

Case C-182/20**Summary of a request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

23 April 2020

Referring court:

Curtea de Apel Suceava (Romania)

Date of the decision to refer:

30 March 2020

Applicants for revision:

BE

DT

Defendants:

Administrația Județeană a Finanțelor Publice Suceava

Direcția Generală Regională a Finanțelor Publice Iași

Accer Ipurl — lichidator judiciar al BE

EP

Subject matter of the dispute in the main proceedings

Application submitted by BE, a company which has been declared insolvent, and DT, a partner and administrator thereof, seeking revision of the judgment delivered in appeal proceedings by the Curtea de Apel Suceava (Court of Appeal, Suceava, Romania), by which that court upheld the decision of the tax authorities (Administrația Județeană a Finanțelor Publice Suceava) (District Directorate of Public Finances, Suceava, Romania) and the Direcția Generală Regională a Finanțelor Publice Iași (Regional Directorate General of Public Finances, Iași, Romania) to adjust value added tax (VAT) in favour of the State, by refusing to deduct VAT on taxable transactions prior to the initiation of insolvency proceedings in relation to that company.

Subject and legal basis of the request for a preliminary ruling

An interpretation of Directive 2006/112/EC and the principles of fiscal neutrality, the right to deduct VAT and fiscal certainty, is requested pursuant to Article 267 TFEU.

Question referred

Do Directive 2006/112/EC and the principles of fiscal neutrality, the right to deduct VAT and fiscal certainty preclude, in circumstances such as those in the main proceedings, national legislation which requires, once insolvency proceedings in respect of an economic operator have been initiated, automatically and without further checks, adjustment of VAT, by refusing to allow the economic operator to deduct VAT on taxable transactions that occurred prior to the declaration of insolvency and ordering the operator to pay the deductible VAT? Does the principle of proportionality preclude, in circumstances such as those in the main proceedings, such provisions of national law, given the economic consequences for the economic operator and the definitive nature of such an adjustment?

Provisions of EU law relied on

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, Articles 168 and 185 to 189.

Provisions of national law relied on

Legea nr. 571/2003 privind Codul fiscal (Law No 571/2003 establishing the Tax Code) — Article 11, which provides for the adjustment of VAT in the case of a transaction which does not have an economic purpose; Article 148, regarding the adjustment of deductible VAT in the case of acquisitions of goods other than capital goods; and Article 149, regarding the adjustment of deductible VAT in the case of capital goods, which provides that the taxable person is to lose the right to deduct tax on undelivered moveable property where they are to be used to carry out non-deductible transactions, and adjustment of the right of deduction where capital goods are used for purposes other than the conduct of economic activity or for non-deductible transactions.

Hotărârea Guvernului nr. 44/2004 pentru aprobarea Normelor metodologice de aplicare a Legii 571/2003 privind Codul fiscal (Government Decision No 44/2004 approving the detailed rules for the implementation of Law No 571/2003 establishing the Tax Code), paragraphs 53 and 54, relating to the application of Articles 148 and 149 of Law No 571/2003.

Legea nr. 227/2015 privind Codul fiscal (Law No 227/2015 establishing the Tax Code), Article 305(7) and (8), which governs the adjustment of VAT by reassessment of the right of deduction.

Legea nr. 85/2006 privind procedura insolvenței (Law No 85/2006 on insolvency procedure), Article 3(23), setting out the insolvency procedure; Article 47(7), which provides that, from the date of declaration of insolvency, only the activities necessary for the purposes of the winding-up operations are to be carried out; Article 116(1) and (2), laying down rules governing the winding-up procedure, and Article 123 relating to the ranking in which claims, including budgetary claims, are to be settled in the case of insolvency.

Legea contenciosului administrativ nr. 554/2004 (Law No 54/2004 on administrative proceedings), Article 21(1), which allows an application for revision to be submitted in the event of an infringement of EU law.

Succinct presentation of the facts and the main proceedings

- 1 BE is a commercial company in respect of which the Tribunalul Suceava (Regional Court, Suceava, Romania) ordered the initiation of insolvency proceedings on 10 February 2015.
- 2 By tax assessment notice of 26 November 2015, the Romanian tax authorities informed BE that it was required to pay the amount of 646 259 Romanian lei (RON) by way of VAT on certain taxable transactions carried out during the period from 20 May 2013 to 13 February 2014. Before the insolvency proceedings were initiated, that amount was regarded as deductible on the ground that it corresponded to the above period, during which BE engaged in an economic activity and was registered as a taxable person for the purposes of VAT.
- 3 All the goods, commodities and capital goods in respect of which the tax authorities ordered that VAT be adjusted to the benefit of the State were sold in the insolvency proceedings. Following these sales VAT was levied and BE continued to be registered as a taxable person for the purposes of VAT.
- 4 BE lodged an appeal against the tax assessment notice in question, which the Direcția Generală Regională a Finanțelor Publice Iași — Administrația Județeană a Finanțelor Publice Suceava (Regional Directorate General of Public Finances, Iași — District Directorate of Public Finances, Suceava) dismissed by decision of 22 January 2018.
- 5 BE brought an administrative action against those decisions of the tax authorities before the Tribunalul Suceava (Regional Court, Suceava), which upheld the action and cancelled the obligation to pay the amount of RON 646 259.
- 6 The tax authorities lodged an appeal against that judgment before the Curtea de Apel Suceava (Court of Appeal, Suceava), which was allowed by judgment of

18 June 2019, and therefore BE was required to pay the abovementioned VAT. Upholding the reasoning of the tax authorities, the appeal court held that the insolvency in itself constituted a ground for cessation of the right of deduction, without analysing the transactions actually carried out in that procedure.

- 7 BE and DT submitted an application for revision of the judgment given in the appeal proceedings, alleging infringement of the provisions of Directive 2006/112/EC and the case-law of the Court of Justice relating to VAT.

The essential arguments of the parties to the main proceedings

- 8 The tax authorities consider that the company lost the right of deduction on being declared insolvent and therefore they required the adjustment of the VAT, which they had initially regarded as deductible, both as regards the goods previously acquired and held in stock and the existing capital goods owned by the applicant for revision at the time the insolvency proceedings were initiated.
- 9 The tax authorities claim in this respect that a declaration of insolvency is tantamount to a cessation of economic activity and that insolvency consists solely of a procedure for the liquidation of assets with a view to extinguishing the company's debts. In their view, the capital goods are no longer used for the conduct of an economic activity and the transactions carried out in connection with the liquidation have no economic purpose in themselves.
- 10 Those authorities add that it is irrelevant that VAT continued to be levied following the sale of those goods in connection with the insolvency.
- 11 By contrast, the applicant for revision points out that, in the insolvency proceedings, it continued to be registered as a taxable person for the purposes of VAT and the winding-up operations (sale of movable and immovable property, leasing of immovable property) were still subject to VAT, which continued to be levied.
- 12 BE further maintains that it was placed at a disadvantage in comparison with other economic operators since the adjustment of VAT in favour of the State deprived it of a considerable amount of money which it had paid by way of VAT at the time the goods were acquired and which it considered to be deductible.
- 13 The applicant for revision further states that, by issuing the tax assessment notice, the tax authorities secured an advantage in the insolvency proceedings since budgetary claims are settled as a matter of priority in the liquidation.
- 14 The tax authorities reply by stating that the applicant for revision has the right to a re-adjustment of VAT in its favour, following the sale of the goods in connection with the insolvency proceedings, as a result of a reassessment of the right of deduction, in accordance with the provisions of the old and new tax codes.

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

- 15 In the grounds for the reference for a preliminary ruling the referring court raises the question of the compatibility with Directive 2006/112/EC, and the principles of fiscal neutrality, the right to deduct VAT and fiscal certainty, of the Romanian national legislation under which an economic operator subject to insolvency proceedings is required, automatically and without further checks of the goods and transactions relating to the liquidation, to adjust, in favour of the State, the VAT corresponding to certain taxable transactions that took place before that those proceedings were initiated. It notes in that regard that neither the tax authorities nor the appeal court actually analysed the commercial transactions carried out during the insolvency proceedings.
- 16 The national court also states that sales of goods in connection with insolvency are subject to VAT and that the economic operator retains its status as a taxable person for the purposes of VAT, and it therefore seeks to ascertain whether the directive and the abovementioned principles preclude national legislation under which transactions carried out during the insolvency proceedings are automatically regarded as having no economic purpose.
- 17 Furthermore, if the Court of Justice holds that that form of taxation pursues a legitimate objective, the referring court is uncertain as to whether it is proportionate to the objective pursued, since such a form of taxation creates a burden for the economic operator who has been declared insolvent which is, on the one hand, additional (by placing it at a disadvantage in comparison with other economic operators and procuring an advantage for the tax authority in the form of priority settlement of budgetary claims) and, on the other, definitive. The referring court notes, as regards the latter point, that the tax authority has not shown that a re-adjustment was made to deductible VAT following the insolvency proceedings.