Case C-501/19

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:

28 June 2019

Referring court:

Înalta Curte de Casație și Justiție (Romania)

Date of the decision to refer:

22 February 2019

Appellant:

UCMR – ADA Asociația pentru Drepturi de Autor a Compozitorilor

Respondent

Pro Management Insolv IPURL, acting as liquidator of Asociației Culturale 'Suflet de Român'

Subject matter of the main proceedings

Appeals against a decision of the Curțea de Apel București (Court of Appeal, Bucharest), by which the respondent/defendant at first instance, Asociația Culturală 'Suflet de Româ' (Cultural Association 'Suflet de Român') (the 'respdondent') was ordered to pay to the appellant in cassation and applicant at first instance, UCMR-ADA Asociația pentru Drepturi de Autor (copyright organisation) ('the appellant') a sum of money by way of arrears of remuneration owing in respect of the public performance of musical works.

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

Request for a preliminary ruling under Article 267 TFEU on the interpretation of Articles 24(1), 25(a) and 28 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax.

Questions referred

(1) Do the holders of rights in musical works supply services within the meaning of Articles 24(1) and 25(a) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (the VAT Directive) to performance organisers from which collective management organisations, on the basis of an authorisation – a non-exclusive licence – receive remuneration, in their own name but on behalf of those right holders, for the public performance of musical works?

(2) If the first question is answered in the affirmative, do collective management organisations, when receiving remuneration from performance organisers for the right to perform musical works for a public audience, act as a taxable person within the meaning of Article 28 of the VAT Directive, and are they required to issue invoices including VAT to the respective performance organisers, and, when remuneration is paid to authors and other holders of copyright in musical works, are the latter, in turn, required to issue invoices including VAT to the collective management organisation?

Provisions of EU law and case-law of the Court of Justice relied on

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax; Articles 2, 24, 25 and 28.

Judgments of 18 January 2017, *SAWP*, C-37/16, EU:C:2017:22, and of 14 July 2011, *Henfling and Others*, C-464/10, EU:C:2011:489.

National provisions relied on

Legea nr. 571/2003 privind Codul fiscal (Law No 571/2003 on the Tax Code), in the version in force at the material time in the main proceedings.

Legea nr. 8/1996 privind dreptul de autor și drepturile conexe (Law No 8/1996 on Copyright and Related Rights).

Succinct presentation of the facts and the main proceedings

1 The appellant is a collective management organisation handling copyright in musical works owned by publishers which are legal persons or by authorised natural persons. It has been appointed by the Oficiul Român pentru Drepturile de Autor (Romanian Copyright Office) as the sole body responsible for collecting royalties for the public performance of musical works at concerts, performances and entertainment events.

2 The respondent is a legal person organising entertainment events at which musical works are performed for a public audience.

3 On 16 November 2012, the respondent organised a concert for which it had obtained from the appellant a non-exclusive authorisation/licence to use musical works, under which it was required to pay to the appellant royalties in an amount calculated in the manner set out in the authorisation.

4 As the respondent paid only part of the sum claimed, the appellant brought the matter before the courts. Both the court at first instance and the appeal court upheld the appellant's claims. However, unlike the court at first instance, the appeal court found that the transaction entailing the collection of royalties by the appellant is not a taxable transaction for VAT purposes and the remuneration due in respect of the public performance of musical works is not subject to VAT. Consequently, that court reduced the sum the respondent had been required to pay at first instance by removing the VAT element.

5 Both the appellant and the respondent lodged appeals against the appeal court's decision before the referring court.

Essential arguments of the parties to the main proceedings

6 **The appellant** takes issue with the appeal court's decision that the respondent was not required to pay VAT. In its view, the non-exclusive authorisation/licence concluded in accordance with the right to authorise the public performance of works and the exercise of that right allowed the respondent the exclusive use of the copyright only to the extent of the authorisation granted. However, by law, that authorisation is granted in consideration for remuneration, to which VAT is applicable because the collection of remuneration by collective management organisations constitutes a taxable transaction for VAT purposes.

7 The appellant also argues that the judgment under appeal infringed the principle of fiscal neutrality because, if the collection of remuneration from the respondent, as user, was not a taxable transaction for VAT purposes, the appellant would be liable for payment of that tax, even though it is not the end-consumer, or the authors of the works used would be so liable. The holders of the copyright in musical works are therefore taxable persons for VAT purposes and therefore add the corresponding VAT on their invoices to the appellant.

8 The appellant has referred to the diverging interpretations of Directive 2006/112 given by the courts and the position of the Ministerului Finanțelor Publice (Public Finance Ministry), which informed the appellant that the authorisation to use musical works by means of public performances, given by events organisers in exchange for remuneration, does not constitute a provision of services for VAT purposes.

9 **The respondent** essentially takes issue with the amount it was ordered to pay, which, it alleges, is the consequence of an incorrect classification of the type of performance organised.

Succinct presentation of the reasons for the reference

10 **The first question** concerns the classification as a supply of services for consideration, within the meaning of Directive 2006/112, of transactions by which holders of the copyright in musical works authorise events organisers to use such works.

11 The referring court raises the issue of the application *mutatis mutandis* in the present case of the line of reasoning followed by the Court in its judgment of 18 January 2017, *SAWP* (C-37/16, EU:C:2017:22) in interpreting the same provisions of Directive 2006/112, even though that judgment does not have a direct bearing on the present case, as it concerned different rights and different categories of rights holders. Accordingly, unlike holders of reproduction rights in the case of private copies, the author of musical works has not only the right to fair compensation but also the right to authorise or prohibit the performance in public, directly or indirectly, of works, since that right may be assigned.

12 It should be noted, however, that in the judgment of 18 January 2017, *SAWP*, C-37/16 (EU:C:2017:22) the Court based its decision on two main arguments in finding that that case did not involve a transaction for consideration that was characteristic of a 'supply of services'.

13 In the first place, there did not appear to be a legal relationship pursuant to which there is reciprocal performance by, on the one hand, holders of reproduction rights or, as the case may be, the organisation collectively managing such rights and, on the other, producers and importers of blank media and of recording and reproduction devices. The obligation to pay royalties was incumbent on those producers and importers by virtue of national law, which also determined their amount.

14 In the second place, the fair compensation payable to the right holders did not constitute the direct consideration for any supply of services, as it was linked to the loss resulting for the right holders from the reproduction of their protected works without their authorisation.

15 According to the referring court, it cannot be ruled out that at least the first argument is also applicable in the present case, bearing in mind the legal relationship created between the holders of copyright in musical works and the collective management organisation, and between the latter and users of the musical works.

16 The referring court states that, under Romanian law, copyright holders cannot by law assign recognised rights to collective management organisations, whereas collective management is mandatory for the exercise of the right to perform musical works for the public. Therefore, collective management organisations also represent the holders of the rights who have not commissioned them to do so.

17 The referring court also observes that:

– both the obligation to grant the non-exclusive authorisation/licence and the payment of the remuneration due to right holders have their origin in national law, which also establishes the criteria as to the amount of such remuneration;

– in the case of mandatory collective management, as in the present case, the collective management organisation acts as required by law, independently of any express mandate given by its members;

– the actual amount payable is calculated on the basis of negotiations between the collective management organisation and the users' representatives, as required by law; the right holders do not, however, participate directly in those negotiations:

– the right holders do not receive the amount of money actually paid by users but receive from the collective management organisation a particular sum of money, arrived at by means of apportionment on the basis of the criterion of proportionality and after a fee has been deducted by way of commission.

18 In those circumstances, the problem arises as to whether there is a legal relationship in which there is reciprocal performance between right holders and a particular user, and the sums of money ultimately received by right holders from the collective management organisation constitute actual consideration for a particular service.

19 If it were to be concluded that there is such a legal relationship, it must then be established whether the present case entails the assignment of intangible property, bearing in mind Article 56(1)(a) of Directive 2006/112 , which includes 'transfers and assignments of copyrights' among the categories of supplies of services.

20 **The second question** is closely connected to the first and falls to be answered only if the first question is answered in the affirmative.

21 In essence, the referring court seeks to ascertain whether, when collecting remuneration from organisers of performances for the right to perform musical works for a public audience, collective management organisations act as taxable persons within the meaning of Article 28 of Directive 2008/112.

22 The question is relevant in the present case because it is necessary to establish whether, in the event that the appellant's claims are well founded, the respondent is also liable for the VAT calculated on the amount that it was ordered to pay. In other words, the referring court seeks to establish whether the collective management organisation takes part, in the present cases, in a supply of services, with the result that, for VAT purposes, it is to be regarded as having itself received and supplied the service in question.

23 The doubt as to interpretation that has given rise to that question arises from the issue of how the appellant in the present case, in its capacity as collective

management organisation, is actually involved in the legal relationship, which presupposes reciprocal performance by right holders and a particular user.

24 It is apparent from the Court's case-law on the interpretation of Article 28 of Directive 2006/112 that that provision creates the legal fiction of two identical supplies of services provided consecutively. Under that fiction, the taxable person, who takes part in the supply of services (the receiver) is considered to have, first, received the services in question from the person on behalf of whom it acts (the principal) before providing, secondly, those services to the client himself. It follows that, as regards the legal relationship between the principal and the receiver, their respective roles of service provider and payer are notionally inverted for the purposes of VAT.

25 In the present case, it is not clear, according to the referring court, whether there may be said to be two identical supplies of services provided consecutively, especially because, in a situation of mandatory collective management, the collective management organisation also represents right holders who have not commissioned them to do so. Moreover, it is questionable whether the collective management organisation merely has the status of a receiver, the role referred to in Article 28 of Directive 2006/112, given the legal obligations imposed on it as regards collective management practice.

26 Once the legal status of collective management organisations has been clarified in the light of Article 28 of Directive 2006/112, as well as, possibly, the requirement to issue invoices including VAT to the respective performance organisers, it will then be necessary, according to the referring court, also to clarify whether, when authors and other holders of copyright in musical works receive payment, they are, in turn, required to issue invoices including VAT to the collective management organisations.