Case C-487/20

Request for a preliminary ruling

Date lodged:

2 October 2020

Referring court:

Curtea de Apel Alba Iulia (Romania)

Date of the decision to refer:

22 September 2020

Applicant:

Philips Orăștie SRL

Defendant:

Direcția Generală de Administrare a Marilor Contribuabili

[…]

CURTEA DE APEL ALBA IULIA

SECȚIA DE CONTENCIOS ADMINISTRATIV ȘI FISCAL (Court of Appeal, Alba Iulia – Section for administrative and fiscal matters)

[…]

ORDER

Public hearing of 22 September 2020

[…]

Registered in the roll is the request for a reference to the Court of Justice of the European Union made by the applicant SC Philips Orăștie SRL in an administrative action against the defendant Direcția Generală de Administrare a Marilor Contribuabili (Directorate-General for the Administration of Large-scale Taxpayers), […] seeking the annulment of an administrative act.

[…]

CURTEA DE APEL

Regarding the request for a reference to the Court of Justice of the European union:

I. Subject matter of the main proceedings. Relevant facts

1 The applicant, SC Philips Orăștie SRL, is a Romanian legal person with registered offices in the municipality of Orăștie, in Hunedoara County.

2 On **14 September 2016**, the competent tax authority, Direcția Generală de Administrare a Marilor Contribuabili (Directorate-General for the Administration of Large-scale Taxpayers, 'the DGAMC') issued tax assessment notice No 423 establishing a liability on the part of the applicant to pay the sum of 31 628 916 Romanian Lei (RON) by way of VAT and ancillary tax liabilities.

3 Enforcement of the debt stated in the tax assessment notice was not suspended and, in its '300' value added tax return for the month of **September 2016**, the applicant completed line 36 […] stating a sum of RON 21 799 334, representing a *balance of VAT due as established in the tax assessment notice and not paid prior to the submission of the VAT return*, without requesting a refund. Thus, Philips Orăștie remained liable, after set-off, for a sum of **RON 12 096 916.**

4 On **4 November 2016**, Philips Orăștie brought a tax appeal (No 82252) against the tax assessment notice, in which it *disputed in part* the lawfulness of the notice, to the extent of **RON 21 799 334**.

5 On lodging its tax appeal, the applicant submitted to the DGAMC the original of *bank guarantee No 5163090001 of 4 November 2016*, issued by Citibank Europe; the guarantee was for the sum of RON 31 577 059 and was extended to 4 March 2020 by subsequent documents.

6 After lodging its tax appeal against the assessment notice and submitting the bank guarantee (in **November 2016**), and up to **March 2019**, Philips Orăștie submitted VAT returns in which it **did not** complete line 38 with the *balance of VAT due* **[Or. 2]** *as established by the tax inspection authorities in the notice communicated and not paid* prior to the submission of the company's VAT return. At the same time it requested the refund of VAT, taking the view that, in light of the provisions of Articles 233 and 235(1) and (5) of the Codul de procedură fiscală – Legea 207/2015 (Code of Tax Procedure – Law 207/2015), the payment obligations in question could not be classified as *outstanding* and could not be included in the *cumulative amount of VAT due*, as defined in Article 303(4) of the Codul fiscal – Legea 227/2015 (Tax Code – Law 227/2015). That interpretation was implicitly confirmed by the tax authority, which issued orders for the refund of VAT (copies of which have been placed on the file), without raising any objection to the manner in which the VAT return had been prepared or, by implication, to the interpretation of the relevant provisions.

7 On **5 March 2019**, the Curtea de Apel București (Court of Appeal, Bucharest, Romania) upheld the action for annulment brought by the applicant against the tax assessment notice […] and, by Civil Judgment No 813 of 5 March 2019, **cancelled** the additional **VAT** in the sum of **RON 21 799 334**. That judgment has not yet become final.

8 The applicant drew up its VAT returns for **April 2019** and **May 2019** in the same manner, that is to say, it **did not** complete line 38 with a balance of VAT due as established by the tax inspection authorities in the notice communicated and not paid prior to the submission of the VAT return.

9 Although there was no change in the applicable regulatory framework, the tax authorities informed the applicant of the incorrect completion of *line 38* relating to *VAT due* in the sum of RON 12 096 916. The applicant asserted that this was not an error, but intentional, and was based on interpretation of the relevant rules. The tax authority did not, however, accept that view and issued two VAT adjustment notices by which it altered the amount of VAT due as stated in the returns, *including in the cumulative amount of VAT due the sum of RON 21 799 334*, with direct effect on the amount of VAT to be refunded.

10 The applicant brought an administrative appeal, but the solution was confirmed. The applicant therefore applied to the administrative court, on 23 December 2019, seeking the annulment of the two VAT adjustment notices.

II. Applicable provisions

NATIONAL LEGISLATION

Codul de procedură fiscală – Legea 207/2015 (Code of Tax Procedure – Law 207/2015)

11 **Article 157 […] – Outstanding tax liabilities**

‘(2) The following shall not be regarded as outstanding tax liabilities:

(b[1]) tax liabilities established in fiscal administrative acts that are challenged in accordance with the law and for which a guarantee in accordance with Articles 210 and 211 or Article 235 is provided’.

12 **Article 233 – Stay of enforcement**

‘(2[1]) Enforcement shall be stayed or shall not be commenced in the following cases:

(a) for tax liabilities established in a decision of the competent tax authority if, after communication of the decision, the debtor informs the tax authority of the

lodging of a letter of guarantee or insurance policy of guarantee in accordance with Article 235. Enforcement shall proceed or shall be commenced if the debtor fails to lodge the letter of guarantee or insurance policy of guarantee within 45 days of the date of communication of the decision in which the tax liability is established;

(b) for tax liabilities established in fiscal administrative acts that are challenged in accordance with the law and guaranteed in accordance with Articles 210 and 211; enforcement shall proceed or shall be commenced upon the fiscal administrative acts becoming final in the system of administrative appeals or judicial proceedings. **[Or. 3]**

(2[2]) Throughout the period of the stay of enforcement in accordance with paragraph 2[1], the tax liability which is the subject of the stay shall not be extinguished, unless the debtor chooses that it should be extinguished in accordance with Article 165(8).'

13 **Article 235 – Stay of enforcement on presentation of a letter of guarantee or insurance policy of guarantee**

'(1) If a challenge is brought against a fiscal administrative act establishing a tax liability, in accordance with this Code, even while the administrative proceedings are being considered, enforcement shall be stayed or shall not be commenced in relation to the disputed tax liability if the debtor presents to the competent tax authority a letter of guarantee or insurance policy of guarantee covering the tax liability which is disputed and has not been discharged at the time of presentation of the guarantee. The validity of the letter of guarantee or insurance policy of guarantee must be at least six months from the date of issue.

[…]

(5) Throughout the period of a stay of enforcement in accordance with this article, the tax liability which is the subject of the stay shall not be extinguished, unless the debtor chooses that it should be extinguished in accordance with Article 165(8).'

Codul fiscal – Legea 227/2015 (Tax Code – Law 227/2015)

14 **Article 303 – Refund of tax to taxable persons registered for VAT purposes**

'(1) If the tax on purchases made by a taxable person registered for VAT purposes, in accordance with Article 316, which is deductible in a tax period exceeds the tax levied on taxable transactions, an excess shall arise in the reporting period, referred to as a negative tax amount.

(2) After determining the amount of tax payable or the negative tax amount relating to the transactions carried out in the course of the reporting period,

taxable persons shall make the adjustments provided for in this article using the tax return referred to in Article 323.

(3) A *cumulative negative tax amount* shall be determined by adding together the negative tax amount for the reporting period, the balance of the negative tax amount carried forward from the return for the preceding tax period, where a refund has not been requested, and the negative balance of VAT as established by the tax inspection authorities in a decision communicated prior to the submission of the tax return.

(4) A *cumulative amount of tax due* shall be determined in the reporting period by adding together the tax due in the reporting period and any portion not paid to the Treasury — prior to the submission of the tax return referred to in Article 323 — of the balance of tax due from the preceding tax period, and any portion not paid to the Treasury — prior to the submission of the tax return — of the balance of VAT due established by the tax inspection bodies in a decision communicated prior to the submission of the return. By way of exception:

(a) in the first tax return submitted to the tax authority after the date of approval of a payment facility, the cumulative amount of tax due in respect of which the payment facility has been approved shall not be carried forward from the return for the preceding tax period;

(b) in the first tax return submitted to the tax authority after the date of registration of the tax authority in the body of creditors referred to in Law No 85/2014, the cumulative amount of tax due in respect of which the authority is registered in the body of creditors in accordance with the provisions of Law No 85/2014 shall not be carried forward from the return for the preceding tax period.

(5) By way of derogation from the provisions of paragraphs 3 and 4, any negative VAT balance established by the tax inspection authorities and any portion that has not been paid to the Treasury by the date of submission of the tax return of the balance of the VAT due established by the tax inspection bodies in a decision the enforcement of which has been stayed by a court in accordance with the law, shall not be added to the negative amount or to the cumulative amount of tax due, depending on the case, relating to the period(s) for which enforcement of the decision is suspended. Such amounts shall be imputed to the return for the tax period in which **[Or. 4]** the stay of enforcement of the decision is lifted, so as to determine the cumulative negative tax amount or, as the case may be, the cumulative amount of tax due.

(6) Using the tax return referred in in Article 323, taxable persons are required to determine the difference between the amounts referred to in paragraphs 3 and 4, which represent the tax adjustments, and to determine the balance of tax due or the balance of the negative tax amount. If the cumulative amount of tax due exceeds the cumulative negative tax amount, a balance of tax due shall arise in the

reporting period. If the cumulative negative tax amount exceeds the cumulative amount of tax due, a balance of the negative tax amount shall arise in the reporting period.

[…]'.

EU law

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax

15 **Article 179**

The taxable person shall make the deduction by subtracting from the total amount of VAT due for a given tax period the total amount of VAT in respect of which, during the same period, the right of deduction has arisen and is exercised in accordance with Article 178.

However, Member States may require that taxable persons who carry out occasional transactions, as defined in Article 12, exercise their right of deduction only at the time of supply.

16 **Article 183**

Where, for a given tax period, the amount of deductions exceeds the amount of VAT due, the Member States may, in accordance with conditions which they shall determine, either make a refund or carry the excess forward to the following period.

However, Member States may refuse to refund or carry forward if the amount of the excess is insignificant.

III. The referring court's reasons for making the request for a preliminary ruling

The applicant's position

17 The applicant maintains that, given that the national tax procedure legislation recognises that there may be a stay of the enforcement of tax liabilities established in a fiscal act that has been challenged and in respect of which a bank guarantee has been lodged, it is obvious that the same rule should apply in the case where such a liability relates to an amount of additional VAT established in a tax assessment notice that has been challenged, especially since, between November 2016 and March 2019, the tax authorities confirmed that interpretation.

18 The VAT refund mechanism expressly described in Article 183 of the VAT directive is to be found, as such, in Article 303(1) of the Tax Code. Consequently, the formula for determining the negative excess VAT in relation to the VAT due under another fiscal act — established by Article 303(2), (4) and (5) of the Tax Code, which was the basis for the adjustments made by the DGAMC that are disputed in the present case — was adopted in the exercise of the procedural autonomy which the Member States enjoy, in principle, at the time of transposing the VAT directive. That autonomy, however, is limited and subject to the requirement of compliance with generally applicable principles, namely the principles of equivalence, effectiveness and VAT neutrality, as developed in the relevant case-law of the Court of Justice.

19 The applicant maintains that the Romanian State has infringed the principle of equivalence, in that Article 303(4) and (5) of the Tax Code establishes a different, less favourable treatment of the VAT refund procedure **[Or. 5]** by comparison with the national procedure for the refund of taxes and duties, in that the extinguishing of the VAT due by the VAT to be refunded occurs even when the taxable person has lodged a guarantee for a stay of enforcement of the VAT due, whereas, in the case of national taxes, the lodging of a guarantee has the effect of paralysing tax liabilities, which can no longer be extinguished or in any way reduce the VAT to be refunded.

20 The applicant also maintains that the principle of effectiveness has been infringed, in that procedural autonomy should not be exercised in such a way as to hinder the exercise of the right to a refund or render it impossible. However, such a situation unquestionably arises because national tax law contains no other provision or procedure governing application of the VAT return to regulate the way in which the *status quo ante* prior to extinguishment is restored, in the event that a court annuls the act imposing the VAT.

21 The applicant also considers that the principle of neutrality has been infringed, in that the uncertainty created by the legislative lacuna and the unclear, ambiguous nature of the solutions brought about under Article 303(4) and (5) of the Tax Code entail an evident financial risk for taxable persons, both regarding the impossibility of obtaining a refund within a reasonable period of time and regarding the costs incurred in lodging a guarantee for the stay of enforcement of the assessment notice establishing the VAT with which the VAT to be refunded is extinguished. This is clearly inconsistent with the Court of Justice's relevant VAT case-law.

The defendant's position

22 The defendant maintains that the mechanism for determining the VAT due or to be refunded is a special one and that the provisions of [Article] 303(4) and (5) of the Tax Code – Law 227/2015 are special provisions unlike those of Articles 157,

233 and 235 of the Code of Fiscal Procedure – Law 2017/2015, which apply only to other types of tax or duty.

23 Consequently, the lodging of a bank guarantee is not sufficient to result in tax liabilities established in a tax assessment notice that has been challenged not being included in the calculation of the cumulative VAT due, even if the liabilities in question are guaranteed.

Position of the referring court

24 The rule introduced by [the first paragraph of] Article 179 and [the first paragraph of] Article 183 of Directive 2006/112/EC – which establishes the VAT to be refunded only by reference to the difference between the *VAT levied* and the *deductible VAT* – for a *given tax period* – has been transposed by the national legislature in Article 303(1) of the Tax Code.

25 However, to this mechanism for determining the VAT to be refunded, provided for by the VAT directive, the Romanian legislature has added the concept of '*cumulative amount of VAT due*', by which it determines the VAT to be refunded after the amount due for the reporting period is added to the amount of VAT due stated in tax assessments in accordance with Article 303(4) of the Tax Code.

26 The final mechanism for the refunding of VAT established in accordance with paragraphs 2 to 4 of Article 303 of the Tax Code adds to the mechanism described by the VAT directive and transposed in paragraph 1 of Article 303 of the Tax Code, the difference consisting in the introduction into the calculation of the amount to be refunded the concept of '*cumulative amount of VAT due*'; this means, in fact, that account is taken of any VAT due on the basis of earlier tax assessments. This is a concept not found in the wording of the VAT directive.

27 Consequently, since the mechanism for determining the negative balance of VAT provided for under national law is different from the mechanism expressly provided for by the VAT directive, it follows that the Romanian State intentionally derogated from the provisions of the VAT directive and instituted, in Article 303(2) to (4) of the Tax Code, a mechanism of its own for the calculation of VAT [to be refunded]. **[Or. 6]**

28 The national court therefore considers that the point that must be resolved in this dispute is whether the concept of '*VAT due*' in [the first paragraph of] Article 179 and [the first paragraph of] Article 183 of Directive 2006/112/EC may be interpreted as the equivalent of '*cumulative amount of VAT due*' described in Article 303(4) of the Tax Code – Law 227/2015.

29 The second point to be clarified is whether such a mechanism, established in the exercise of procedural autonomy, is *consistent with the principles of equivalence, effectiveness and neutrality*.

30 The principle of equivalence requires the Member States not to establish procedural rules that are less favourable, in the case of applications for the refund of a tax arising from the application of EU law, than the rules which apply to claims that are similar, having regard to their subject matter, basis and essential characteristics, but arise from the application of national law.

31 The principle of effectiveness precludes the introduction of procedural rules that would make it excessively difficult or practically impossible to exercise rights conferred by the EU legal order.

32 The general scheme governing liability for national taxes and duties, Articles 157, 233 and 235 of the Code of Tax Procedure – Law 207/2015, includes the rule that, where a tax decision is disputed and a bank guarantee is lodged in respect of the entire disputed liability, enforcement is stayed and the liability may be extinguished prematurely only at the request of the debtor.

33 With regard to VAT, Article 30[3](5) of the Tax Code – Law 227/2015 omits to stipulate any *express* derogation from the inclusion in the *cumulative amount of tax due* of any portion, not paid to the Treasury prior to the submission of the tax return, of the balance of VAT due as established by the tax inspection authorities in decisions the enforcement of which has been suspended following the lodging of a *bank guarantee*.

34 From the time when the bank guarantee was lodged (November **2016**) until the time when the substantive ruling in the case was given (April **2019**), the tax authority *implicitly acknowledged* that the provisions of Article 235(1) and (5) of the Code of Tax Procedure – Law 207/2015 applied, processing the VAT returns submitted without taking into account the guaranteed liabilities. However, *following the annulment of the tax decision* (April **2019**) by a ruling which has not yet become final (but which enjoys the authority of a provisional judgment and thus creates significant doubt about the lawfulness of the administrative act), the tax authority changed its position, adopting the view that only the provisions of Article 303(4) and (5) of the Tax Code – Legea 227/2015 applied.

35 The question therefore arises of whether such a disparity is objectively justified, given that the measures which the Member States may adopt under Directive 2006/112/EC in order to ensure the correct levying and collection of the tax and for the prevention of fraud must not go further than is necessary to attain such objectives and must not undermine the neutrality of VAT (as held by the Court of Justice of the European Union in its judgments in *Gabalfrisa and Others*, C-110/98 to C-147/98, EU:C:2000:145, paragraph 52, *Collée*, C-146/05, EU:C:2007:549, paragraph 26, *Nidera Handelscompagnie*, C-385/09, EU:C:2010:627, paragraph 49, and *Idexx Laboratories Italia*, C-590/13, EU:C:2014.2429, paragraphs 36 and 37). The existence of a bank guarantee makes the collection of the tax very simple for the tax authority once the lawfulness of the tax assessment has been confirmed definitively by a court. **[Or. 7]**

36 In addition, it is necessary to clarify to what extent the principle of neutrality is observed so long as the interpretation and actual application of the national rules creates an additional financial burden for the company, both regarding the impossibility of obtaining a refund within a reasonable period of time and regarding the costs incurred in lodging a guarantee for the stay of enforcement of the tax assessment.

37 […]

38 […]

FOR THOSE REASONS,

IN THE NAME OF THE LAW

ORDERS

that, pursuant to **Article 267** of the Treaty on the Functioning of the European Union, the following question be referred to the Court of Justice of the European Union for a preliminary ruling:

May the provisions of **[the first paragraph of] Article 179 and [the first paragraph of] Article 183 of Directive 112/2006/EC**, regard being had to the **principles of equivalence, effectiveness and neutrality**, be interpreted as precluding national legislation or practices in accordance with which the amount of *VAT to be refunded* is reduced by including in the calculation of *the VAT due* amounts representing *additional liabilities* established in a notice of assessment that has been annulled by a judgment that is not yet final, where such additional liabilities are *guaranteed by a bank guarantee* and the national tax procedure rules *recognise* that such a guarantee *has the effect of staying enforcement* in the case of other taxes and duties?

[…] [procedural matters, signatures] […]