

Case C-81/20**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:**

12 February 2020

Referring court:

Tribunalul București (Romania)

Date of the decision to refer:

19 December 2019

Applicant:

SC Mitliv Exim SRL

Defendants:

Agenția Națională de Administrare Fiscală

Direcția Generală de Administrare a Marilor Contribuabili

Subject matter of the main proceedings

Action by which the company Mitliv Exim SRL asks the Tribunalul București (Regional Court, Bucharest, Romania) to order the defendants, the Agenția Națională de Administrare Fiscală (National Tax Administration Office) ('the ANAF') and the Direcția Generală de Administrare a Marilor Contribuabili (Directorate-General for Large-scale Taxpayers) ('the DGAMC'), to pay interest on sums paid by the applicant which, according to the applicant, were not due.

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

Interpretation is sought, pursuant to Article 267 TFEU, of Articles 2 and 273 of Directive 2006/112/EC, Article 325 TFEU and Article 50 of the Charter of Fundamental Rights of the European Union.

Questions referred

(1) Do Articles 2 and 273 of Council Directive 2006/112 of 28 November 2006 on the common system of value added tax, Article 50 of the Charter of Fundamental Rights of the European Union and Article 325 TFEU, in circumstances such as those in the main proceedings, preclude national legislation, such as that at issue in the main proceedings, which permits the adoption or implementation of sanctioning measures in relation to a taxpayer who is a legal person, in both administrative and criminal proceedings which are conducted in parallel in relation to that taxpayer, for the same specific acts of tax evasion, in a situation where the penalty applied in the administrative proceedings may also be classified as a criminal penalty, in accordance with the criteria identified by the Court of Justice of the European Union in its case-law, and to what extent are all of those events, taken together, excessive with regard to the taxpayer concerned?

(2) In the light of the answer to Question 1, should EU law be interpreted as precluding national legislation, such as that at issue in the main proceedings, which permits a State, through its tax authorities, to disregard, in administrative proceedings, in respect of the same specific acts of tax evasion, the sum already paid by way of criminal damages which at the same time also constitutes the sum covering the tax loss, thereby making that amount unavailable for a certain period, in order subsequently also to establish in respect of that taxpayer, in the administrative proceedings, ancillary tax obligations in respect of the debt which has already been cleared?

Provisions of EU law and case-law relied on

Article 325 TFEU

Article 50 of the Charter of Fundamental Rights of the European Union

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, Article 2(1) and Article 273.

Judgment of the Court of Justice of 20 March 2018, *Menci* (C-524/15), paragraphs 44 to 63; judgment of the Court of 26 February 2013, *Åkerberg Fransson* (C-617/10), paragraphs 25 to 27 and 37; judgment of the Court of 5 June 2012, *Bonda* (C-489/10), paragraphs 37 to 44; judgment of the Court of 6 September 2011, *Lady & Kid and Others* (C-398/09), paragraph 17; and judgment of the Court of 18 April 2013, *Irimie* (C-565/11), paragraphs 26 and 27

Judgment of the European Court of Human Rights of 15 November 2016, *A and B v. Norway*, paragraph 130, in which the ECtHR stated that it is necessary to show that the dual proceedings (administrative and criminal) have been linked so that they may be integrated into a coherent whole, considering that this implies not only that the purposes pursued and the means used to achieve them should in essence be complementary and linked in time, but also that the possible

consequences of organising the legal treatment of the conduct concerned in such a manner should be proportionate and foreseeable for the persons affected.

Provisions of national law relied on

Legea nr. 241/2005 pentru prevenirea și combaterea evaziunii fiscale (Law No 241/2005 on preventing and combating tax evasion), Article 9(1)(c), pursuant to which the recording, in accounting records or other accounting documents, of expenses which are not based on genuine transactions or the recording of other fictitious transactions, if this is done in order to avoid fulfilling tax obligations, constitutes tax evasion, and is punishable by a term of imprisonment of two to eight years and by the loss of certain rights, and Article 10(1), pursuant to which, where the offence of tax evasion has been committed, the term of the penalty prescribed by law for the criminal act committed is to be reduced by half if, during the pre-trial investigation or during the trial itself, before the final hearing, the accused covers the civil party's claims in their entirety.

Legea nr. 207/2015 privind Codul de procedură fiscală (Law No 207/2015 establishing the Code of Fiscal Procedure), as subsequently amended and supplemented

- Article 168(1) and (2), pursuant to which any amount paid and not due is to be refunded, at the request of the taxpayer;
- Article 178, which provides that, in the case of tax claims extinguished by offsetting, the interest and periodic penalty payments are, if necessary, to be calculated up to the date laid down in Article 167(4);
- Article 182, which provides that, in respect of the amounts which must be refunded or reimbursed from the State budget, the taxpayer is to be entitled to interest until the refund obligation is extinguished and that, in the case of a taxpayer having claims arising from the annulment of a fiscal administrative act, the taxpayer is to be entitled to interest from the day on which the tax claim was extinguished until the date of the refund or offsetting of the taxpayer's claim arising from the annulment of the fiscal administrative act; such interest is not to be granted where the taxpayer has asked to be awarded compensation for damage on the conditions laid down in Article 18 of Legea nr. 554/2004 a contenciosului administrativ (Law No 554/2004 on administrative proceedings) or in the case provided for in Article 107(5) of the Codul de procedură fiscală (Code of Fiscal Procedure);
- Article 277(1)(a), which provides for the suspension of the administrative complaints procedure where the authority which carried out the inspection activity has referred the matter to the judicial authorities as regards the existence of indications of an offence which, if established, would affect the outcome of the administrative proceedings;

– Articles 352 and 353, pursuant to which administrative proceedings initiated before 1 January 2016 remain subject to the previous legislation.

Ordinul președintelui Agenției Naționale de Administrare Fiscală nr. 2047/2016 (Decree No 2047/2016 of the President of the National Tax Administration Office) approving the procedure for the distribution or repayment to accounts from budgetary revenue accounts [of amounts] corresponding to the amounts collected in Account 50.86.09 ‘Balance of the sums collected which constitute damage caused and recovered under Article 10 of Legea nr. 241/2005’ (Decree No 2047/2016)

Succinct presentation of the facts and the main proceedings

- 1 The applicant was subjected to a pre-trial investigation relating to VAT fraud offences in connection with a file compiled by the Direcția de Investigare a Infrafracțiunilor de Criminalitate Organizată și Terorism — Serviciul teritorial Craiova (Directorate for Investigating Organised Crime and Terrorism — Craiova Territorial Department) (‘the DIICOT’).
- 2 After initiating the pre-trial investigation with reference to the offence set out in Article 9(1)(c) of Legea nr. 241/2005, the public prosecutor’s office ordered that scientific and technical surveys be carried out by inspectors from the DIICOT and the expert opinion of an accountant be obtained, which revealed tax obligations totalling 9 238 577 Romanian lei (‘RON’), RON 3 527 305 of which was attributable to the company MITLIV EXIM SRL for the period from 1 November 2011 to 21 September 2012, on account of the non-recognition of the right to deduct VAT on purchases of goods from the supply company, which for its part had purchased them from a Cypriot company.
- 3 After the ANAF joined the proceedings as a civil party on 28 October 2014 in respect of those amounts, which constituted damage caused to the State budget, the applicant paid, between 12 December 2014 and 29 September 2015, by five payment orders, an amount of RON 3 527 305, established in respect of it on an interim basis in the file compiled by the DIICOT, in order to benefit from Article 10(1) of Legea nr. 241/2005.
- 4 In the period running from 21 October 2015 to 22 February 2016, the applicant was subjected to a tax inspection concerning VAT and income tax for the period from 1 January 2010 to 30 June 2015, which concluded with the issuing of a tax assessment dated 25 February 2016 and a tax inspection report of the same date, both of which established tax obligations in respect of the applicant consisting of additional income tax (RON 2 351 535), additional VAT (RON 3 718 357), interest on the additional income tax (RON 942 836), periodic penalty payments in relation to the additional income tax (RON 357 576), interest on the additional VAT (RON 1 560 395) and default interest on the additional VAT (RON 551 459).

- 5 Following the request submitted by the applicant on 7 March 2016, the tax authorities offset, on 9 March 2016, the amount of RON 3 527 305, paid in the course of the pre-trial investigation, against the obligations established by the tax inspection authorities.
- 6 The applicant lodged an administrative complaint against the tax assessment and the tax inspection report on 31 March 2016; the authority competent to decide on that complaint ordered that the procedure be suspended in respect of the amount of RON 9 148 714, pursuant to Articles 277 and 279 of the Codul de procedură fiscală, and that the complaint be dismissed as unfounded in respect of the amount of RON 289 424.
- 7 The action brought by the applicant before the Curtea de Apel Craiova (Court of Appeal, Craiova, Romania) against the inspection report, the tax assessment and the decision on the complaint was upheld in part, in respect of the amount of RON 289 424, and dismissed as to the remainder. That decision has been challenged by means of an appeal currently pending before the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice, Romania).
- 8 By an application submitted to the DGAMC on 28 October 2016, the applicant requested payment of interest in relation to the amount of RON 3 527 305 paid in the course of the pre-trial investigation and offset pursuant to Article 167 of the Codul de procedură fiscală. That application was dismissed as unfounded on the ground that the sum paid was used to extinguish the obligations established in the tax assessment of 25 February 2016.
- 9 On 8 December 2017 the applicant was found guilty of a criminal offence by the Curtea de Apel Craiova and ordered to pay, jointly and severally, the amount of RON 9 238 577 as compensation for the civil damage caused to the Romanian State, with the ancillary tax obligations owed, pursuant to the Codul de procedură fiscală, from the time they became due until the date of their payment in full, the payments made by the applicant being assessed and the preservation order on the stocks of goods up to the amount of RON 9 238 577 being maintained.
- 10 In parallel with the proceedings currently pending before the Înalta Curte de Casație și Justiție and in light of the refusal by the competent tax authorities of the application for payment of interest, on 16 February 2017 the applicant brought an action before the referring court, claiming that it should order the competent tax authority to pay interest in the amount of RON 696 940 for the interim payments made.

The essential arguments of the parties to the main proceedings

- 11 The applicant argues that the tax authorities established ancillary tax obligations also in respect of the amount paid in the course of the pre-trial investigation, even though the amount was available to the State, and the criminal court gave a judgment by which it ordered payment, jointly and severally, of the entirety of the

damage caused to the State, even though the amount established in respect of the applicant had already been made available to the State authorities' account.

- 12 The applicant company requests payment of interest on the sums paid to cover, for the purpose of reducing the penalty, the criminal damage, which it considers to be the same as the tax loss.
- 13 It considers that the payment made in the course of the pre-trial investigation cannot only give rise to the possibility of being taken into consideration in the criminal proceedings, by reducing the term of the penalty by half, without also producing effects in terms of tax. Since both sets of proceedings concern the same VAT owed to the Romanian State, arising from the same specific acts (of tax evasion, as imputed to the [applicant] company), that VAT has, in practice, been levied twice, together with the related ancillary obligations.

Succinct presentation of the reasons for the reference

- 14 The Tribunalul București notes that what is at issue is the possibility of two separate sets of proceedings, one administrative and one criminal, being conducted against the applicant in respect of the same specific acts of tax evasion, where the payment made in the course of the criminal investigation is not recognised either in terms of tax or the civil aspect of the criminal proceedings.
- 15 Thus, it is apparent from the tax assessment of 25 February 2016 and the tax investigation report of the same date that the ancillary obligations relating to the additional VAT were calculated from the due date, 25 October 2010, until 25 January 2016, also including the period from December 2014 to September 2015, in which the applicant made a payment in the amount of RON 3 527 305, which was available to the State authorities throughout that period.
- 16 The applicant has expressly stated that the above payment was made both for the purpose of reducing the penalty and to interrupt the period of the interest and the default interest, an aspect which, however, the tax authorities did not take into consideration during the tax inspection, establishing interest and default interest in respect of the applicant also for the period during which it paid, in advance, the amount constituting the additional VAT.
- 17 Given that the tax inspection covered entirely the period during which the criminal investigation was carried out, the overlapping of the periods forming the subject matter of the two sets of proceedings, that is to say the period from 1 November 2011 to 21 September 2012, is relevant to the main proceedings as the applicant has requested interest only on the undue payment of VAT corresponding to that period.
- 18 In each of the two sets of proceedings (the criminal proceedings and the tax proceedings), damage has been established in respect of the evasion of payment of VAT to the State budget, which is based on the same specific acts carried out by

the applicant; the criminal damage amounting to RON 3 527 305 and the tax loss amounting to RON 3 718 357 (additional VAT to which the ancillary obligations are added).

- 19 The referring court raises the issue of the possible excessive nature of some of the penalties applied to the taxpayer in two respects, criminal and tax, and in this context recalls the case-law of the Court of Justice and the European Court of Human Rights referred to above, according to which national legislation which authorises duplication of proceedings and penalties must satisfy a number of conditions in order to be permissible.
- 20 In the view of the referring court, if the amount is considered to be owed already from the period during which the criminal investigation was initiated, the fiscal administrative acts issued during the tax inspection should not have included the ancillary obligations relating to that amount, since the latter was available to the defendant institutions, whilst if the amount is considered to be owed from the time that the fiscal administrative acts were issued during the tax inspection, the applicant would have been entitled to interest and default interest relating to the period from December 2014 to September 2015, during which the amount was available to the State authorities, as it was levied in the absence of a tax claim or a final judgment.

WORKING DOCUMENT