taxable person under Article 2(1) of Directive 2008/9/EC, even where that person is registered for VAT purposes or would be required to be registered for VAT purposes in the Member State of refund?

(3) In the light of the provisions of Directive 2008/9/EC, does the condition of not being registered for VAT purposes in the Member State of refund constitute a further condition to those laid down in Article 3 of Directive 2008/9/EC in order that a taxable person established in another Member State and not established in the Member State of refund may be entitled to a refund in a case such as the present?

(4) Must Article 3 of Directive 2008/9/EC be interpreted as precluding a practice of a national administration of refusing to refund VAT on grounds of failure to satisfy a condition laid down exclusively in national law?

## **Provisions of EU law relied on**

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax ('Directive 2006/112'), Articles 17 and 214(1);

Council Directive 2008/9/EC of 12 February 2008 laying down detailed rules for the refund of value added tax, provided for in Directive 2006/112/EC, to taxable persons not established in the Member State of refund but established in another Member State, Articles 2(1) and 3.

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

Legea nr. 571 privind Codul fiscal (Law No 571 establishing the Tax Code; 'the Tax Code') of 22 December 2003:

Article 128 — ‘Supply of goods

(1) “Supply of goods” shall mean the transfer of the right to dispose of property as owner.

...

(9) Intra-Community supply is a supply of goods, within the meaning of paragraph (1), which are dispatched or transported from one Member State to another Member State by the supplier or person to whom the supply is made, or by another person on their behalf.

(10) The transfer by a taxable person of goods forming part of his business from Romania to another Member State shall be treated as an intra-Community supply for consideration, except in cases provided for in paragraph (12) where there is no transfer.

(11) In accordance with paragraph (10), “transfer” shall mean the dispatch or transport of movable tangible property by or on behalf of the taxable person, for the purposes of his business, from Romania to another Member State.

(12) For the purposes of this Title, the dispatch or transport of goods from Romania to another Member State by or on behalf of the taxable person for the purposes of the following transactions shall not constitute a transfer:

...

(g) temporary use of the goods in question within the territory of the Member State of destination of the goods dispatched or transported, for the purposes of supplying services in the Member State of destination, by the taxable person established in Romania;

(h) temporary use of the goods in question, for a period not exceeding 24 months, within the territory of another Member State, provided that the importation into that State of the same goods from a third country, with a view to temporary use, is covered by the customs arrangements for temporary importation with full exemption from import duties.

(13) If one of the conditions referred to in paragraph (12) is no longer satisfied, the dispatch or transportation of the goods in question shall be regarded as a transfer from Romania to another Member State. In those cases, the transfer shall be deemed to be carried out at the time when that condition ceases to be met’.

Article 130<sup>1</sup> — ‘Intra-Community acquisitions of goods

...

(2) The following transactions shall be treated as an intra-Community acquisition for consideration:

(a) the application in Romania, by a taxable person, for the purposes of his business, of goods transported or dispatched by the same taxable person or by another person, on his behalf, from the Member State in whose territory the goods were produced, extracted, purchased, acquired or imported by him, in the course of his business, if the transport or dispatch of those goods, had it been carried out from Romania to another Member State, would be regarded as a transfer of goods to another Member State under Article 128(10) and (11); ...’.

Article 147<sup>2</sup>(1)(a)

‘(a) A taxable person not established in Romania but established in another Member State, who is not registered and not required to be registered for VAT purposes in Romania, shall be eligible for a refund of value added tax paid on imports or acquisitions of goods/services carried out in Romania; ...’.

Article 153(5):

‘A taxable person not established in Romania and not registered for VAT purposes in Romania, who intends to:

- (a) carry out an intra-Community acquisition of goods for which he is liable for the tax under Article 151; or
- (b) carry out an intra-Community supply of goods exempt from the tax,

shall submit an application for registration for VAT purposes pursuant to this article, before carrying out the transactions’.

Normele metodologice de aplicare a Codului fiscal (Provisions implementing the Tax Code), approved by Hotărârea de Guvern (Government Decree) No 44/2004 (‘the implementing provisions’)

Point 6(11):

‘For the purposes of Article 128(10) of the Tax Code, a transfer is a transaction treated as an intra-Community supply for consideration of goods, with an obligation to comply with all the conditions and rules relating to intra-Community supplies, including those relating to exemption from tax. A feature of such a transaction is that at the time the goods are dispatched from one Member State to another Member State, this does not constitute a supply within the meaning of Article 128(1) of the Tax Code and, consequently, the same taxable person who declares the transfer in the Member State in which the transport of the goods begins shall also declare the ‘assimilated’ intra-Community acquisition in the Member State in which it takes place. Examples of transfers are: the transport to another Member State of goods imported into Romania by the person who carried out the import, in the absence of a transaction at the time of the dispatch; the transport/dispatch of tangible movable property from Romania to another Member State for the purpose of forming a stock to be sold in that Member State; the

transport of goods to another Member State for the purpose of incorporating those goods into movable or immovable property in that Member State where the person concerned provides services in that Member State; the transport/dispatch of tangible movable property from Romania to another State for repair and which, subsequently, does not return to Romania, in which case the original non-transfer becomes a transfer.’

Point 49(1):

‘Under Article 147<sup>2</sup>(1)(a) of the Tax Code, any taxable person not established in Romania but established in another Member States shall be eligible for a refund of VAT paid on imports and acquisitions of goods/services carried out in Romania. The value added tax shall be refunded by Romania, provided that the taxable person meets the following conditions:

- (a) during the refund period he has not had in Romania the seat of his economic activity or a fixed establishment from which business transactions were effected or, if no such business or fixed establishment existed, his domicile or normal place of residence;
- (b) during the refund period he is not registered or required to be registered for VAT purposes in Romania under Article 153 of the Tax Code;
- (c) during the refund period he has not supplied any goods or services deemed to have been supplied in Romania, with the exception of the following transactions:
  1. the supply of transport services and services ancillary thereto, exempted pursuant to Article 143(1)(c) to (m) and Articles 144(1)(c) and 144<sup>1</sup> of the Tax Code;
  2. the supply of goods and services to a person liable for VAT under Article 150(2) to (6) of the Tax Code.’

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

- 1 The applicant CHE[P] Equipment Pooling NV (‘CHEP BE’) is a company established in Belgium which specialises in services relating to the rental of cargo pallets (‘pallets’) at European level. The European stock of pallets is sub-rented to the CHEP companies in each European country, including CHEP Pooling Services România SRL (‘CHEP România’), and those companies in turn rent the pallets to the final customers in the relevant country. To carry on this activity CHEP BE acquires new pallets in most European countries, including Romania, to meet local demand for pallets.

- 2 In view of the applicant's acquisitions of the pallets from a Romanian supplier from 1 October 2014 to 31 December 2014, the applicant requested that the Romanian tax authorities refund an amount of RON 185 822.23 by way of VAT.
- 3 By decision of 14 April 2016 relating to the refund of VAT to taxable persons not resident in Romania who are established in another Member State of the European Union, the defendant Administrația fiscală pentru contribuabili nerezidenți (Tax Authority for Non-resident Taxpayers) refused the applicant's request for a refund. That decision noted that the applicant rented to CHEP România not only pallets acquired from the Romanian supplier, but also other types of pallets acquired by the applicant and originating from other EU Member States and dispatched to Romania. It was found that the transport or dispatch of goods from one Member State to another Member State, without transfer of the right to dispose of the goods as owner, constitutes a transfer in the Member State in which the transport began and a transaction treated as an intra-Community acquisition in the Member State in which the transport of the goods terminated (in this case, Romania), in respect of which the applicant was required to be registered for VAT purposes in Romania under Article 153(5)(a) of the Tax Code.
- 4 By decision of 11 October 2016, the Direcția Generală Regională a Finanțelor Publice București — Serviciul soluționare contestații (Regional Directorate-General of Public Finance of Bucharest — Complaints Office) rejected the applicant's complaint against the decision of 14 April 2016.
- 5 The applicant brought an action before the referring court, seeking annulment of the two decisions referred to above and refund of an amount of RON 185 822.23 by way of VAT.

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

- 6 **The applicant** claims to have a right to a refund of VAT under Directive 2008/9 and that the ground stated by the defendant tax authorities to deny it that right — that is to say the fact that, under Article 147<sup>2</sup>(1)(a) of the Tax Code, it was required to be registered for VAT purposes in Romania — is a requirement which does not feature amongst those expressly laid down in that directive. It follows that that requirement, laid down in the Romanian Tax Code, is contrary to EU law.
- 7 The applicant further claims that, in any event, it was not required to be registered for VAT purposes in Romania since the transactions relating to the dispatch in Romania of goods acquired from other EU Member States, which form the subject-matter of the contested decisions, do not constitute a transfer for VAT purposes but rather a non-transfer for the purposes of Article 128(2)(g) and (h) of the Tax Code and thus cannot even be regarded as 'assimilated' intra-Community acquisitions in Romania.

- 8 **The defendants** contend that it is abundantly clear from the documents attached to the request for a refund submitted by the applicant that the latter also rented to CHEP România goods acquired in other EU Member States and transported to Romania to be rented or sub-rented. The applicant has failed to show that those goods returned to the Member State from which they were originally dispatched or transported for the purposes of supplying services and, therefore, cannot claim that the transaction carried out does not constitute a transfer and is eligible for the exemption under Article 128(2)(g) and (h) of the Tax Code.

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

- 9 It is necessary to ascertain whether the transport of pallets from one Member State to another Member State by a non-resident person, for the purposes of their subsequent rental in the latter Member State to a taxable person established and registered for VAT purposes in Romania, constitutes a non-transfer in accordance with Article 17(2) of Directive 2006/112.
- 10 It is also necessary to ascertain whether the non-resident company is required to be registered for VAT purposes in Romania, given that it does not have the technical and human resources in Romania to carry out taxable transactions in that State, but merely provides services in respect of which the place of the transaction for VAT purposes is Romania.
- 11 Even if the non-resident company were required to be registered for VAT purposes in Romania, the question arises as to whether the non-resident company is entitled to the VAT refund on the ground that Directive 2008/9 does not lay down such a condition. Since the requirement that the legal person not be registered for VAT purposes laid down in Article 147<sup>2</sup>(1)(a) of the Tax Code and Point 49(1) of the implementing provisions is an additional condition to those expressly laid down in Article 3 of Directive 2008/9, it would appear to be contrary to that directive.