Case C-611/19

Summary of the request for a preliminary ruling under Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

13 August 2019

Referring court:

Fővárosi Közigazgatási és Munkaügyi Bíróság (Budapest Administrative and Labour Court, Hungary)

Date of the decision to refer:

19 May 2019

Applicant:

Crewprint Kft.

Defendant:

Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága (Appeals Directorate of the National Tax and Customs Administration, Hungary)

Subject matter of the main proceedings

Judicial proceedings brought against a decision of the national tax authority denying the right to deduct VAT on the grounds that the tax authority reclassified the taxable person's activity and found the invoicing chain to be a fraudulent abusive practice on the basis of multiple recurrences of circumstances not found to be objective according to the case-law of the Court of Justice.

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

The Fővárosi Közigazgatási és Munkaügyi Bíróság (Budapest Administrative and Labour Court, Hungary) asks the Court of Justice to interpret Article 167, Articles 168(a) and 178(a) and Articles 220 and 226 of Directive 2006/112 in the light of the principles of tax neutrality and effectiveness.

Questions referred for a preliminary ruling

1. Is it compatible with the relevant provisions [on the deduction of VAT] of Directive 2006/112 and with the principle of tax neutrality for national interpretation and practice to operate with the effect that the tax authority denies the right [to deduct VAT] on an economic transaction between the parties, on the basis that it finds the form of the legal relationship between them (a works contract) to be fraudulent because it gives rise to a right to deduct tax and, therefore, classifies it, under Article 1(7) [of the General Law on Tax Procedure] as an activity (agency) that does not give rise to a right to deduct, taking the view that the parties' conduct was intended to evade tax since the activity carried on by the addressee of the invoice did not necessarily have to take [that form of business activity], and since it could also have performed that activity as an agent? In that context, are taxable persons obliged, as a requirement for [deducting VAT], to choose the form of economic activity that places the greater tax burden on them, or is there an abusive practice where, in exercise of their freedom to contract and for purposes unrelated to tax law, they choose a contractual form for the economic activity carried on between them that also has the unintended consequence of entitling them to deduct the tax?

2. Is it compatible with the relevant provisions [on the deduction of VAT] of Directive 2006/112 and with the principle of tax neutrality for national interpretation and practice to operate with the effect that, where a taxable person wishing to exercise the right [to deduct VAT] fulfils the substantive and formal requirements [for that deduction] and has taken the measures it can be expected to take before concluding the contract, the tax authority denies the right to deduct VAT on the basis that it finds that it was unnecessary from an economic perspective to set up a chain and that doing so is therefore an abusive practice because the subcontractor, notwithstanding that it is in a position to supply the services, engages other subcontractors to perform them for reasons unconnected with the taxable event, and because the taxable person wishing to exercise the right [to deduct VAT] knew that its subcontractor, at the time it accepted the commission, owing to a lack of personnel and material resources, would perform the services using subcontractors of its own? Is the answer affected by the fact that the taxable person or its subcontractor included in the chain a subcontractor with which it has a direct relationship or to which it has a personal or organisational link (personal acquaintance, family relationship or even ownership)?

3. If the preceding question is answered in the affirmative, is the requirement that the facts must be determined on the basis of objective facts satisfied where, in proceedings in which the tax authority considers the economic relationship between the taxable person wishing to exercise the right to [deduct VAT] and its subcontractor is irrational and unjustified, it bases that finding solely on the evidence of some of the subcontractor's employees,

without ascertaining on the basis of objective facts the characteristics of the economic activity under the contract, the specific circumstances of that activity or the relevant economic context, and without hearing the directors with decision-making powers of the taxable person or of the subcontractors forming part of the chain and, if that requirement is satisfied, is it relevant whether the taxable person or members of the chain are capable of performing the services and is it necessary to involve an expert in that respect?

4. Is it compatible with Directive 2006/112 and with the principle of effectiveness for national interpretation and practice to operate with the effect that, where the substantive and formal requirements [to deduct VAT] are satisfied and the measures that can [reasonably] be expected have been taken, the tax authority, acting on the basis of circumstances that, according to judgments of the Court of Justice do not justify [the refusal to allow the deduction of VAT] and are not objective, finds tax evasion to have been proven and denies the right [to deduct VAT] solely because those circumstances occur in the chain detected as a whole, in a sufficient number of its members who were investigated?

Provisions of EU law relied upon

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, Article 9(1), Article 167, Articles 168(a) and 178(a) and Articles 220 and 226.

Provisions of national law relied upon

Az adózás rendjéről szóló 2003. évi XCII. törvény (Law XCII of 2003 on General Taxation Procedure, 'General Taxation Procedure Law'), Articles 1(7), 2(1) and 97(4).

Az általános forgalmi adóról szóló 2007. évi CXXVII. törvény (Law CXXVII of 2007 on Value Added Tax, 'the Law on VAT'), Article 26, Articles 27(1), 119(1) and 120(a) and Article 127(1)(a).

A számvitelről szóló 2000. évi C. törvény (Law C of 2000 on Accounting), Article 166(1) and (2).

Brief description of the facts and the main proceedings

1 The applicant, whose corporate purposes are printing and the provision of typographical services, received orders for the manufacture of typographical products, which were executed, in accordance with two framework works contracts and with individual orders placed under those contracts, by its main

printing subcontractor, Crew Kft, partly with the involvement of other subcontractors.

2 From 10 July 2012, the applicant's director, who at the time of its incorporation was an employee of that company, became also one of the directors of Crew Kft. The business premises of Crew Kft. and of the applicant's two branches have the same address. The applicant does not have any printing resources.

3 Crew Kft.'s main activity is printing, although in reality it provides global typographical services. The undertaking has various printing machines and other typographical machines, but does not have a binder or any digital or rotary equipment, and a subcontractor therefore has to do that work.

4 The invoices received from Crew Kft., the VAT on which was deducted by the applicant, showed 'provision of typographical services … — Subcontracting of typographical and binding services on the basis of a certificate of work'. The certificates of work were also enclosed with the invoices and contained a detailed description of the product that the subcontractor had produced for the applicant, and the delivery notes were also included.

5 The first-tier tax authority inspected the applicant to carry out an *ex post* examination of its Value Added Tax (VAT) declarations, and adopted four decisions as a result. In those decisions, the competent tax authority declared there to be a tax difference owed by the applicant in respect of VAT of 56 415 000 Hungarian forints (HUF) in relation to the second to fourth quarters of 2012, of HUF 17 882 000 in relation to the first quarter of 2013, of HUF 19 409 000 in relation to the second quarter of 2013 and of HUF 18 999 000 in respect of the third quarter of 2013, constituting a tax debt, and, accordingly, imposed a fine and a late payment surcharge on account of that difference.

6 In the course of the inspection, the first-tier tax authority heard the director of the applicant company and carried out related investigations into the undertakings participating in the chain. In the context of those investigations, it obtained the available subcontracts and files of the undertakings, and heard the subcontractors' directors and their employees who were available. It was also given access to the tax declarations and data managed by the tax authority and data recorded in other public registers.

7 In its decisions the tax authority stated that SZET Hungary Kft. and Mikron-96 Bt. were subcontractors of the applicant's subcontractor, Crew Kft., and that they in turn used other subcontractors.

8 In the connected investigation into Crew Kft., the tax authority found that, at its place of business, the undertaking manufactured the products ordered from it by the applicant and that it subsequently delivered them using its own vehicle to the applicant's principals. Crew Kft. subcontracted a minority of the applicant's orders. The parties rendered accounts each month, enabling the applicant to add a minimum commercial margin to the price set by Crew Kft.

9 The director of SZET Hungary Kft. had in the past been the wife of the applicant's director and those two people also had a commercial company in common. Through a subcontractor, SZET Hungary Kft. performed, first, binding tasks and, secondly, all the manufacturing tasks, for Crew Kft.

10 The former director of Ride-Ex Hungary Kft., which was one of the subcontractors designated by the director of SZET Hungary Kft., stated that he executed orders obtained by the owner, and that he knew SZET Hungary Kft and its director, although not the applicant company, its director or Crew Kft.

11 There were no longer any banking transactions between Vikobit Kft. and SZET Hungary Kft in the periods investigated, and, in addition, the tax authority found that Vikobit Kft. did not carry on any activity related to typography.

12 The director of Micron-96 Bt., Crew Kft.'s other subcontractor, fully confirmed the statements of the applicant's director and indicated that they knew each other although, when the printing work was carried out, Micron-96 Bt.'s subcontractor was R-M Trade Hungary Kft.

13 The activities of R-M Trade Hungary Kft did not include activities related to typography and, since it lacked personal and physical resources, the undertaking could not perform those activities.

14 The first-tier tax authority did not question that the printing work had been carried out in accordance with the stated facts, although, notwithstanding the invoices for subcontracted work received by Crew Kft., it found that Crew Kft. and the applicant had performed the majority of the printing tasks between them, using their own resources, their own personnel and equipment and at their own premises, given that Crew Kft.'s subcontractors could not perform those tasks. Accordingly, Crew Kft. received and wrongly deducted invoices for the typographical services, and subsequently reduced the tax owed by means of the false invoices for subcontracted work, with the effect that the taxable persons in the last link of the specially created invoicing chain failed to comply with their obligations to pay VAT. According to the tax authority, the applicant necessarily and objectively must have been aware of those facts and of the tax evasion by Crew Kft., since both companies have the same director, the same registered office, the same place of business and the same accountant.

15 The tax authority considers that the applicant abused its rights as a taxable person when, on the basis of the invoices received, it deducted tax that the issuer of the invoice had not paid to the public exchequer, even though the applicant must have known that the VAT deducted had not been paid to the exchequer. That conduct constitutes a serious breach of the principle that rights must be exercised in accordance with their purpose established in Article 2(1) of the General Taxation Procedure Law, the infringement of which, in itself, precludes the taxable person from exercising the right to deduct VAT.

16 The tax authority found furthermore that the contents of the invoices that the applicant received from Crew Kft. were also incorrect, since there was no subcontracting relationship between the parties, and the applicant was acting instead as an intermediary. According to the tax authority, the applicant acted as an agent in the transactions, since the applicant's director obtained the customers as an employee of Crew Kft., and Crew Kft. itself executed the orders. In the framework contract the applicant and Crew Kft. agreed the applicant's commission as 0.2%. However, apart from obtaining the orders, the applicant did not add any material value to the work. In the light of the foregoing, in accordance with its power under Article 1(7) of the General Taxation Procedure Law, the tax authority reclassified the contracts on the basis of their contents and, as a result, denied the applicant the right to deduct the tax on the invoices it had received.

17 On 28 March 2017, the defendant confirmed the first-tier decisions.

Fundamental arguments of the parties in the main proceedings

18 In its action, the applicant claims that the defendant infringed its obligation to clarify the facts and its obligation to provide evidence, and that it also misinterpreted the substantive legal provisions in so far as, given that the legal requirements were satisfied, the applicant was entitled to deduct the tax. It emphasises that the defendant also acknowledged that, in accordance with the invoices, 'an economic transaction had taken place between the parties shown in the invoice', but nevertheless found that the issuer of the invoice had acted fraudulently. The applicant argues that, on the contrary, neither the issuer of the invoices nor the issuer of the invoices received by that person acted fraudulently, and states that it acted with due diligence in relation to those undertakings before entering into the economic relationship. The relationship structure set up by the applicant's director was confined purely to the companies mentioned. The applicant played no part in the formation of the other part of the invoicing chain identified by the defendant.

19 The applicant also criticises the defendant for exceeding its power under the General Taxation Procedure Law and infringing Article 1(7) of that law by reclassifying the applicant's activity and finding that the applicant acted as an agent, since it accepted the orders from its own customers as a trader in its own right and made a profit on the commercial margin between the prices of the orders accepted and placed by it, meaning that the reference to subcontracting in the invoices received does not make them less credible. The applicant also notes that supply chains are a common phenomenon. For VAT purposes, supplies of goods do not require physical possession of the goods. The fact that the applicant was not directly linked to the products ordered therefore does not justify the finding that it acted only as an agent.

20 The applicant disputes the defendant's assertion that the activities shown on the invoice were performed by Crew Kft. without the involvement of subcontractors,

since the defendant bases that assessment on particular information taken from the statements of a number of Crew Kft.'s workers who carry out only parts of the manufacturing process, whilst no expert has examined whether Crew Kft. could have carried out all the parts of the services, and in the applicant's view the defendant therefore failed to justify its finding that there had been tax evasion on the basis of any objective facts.

21 As regards whether it knew that it was evading tax, the applicant noted, on the basis of rulings of the Court of Justice, that not even a single item of objective evidence had been submitted in the course of the tax proceedings proving that the applicant's director had even known the identity and activity of the operators downstream of the subcontractor's subcontractors. The defendant knew that its subcontractor was not going to perform the whole of the service indicated in the invoice. Conversely, it acted with due diligence in relation to the subcontracting of which it was aware, and that diligence, according to the order of the Court of Justice in *Signum Alfa Sped* (C-446/15, EU:C:2016:869), is not unlimited, that is to say, the addressee of the invoice is not required to carry out tax checks, let alone investigate the participants constituting each of the links in the order chain. Proof that the taxable person was aware cannot be based on the fact that it did not carry out checks that it was not required to perform.

Brief description of the grounds for the request for a preliminary ruling

22 Since the matters of fact relevant to the exercise of the right to deduct, which are set out in paragraphs 43 and 44 of the judgment of 21 June 2012, *Mahagében and Dávid* (C-80/11 and C-142/11, EU:C:2012:373), are present in this case, all the material and formal conditions for the creation and exercise of the right to deduct are fulfilled. What is more, there was nothing in the decision to indicate that the applicant filed false returns or issued improper invoices.

23 The referring court must decide whether, merely because the tax authority found, in relation to the members of the chain upstream of the applicant and its subcontractors, a large number of certain factors that the Court of Justice has in various judgments already held cannot be regarded as objective circumstances and therefore do not in themselves justify denying the right to deduct VAT, it is justified for the applicant to be denied the right to deduct VAT on grounds that the contents of the invoices appear implausible and, consequently, on grounds of tax evasion.

24 Although the facts of the present case are the same as regards the relevant factual considerations as those set out in and that constitute the basis of the questions referred for a preliminary ruling in *Mahagében and Dávid* (C-80/11 and C-142/11, EU:C:2012:373), *Hardimpex* (C-444/12, not published, EU:C:2013:318) and *Signum Alfa Sped* (C-446/15, EU:C:2016:869), as regards the exercise of the right to deduct VAT, there remain, even after those judgments, significant contradictions in legal interpretation which appear to confirm that the national

practice, which continues unchanged as regards the way in which the national tax authority and courts apply those articles of the Directive, is still inconsistent with the *acte clair* doctrine established in the judgment of 6 October 1982, *CILFIT and Others* (283/81, EU:C:1982:335).

25 Given that the practice followed by the defendant in this case has led to the right to deduct being denied even where the substantive and formal legal requirements of the right to deduct VAT are satisfied and even where the measures that could reasonably be expected were taken, the referring court finds that the issue of legal interpretation to which the proceedings relate quite clearly influences the decision to be made on the substance of the case, and it is therefore relevant and cannot be resolved without a referral for a preliminary ruling.

26 According to the order in *Signum Alfa Sped* (C-446/15, EU:C:2016:869), the provisions of Directive 2006/112 preclude a national practice under which the tax authorities deny a taxable person the right to deduct Value Added Tax which is payable or paid in respect of services supplied to it on the ground that the invoices relating to those services lack verisimilitude since the issuer of those invoices could not be the real supplier of those services, unless it is established, in the light of objective factors and without the taxable person being required to carry out checks not required of it, that that taxable person knew or should have known that those services were involved in Value Added Tax fraud.

27 According to the decisions of the tax authority, it can be found that it has continued to deny the applicant's right to deduct VAT relying on the implausibility of the contents of the invoices precisely on the basis of factors that, according to the judgments of the Court of Justice do not adversely affect the taxable person's right to deduct input VAT because they cannot be regarded as objective factors. Nevertheless, according to the tax authority, a sufficiently large number of those inappropriate factors justifies denying the right to deduct VAT. Furthermore, the tax authority has demonstrated that those factors exist by means of a check which the taxable person is neither required nor, due to objective circumstances, able, to carry out.

28 In the light of the case-law of the Court of Justice on the VAT legislation, the referring court entertains doubts as to whether the aim, breadth and depth of that investigation are in conformity with the principles of tax neutrality, effectiveness and proportionality.

29 The referring court is of the view that the tax authority's right to reclassify contracts is not unlimited, in particular in relation to the deduction of VAT, and cannot be exercised by imposing requirements additional to those laid down in Directive 2006/112, going beyond the purpose of the system for deducting the tax. It therefore entertains doubts as to whether the tax authority complied with the fundamental principles governing the VAT regime when it reclassified the activity carried on by the applicant as a brokering activity.

30 The referring court therefore wishes to know whether, where the taxable person fulfils the substantive and formal requirements to deduct VAT, it is necessary, in order to justify refusing that deduction, to specify how tax evasion has been committed, or whether it is sufficient to cite irregularities committed by the participants in the chain, deficiencies or gaps in the recollections of participants in the chain and a sufficient number of circumstances which, as the Court of Justice has found, cannot be grounds for refusing the VAT deduction.

31 In the light of the foregoing, it is not clear whether, in the circumstances described above, the fact that the service is supplied by setting up a chain in which there is or has been a personal or organisational link between the taxable person and the issuer of the invoice or between any of the members of the chain may be relevant and, therefore, may in itself amount to tax evasion. Furthermore, it is also unclear whether the initiative of setting up a chain for purposes unrelated to the taxable event constitutes tax evasion because the creation of that chain actually affects the amount of VAT payable, since the amount of VAT payable will be higher as a result of characteristics inherent to the setting up of the chain. It is also necessary to elucidate whether the tax authority is acting lawfully where, in carrying out its assessment, it does not take into account either the purpose of the VAT system or the fact that the amount of VAT payable also increases at the same time as the amounts covered by the right to deduction increase.

32 The issue also arises of whether the tax authority's practice satisfies the requirement for proof in the manner required by law, when it requires the taxable person to carry out a fact check of a depth incompatible with the time limit in which to carry out the transactions agreed in the commercial sphere and which is objectively impossible for other reasons, whilst that authority does not exhaustively investigate the circumstances giving rise to the setting up of the chain.

33 In all the questions it raises, the referring court asks whether the breadth, depth and scope of the proof which the tax authority requires as a condition of exercising the right to deduct VAT and which the Kúria (Supreme Court, Hungary) considers lawful — account also being taken of the principle of fiscal neutrality — encompass the relevant facts and are necessary and proportionate, that is to say, they do not exceed the framework laid down in the judgments of the Court of Justice, in particular given that the tax authority criticises the applicant for furnishing insufficient proof in the tax proceedings and, in addition to refusing it the right to deduct VAT, imposes a tax penalty on it.

34 Accordingly, since it continues to justify denial of the right to deduct VAT without relying on objective facts reasonably and directly related to the economic transaction, the tax authority is automatically denying exercise of that right, relying on an abusive practice, an organisational or personal relationship and a reclassification of the contract. Accordingly, the referring court considers that the tax authority not only transfers its own duty of verification to taxable persons, contrary to the aforementioned provisions of Directive 2006/112 and the case-law

of the Court of Justice, but also, by that practice, infringes the principles of fiscal neutrality, proportionality and effectiveness.

35 A legal practice based on considerations that run counter to the findings in *Signum Alfa Sped* (C-446/15, EU:C:2016:869), with no examination of the individual criteria mentioned in the Law on VAT and in the judgments of the Court of Justice (whether the taxable person knew or could reasonably be expected to have known), renders nugatory the right to deduct VAT provided for in Article 168 and Article 178(a) of Directive 2006/112 and in the judgments of the Court of Justice, in particular in Hungarian cases.