

Case C-430/19**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:**

3 June 2019

Referring court:

Tribunalul Cluj (Romania)

Date of the decision to refer:

15 May 2019

Applicant:

SC C. F. SRL

Defendants:

A. J. F. P. M.

D. G. R. F. P. C.

Subject matter of the main proceedings

An administrative and fiscal action brought by the applicant SC C. F. SRL against the Administrația Județeană a Finanțelor Publice M. (Regional Public Finance Administration, M., Romania; ‘the AJFPM’) and the Direcția Generală Regională a Finanțelor Publice C. (Regional Directorate-General of Public Finances, C., Romania; ‘the DGRFPC’), concerning an appeal against a fiscal administrative document.

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

Pursuant to 267 TFEU, the Tribunalul Cluj – Secția de Contencios Administrativ și Fiscal, de Conflicte de Muncă și Asigurări Sociale (Regional Court, Cluj – Chamber for Administrative and Fiscal Matters, Employment Disputes and Social Security) requests interpretation of the principle of observance of the rights of the defence, with reference to the particular matter of the right of access to the

administrative file, and interpretation of the so-called ‘theory of the innocent party’.

Questions referred

1. In light of the principle of respect for the rights of the defence, as outlined to date in the case-law of the Court of Justice (*Solvay, Sopropé – Organizações de Calçado Lda* and *Ispas*), may or must an administrative fiscal document issued to an individual be declared null and void if that individual has not been allowed access to the information on the basis of which that document was issued, notwithstanding the fact that reference is made in that document to certain information on the administrative file?

2. Do the principles of neutrality, proportionality and equivalence preclude the exercise of the right to deduct VAT and corporation tax in the case of a company the conduct of which with regard to fiscal matters is beyond reproach and which has been denied the right to deduct corporation tax on account of the fiscal conduct of its suppliers, which is alleged to be improper on the basis of factors such as a lack of human resources or a lack of means of transport, in the case where, in addition, the tax authority has adduced no evidence of any activity that suggests fiscal and/or criminal liability on the part of those suppliers?

3. Is a national practice inconsistent with EU law if, pursuant to that practice, the right to deduct VAT and corporation tax is subject to the possession of other supporting documents in addition to the tax invoice, such as estimates of expenditure or reports on the progress of works, even though such additional supporting documents have not been clearly and precisely defined in the national tax legislation?

4. In light of the judgment in *WebMindLicenses*, can the situation in which a taxable person purchases goods and services from a taxable person which benefits from a different tax regime from that of the taxable person in question constitute tax evasion?

EU law cited

The principle of observance of the rights of the defence and the principles of neutrality, proportionality and equivalence

Provisions of national law cited

Legea nr. 207/2015 privind Codul de procedură fiscală (Law No 207/2015 establishing the Tax Procedure Code)

Articles 9(1) and 46(2)(j), which establish the obligation of the tax authority to give taxable persons an opportunity to express their view and to mention that fact in the fiscal documents which they issue

Article 278(1), in accordance with which an administrative complaint does not suspend the enforceability of a fiscal administrative document

Legea nr. 227/2015 privind Codul fiscal (Law No 227/2015 establishing the Tax Code), applicable from 1 January 2016 onwards:

Article 11(1)

‘When establishing the amount of a tax, levy or mandatory social security contribution, the tax authorities may disregard a transaction that has no economic purpose and alter the fiscal effects of such a transaction. Alternatively, they may reclassify the form of a transaction or activity so as to reflect the economic content of the transaction or activity.’

Article 25(1)

‘For the purpose of establishing taxable profits, deductible expenses shall include costs incurred in order to carry on an economic activity, including those governed by applicable laws, as well as registration duties and contributions paid to chambers of commerce and industry and to employers’ organisations and trade unions.’

Article 299(1)(a), which concerns the obligation upon taxable persons for VAT purposes to be in possession of an invoice and a proof of payment of VAT paid or due upstream

The Tax Code previously in force (Law No 571/2003): Article 11(1), Article 21(1), Article 146(1)(a) — the provisions which correspond to the provisions of the new Tax Code referred to

Outline of the facts and the main proceedings

- 1 C. F. SRL is a Romanian private-law company the corporate objective of which is the exploitation of forestry resources. Between 29 August 2016 and 13 April 2017, it was the subject of a tax inspection carried out by the AJFPM. The tax inspection concerned corporation tax relating to the period from 1 January 2011 and 31 December 2016 and value added tax (VAT) relating to the period between 1 March 2014 and 31 December 2016.
- 2 Following the aforementioned tax inspection, additional tax liabilities were established, in terms of both corporation tax and VAT. C. F. SRL brought a tax appeal against the notice of assessment and the tax inspection report issued by the

AJFPM. The company has argued that various irregularities occurred in the tax inspection, regarding matters of tax procedure and substantive tax law.

- 3 C. F. SRL's tax appeal was partly dismissed as unfounded and partly upheld, with the tax inspection unit being ordered to carry out a new tax inspection. In so far as concerns the part of the tax appeal that was dismissed, C. F. SRL brought an action for annulment before the Tribunalul Cluj (Regional Court, Cluj, Romania). In the first place, relying on the judgment of the Court of Justice of 25 October 2011, *Solvay v Commission*, (C-109/10 P, EU:C:2011:686), C. F. SRL requests the annulment of the inspection documents on the ground that, during the administrative stage, it was denied access to the full administrative file.
- 4 Early on, at the written stage of the preliminary administrative complaint, the applicant had requested the tax inspection bodies to allow it to exercise its right to have access to the full administrative file. That request was made in a context in which the tax inspection had been suspended for six months to allow another review to be carried out by a different body with tax inspection duties and to inform the relevant criminal prosecution authority, namely the Direcția Regională Antifraudă O. (Regional Anti-Fraud Office, O., Romania; 'DRAFO'). Ultimately, the investigation carried out by the criminal prosecution authority concluded with the case being closed. In addition, C. F. SRL argued certain procedural irregularities.
- 5 C. F. SRL was also accused of having been involved in fictitious transactions relating to corporation tax and VAT. According to the Romanian tax authorities, the commercial transactions between C. F. SRL and two of its trading partners were fictitious, inasmuch as the two suppliers did not have the technical and logistical capacity to supply the services in question. The tax authorities intend to hold C. F. SRL liable for the allegedly improper conduct of its suppliers with regard to fiscal matters.

Main arguments of the parties in the main proceedings

- 6 In so far as concerns access to the inspection file, the applicant submits that, following the resumption of the tax inspection procedure, it was in no way informed of the way in which the review carried out by the other body with review duties had influenced the tax inspection. In addition, the procedural irregularities which the applicant noted could not be argued in any relevant way because its right of access to the administrative file for the tax inspection had not even been formally discussed.
- 7 In its defence, the AJFPM has stated that the original accounting documents were acquired by DRAFO at some point in 2013 and that they were subsequently handed over to the Parchetul de pe lângă Tribunalul Cluj (the Public Prosecutor's office attached to the Regional Court, Cluj, Romania), which was investigating the commission of forestry offences by C. F. SRL. It has also stated that the tax inspection unit examined C. F. SRL's accounting documents at the Parchetul de

pe lângă Tribunalul Cluj (the Public Prosecutor's office attached to the Regional Court, Cluj). The AJFPM also submits that C. F. SRL's rights of defence were observed, in that the company's legal representative was invited to the tax authority's offices in order to obtain a copy of the administrative review document.

- 8 In so far as concerns the conduct of its suppliers with regard to fiscal matters, C. F. SRL takes the view, on the basis of the case-law of the Court of Justice of the European Union concerning the so-called 'theory of the innocent party', that it cannot be held liable for the allegedly improper fiscal conduct of its suppliers. C. F. SRL disputes the assertion of the tax inspection bodies that the fictitious nature of the transactions at issue is evident from the fact that it is unable to produce other supporting documents in addition to the tax invoices. In the case-law of the highest court in Romania, the Înalta Curte de Casație și Justiție (the High Court of Cassation and Justice, Romania), it is stated that the only supporting document required by Romanian tax legislation in order to exercise the right to deduct, with regard to both VAT and corporation tax, is a tax invoice.
- 9 C. F. SRL also disputes another assertion made by the tax inspection unit, which is that the fictitious nature of the transactions under examination in this case is apparent from the fact that the suppliers in question were subject to the tax for micro-enterprises, at 3% of turnover, whereas C. F. SRL was subject to corporation tax at 16% of profits. C. F. SRL has expressed the opinion that there can be no question of loss having been occasioned to State funds, in light of the precedent stated in the judgment of the Court of Justice in *WebMindLicenses* (judgment of 17 December 2015, C-419/14, EU:C:2015:832), inasmuch as its suppliers exercised their legal right to opt for a different tax regime from the one which C. F. SRL chose.
- 10 In its defence, the tax authority faithfully reproduces the tax inspection document. The AJFPM makes no reference in it to the case-law of the Court of Justice of the European Union.

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

- 11 In so far as concerns the legal issue of access to the administrative file, the referring court mentions the case-law of the Court of Justice on the principle of observance of the rights of defence, in particular the judgments of 18 December 2008, *Sopropé* (C-349/07, EU:C:2008:746, paragraph 36), of 3 July 2014, *Kamino Logistics* (C-129/13 [and C-130/13], EU:C:2014:2041, paragraph 73), and of 9 November 2017, *Ispas* (C-298/16, EU:C:2017:843, paragraph 39).
- 12 The referring court points out that, following the judgment in *Ispas*, the Romanian legislature took no steps to govern the concept of 'right of access to the administrative file'. In particular, it did not lay down the conditions under which that right may be exercised or, more importantly, establish what sanctions may be applied by national courts which establish that the right has been infringed. The

referring court also observes that, under Romanian fiscal procedure, the lodging of a preliminary administrative complaint does not have suspensory effect, as is quite evident from the wording of Article 278(1) of the Tax Procedure Code.

- 13 Given those factors, the referring court expresses serious doubts as to what penalties it must apply in the national proceedings with regard to the administrative review document issued by the AJFPM on account of the infringement of the right of access to the administrative file. The referring court also observes that the case-law of the national courts concerning the sanctions which apply to failure to observe the rights of the defence is not consistent.
- 14 In *Ispas*, the Court of Justice was not called upon to clarify what procedural penalties should be applied by national courts where they find that a taxable person's right of access to the administrative file has not been respected. In conclusion, the referring court wishes to establish what, in the view of the Court of Justice, is the sanction that should be applied in the event of the infringement of the rights of defence of a company, such as the applicant, which has not been granted a right of access to the administrative file, in relation to the EU law principle of observance of the rights of the defence.
- 15 The second legal issue relates to the manner in which, in accordance with EU law, a company, such as the applicant, may be held liable for the allegedly improper fiscal conduct of its suppliers. The referring court points out that, in the context of the tax inspection, the AJFPM does not claim that the two companies providing services to C. F. SRL failed to comply with their reporting obligations or their accounting obligations or their payment obligations with regard to the State. It does argue that the two supplying companies benefit from a tax regime that they regard as more advantageous than that under which C. F. SRL operates. The referring court considers that a difference between the tax regimes of a service provider and of its customer, which is merely the result of the exercise of a legal option, cannot constitute a situation of tax evasion. Consequently, the referring court is of the opinion that it would be extremely helpful to the resolution of the present dispute to have the Court of Justice's interpretation of the so-called 'theory of the innocent party', with reference to the particular situation in the present case and its previous case-law.
- 16 In so far as case-law is concerned, the referring court cites judgments of the European Court of Human Rights (judgment of the Court of Human Rights of 18 June 2010, *Business Support Center v. Bulgaria*, Application No 6689/03, paragraph 24, and judgment of the Court of Human Rights of 22 January 2009, '*Bulves*' *AD v. Bulgaria*, Application No 3991/03). It also cites judgments of the Court of Justice (judgment of 21 February 2006, *Halifax*, C-255/02, EU:C:2006:121; judgment of 21 December 2011, *Cicala*, C-482/10, EU:C:2011:868, paragraphs 17 to 19; judgment of 6 September 2012, *Gábor Tóth*, C-324/11, EU:C:2012:549; judgment of 13 February 2014, *Maks Pen EOOD*, C-18/13, EU:C:2014:69, paragraph 31, and judgment of 22 January 2015, *PPUH Stehcemp*, C-277/14, EU:C:2015:719, paragraph 52).

- 17 The referring court also entertains doubts regarding the supporting documents requested by the AJFPM's tax inspection unit in order to prove the right to deduct corporation tax and VAT. In accordance with Article 178(a) of Council Directive 2006/112/EC on the common system of value added tax, the only formal requirement imposed by EU law is the possession of a tax invoice. However, in the case-law of the highest court, there are recorded cases in which the right to deduct corporation tax is held to be subject to the submission of not only the tax invoice, but also other supporting documents. The referring court therefore considers that, on this point too, it is necessary, in order to resolve the dispute, to have an interpretation of the principle of substance over form, with particular reference to the case at hand.

WORKING DOCUMENT