

Case C-424/19**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:**

29 May 2019

Referring court:

Curtea de Apel București (Romania)

Date of the decision to refer:

15 February 2019

Applicant and appellant:

Cabinet de avocat UR

Defendants and respondents:

Administrația Sector 3 a Finanțelor Publice prin Direcția Generală Regională a Finanțelor Publice București

Administrația Sector 3 a Finanțelor Publice

MJ

NK

Subject matter of the main proceedings

Appeal brought by Cabinet de avocat UR (UR Law Office), appellant and applicant at first instance ('the applicant'), in proceedings against the Administrația Sector 3 a Finanțelor Publice prin Direcția Generală Regională a Finanțelor Publice București (Directorate-General of Public Finances, Bucharest, Romania, representing the Public Finance Authority, Sector 3), against the Administrația Sector 3 a Finanțelor Publice (Public Finance Authority, Sector 3), and against MJ and NK, respondents and defendants at first instance ('the defendants'), against the judgment of the Tribunalul București (Regional Court, Bucharest, Romania), in which the court dismissed its application for removal from the register of taxable persons for the purposes of value added tax (VAT)

and for the reimbursement of the VAT which it had paid between 2010 and 2014 following its allegedly wrongful registration as a taxable person for VAT purposes.

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

Pursuant to Article 267 TFEU, read in conjunction with Article 19(3)(b) TEU, the Curtea de Apel București (Court of Appeal, Bucharest, Romania) requests interpretation of Article 9(1) of Council Directive 2006/112/EC on the common system of value added tax, and of the principle of the primacy of EU law.

Questions referred

1. In the context of the application of Article 9(1) of Council Directive 2006/112/EC (on the common system of value added tax), does the concept of ‘taxable person’ include persons who practice the profession of lawyer?
2. Does the principle of the primacy of EU law permit an exception to be made, in subsequent proceedings, to the authority of *res judicata* attaching to a final judicial decision in which it has been established, in essence, that, in accordance with national value added tax legislation, as it is interpreted and applied, lawyers do not supply goods, do not carry out an economic activity and do not conclude contracts for the supply of services, but instead conclude contracts for legal assistance?

EU law cited

Article 9(1), Article 24(1) and Article 193 of Council Directive 2006/112/EC on the common system of value added tax

Judgments of the Court of Justice in Case C-224/01, *Köbler*, Case C-492/08, *Commission v France*, Case C-62/12, *Kostov*, Case C-463/14, *Asparuhovo Lake Investment Company*, and Case C-543/14, *Ordre des barreaux francophones et germanophone and Others*

Provisions of national law cited

Articles 127, 129 and 150 of the Codul fiscal (Tax Code), which transpose into national legislation Articles 9, 24 and 193 of Directive 2006/112

Articles 1341 and 1344 of the Codul civil (Civil Code), which relate to undue payments

Articles 431 and 432 of the Codul de procedură civilă (Code of Civil Procedure), which concern the authority of *res judicata*

Article 15 of Legea nr. 51/1995 pentru organizarea și exercitarea profesiei de avocat (Law No 51/1995 on the organisation and practice of the profession of lawyer), pursuant to which the practice of that profession is incompatible with the direct carrying out of a commercial activity

Outline of the facts and the main proceedings

- 1 By application lodged at the Tribunalul București (Regional Court, Bucharest) the applicant, Cabinet de avocat UR ('UR Law Office'), sought an order requiring Administrația Sector 3 a Finanțelor Publice (Public Finance Authority, Sector 3, Romania) to remove it from the register of taxable persons for the purposes of VAT, with effect from 2002, at which time the applicant had been mistakenly registered as a taxable person for VAT purposes; an order compelling the defendants jointly to repay the VAT wrongly levied between 2010 and 2014, amounting to a total of RON 1 016 804; an order requiring the defendants MJ and NK to pay a fine of 20% of the gross national minimum wage, for each day of delay, the sum to be entered as revenue in the State budget; an order requiring each of the defendants MJ and NK to pay it a late payment penalty of RON 1 000 for each day of delay from 15 September 2015 onwards, by which date the defendants were required to remove the applicant from the register, and an order requiring all the defendants jointly to pay, for each day of delay, interest at 0.03% on the total sum of RON 1 016 804, calculated from the date of each individual payment made by the applicant up to its actual refund by the defendants.
- 2 In the grounds for its application, the applicant essentially stated that, on 28 May 2015, it had requested its removal from the register of taxable persons for the purposes of VAT and the reimbursement of the VAT wrongly levied, on the ground that it had wrongly been registered as a taxable person for VAT purposes despite the fact that the provisions relating to that tax had not applied and did not apply to it. The defendants had not acceded to that request, and so the applicant had issued proceedings before the abovementioned court. The applicant has asserted that the total sum of RON 1 016 804 which it paid by way of VAT between 2010 and 2014 was an undue payment, since, in reality, the debt which it extinguished did not exist.
- 3 The defendants lodged a defence seeking the dismissal of the application, arguing, in essence, that the applicant was obliged to pay VAT since, in 2002, it had exceeded the turnover threshold under which it had been exempt from payment of the tax, which it had declared and paid to the tax authorities from that date.
- 4 The applicant lodged a reply to that defence in which it contested the defendants' contentions. It claimed, essentially, that it was engaged in legal work and had concluded and continued to conclude with its clients contracts for legal assistance and not contracts for the supply of services. The applicant argued that since it had not been carrying out any economic activity it was not subject to the provisions of the Tax Code relating to VAT.

- 5 By judgment of 17 February 2017, the Tribunalul București (Regional Court, Bucharest) dismissed the applicant's application as unfounded. In the grounds for its judgment, the court emphasised, essentially, that, in accordance with the Tax Code, any person who, independently, carries out in any place an economic activity, which includes the liberal professions, is deemed to be a taxable person, whatever the purpose or results of that activity. According to Law No 51/1995 on the organisation and practice of the profession of lawyer, that activity is a liberal profession and an independent occupation and thus falls within the scope of the Tax Code. The applicant is, therefore, a taxable person. The applicant's submission that the practice of the profession of lawyer cannot be regarded as a supply of services was rejected, since the activities of the liberal professions, as those of lawyers, were mentioned separately in the Tax Code. Moreover, there is no legal provision for VAT exemption for the profession of lawyer. Thus, the applicant had been registered as a taxable person for VAT purposes in accordance with the law.
- 6 The applicant has brought an appeal against that judgment before the Curtea de Apel București (Court of Appeal, Bucharest).

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

- 7 The referring court states that it is common ground that, on 28 May 2015, when it put its request to the tax authority, the applicant was a taxable person, having exceeded, in 2002, the threshold [for exemption] laid down in the tax legislation. The applicant nevertheless seeks reimbursement of the sum at issue, on the ground that its payment was not due, since the activity which it carries out does not fall within any of the cases contemplated by the Tax Code.
- 8 In support of its appeal, the applicant has invoked, among other things, the authority of *res judicata* of a judgment of 21 September 2016 of the Tribunalul București (Regional Court, Bucharest) and of a judgment of 30 April 2018 of the Curtea de Apel București (Court of Appeal, Bucharest), which were delivered in other proceedings concerning it. In the grounds for those judgments, it was stated that the applicant had not supplied any goods or services within the meaning of the Tax Code, since it had not concluded with its clients contracts for the supply of services, but instead concluded contracts for legal assistance, which fell within the scope of Law No 51/1995 on the organisation and practice of the profession of lawyer and did not constitute contracts for the supply of services within the meaning of that law.
- 9 The referring court states that, according to national law, the authority of *res judicata* of a judicial decision may have both a negative effect and a positive effect. The negative effect of the *res judicata* prevents new proceedings from being brought where the parties, the cause of action and the object are all the same as in the previous proceedings. This is to prevent contradictions between the operative parts of judicial decisions. The positive effect of the authority of *res*

judicata enables any of the parties to invoke a previous decision that has acquired the force of *res judicata* in any new dispute that has a connection with the earlier decision. In so far as the positive effect is concerned, there is no need for fulfilment of the condition relating to the identity of the three aspects of the procedural legal relationship (parties, cause of action and object), as there is in the case of the negative effect. There merely needs to be a connection with the previous decision that has acquired the force of *res judicata* and the new proceedings will be bound by that previous decision, so that there is no departure from the earlier ruling of a different court. The positive effect of the authority of *res judicata* does not require an identity of actions, but only the identity of the litigious issues raised in the two sets of proceedings, with the effect that it may be put forward as a defence as to the merits. In addition, under the Code of Civil Procedure, the authority of *res judicata* is not confined to the operative part of a judgment, but also extends to the reasoning upon which the judgment is based, including the reasoning followed in order to resolve a litigious issue.

- 10 The referring court states that, in order not to prejudge the outcome of the present case, it cannot confirm whether or not the judgments mentioned above have the positive effect of *res judicata*. However, if they do have that positive effect, the abovementioned grounds of those two judgments will be likely to influence the decision to be given in the case that is now before it.
- 11 In that context, in so far as concerns the first question referred for a preliminary ruling, which concerns the concept of ‘taxable person’ within the meaning of Directive 2006/112, the referring court cites the following case-law of the Court of Justice: Case C-492/08, *Commission v France*, Case C-62/12, *Kostov*, Case C-463/14, *Asparuhovo Lake Investment Company*, and Case C-543/14, *Ordre des barreaux francophones et germanophone and Others*.
- 12 However, the referring court finds that, while the points dealt with specifically by the Court in those cases may offer useful guidance for the resolution of the dispute that is before it, they do not establish with certainty whether the activity carried out by a lawyer, such as that at issue in the present case, falls within the scope of Directive 2006/112.
- 13 Furthermore, the referring court points out that, in the event that, adopting an interpretation of national law that is consistent with the answer provided by the Court to the first question referred for a preliminary ruling, it should conclude that the activity carried out by the applicant is subject to VAT, an answer to the second question referred will then be necessary, that is to say, the question whether the principle of the primacy of EU law permits an exception to be made, in subsequent proceedings, to the authority of *res judicata* attaching to a final judicial decision.
- 14 With regard to the second question, the referring court points out that the Court has already held, in paragraph 38 of its judgment in Case C-224/01, *Köbler*, that the importance of the principle of *res judicata* cannot be disputed and that, in

order to ensure both stability of the law and legal relations and the sound administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time-limits provided for in that connection can no longer be called in question.

- 15 The referring court is thus faced with two fundamental principles the application of which in the case before it cannot be reconciled. There is the principle of the primacy of EU law and the principle of the authority of *res judicata* attaching to final judicial decisions and which will apply in subsequent proceedings. The referring court must therefore establish in which order these principles apply, all the more so since each of them could lead to a diametrically different resolution of the dispute: if the first principle is applied, it may be necessary to dismiss the appeal, in light of the relevant EU law; if the second is applied, it may be possible to uphold the appeal, in light of the aspects on which the earlier judgments have already ruled.
- 16 Finally, the referring court states that it has not identified any judgment of the Court of Justice in which an answer is given to the questions referred for a preliminary ruling and that it is not possible to apply the Court's existing case-law to the present dispute *mutatis mutandis*, given the particular features of the present case.