Case C-640/23

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:

25 October 2023

Referring court:

Înalta Curte de Casație și Justiție (Romania)

Date of the decision to refer:

26 June 2023

Appellants and defendants at first instance:

Direcția Generală Regională a Finanțelor Publice Galați – Administrația Județeană a Finanțelor Publice Vrancea

Direcția Generală de Administrare a Marilor Contribuabili

Respondent and applicant at first instance:

Greentech SA

Subject matter of the main proceedings

Appeals against a judgment partially upholding the administrative appeal brought by the respondent and applicant at first instance seeking the annulment of certain administrative and tax measures relating to value added tax (VAT) issued by the appellants and defendants at first instance.

Subject matter and legal basis of the request

On the basis of Article 267 TFEU, interpretation is sought of Articles 2, 19 and 168 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (‘Directive 2006/112’), read in conjunction with Article 203 thereof.

Question referred for a preliminary ruling

Do the principles of neutrality, legal certainty and the protection of legitimate expectations, governed by the provisions of Articles 2, 19 and 168 of [Directive 2006/112], read in conjunction with Article 203 thereof, preclude a refusal to recognise the right to deduct the VAT paid in respect of a sales transaction, which has subsequently been reclassified by the tax authorities as a transfer of an undertaking falling outside the scope of VAT, where the VAT has already been collected by the State budget and cannot be refunded under national legislation?

Provisions of European Union law [and case-law] relied on

Articles 2, 19 and 168 of Directive 2006/112, read in conjunction with Article 203 thereof

Case-law of the Court of Justice of the European Union ('the Court'), in particular the judgments of 26 April 2017, *Tibor Farkas*, C-564/15, EU:C:2017:302; of 11 April 2019, *PORR Építési*, C-691/17, EU:C:2019:327; and of 14 March 2013, *Agrargenossenschaft Neuzelle*, C-545/11, EU:C:2013:169

Provisions of national law [and case-law] relied on

[Legea nr. 571 din 22 decembrie 2003 privind Codul fiscal (Law No 571 of 22 December 2003 establishing the Tax Code)], Article 3 (under which the taxes and duties governed by that code are based on, inter alia, the principle of fiscal neutrality); Article 126(1) (under which transactions which constitute or are treated as a supply of goods for consideration are subject to VAT); Article 128(7) (under which the transfer of a totality of assets or part thereof, inter alia, following a sale, does not constitute a supply of goods if the person to whom the assets have been transferred is a taxable person); and Article 145(2) (under which every taxable person is entitled to deduct VAT in respect of purchases subject to VAT).

[Ordonanţa Guvernului nr. 92/2003 privind Codul de procedură fiscală (Government Order No 92/2003 on the Code of Tax Procedure)], Article 84 (under which, in principle, tax returns may be corrected by the taxpayer, on his or her own initiative, within the limitation period laid down for the right to establish tax liabilities) and Article 91 (under which the right of the tax authority to establish tax liabilities is in principle limited to five years from 1 January of the year after the year in which the tax claim arose).

Hotărârea Guvernului nr. 44/2004 pentru aprobarea Normelor metodologice de aplicare a Legii nr. 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 (7) and (8) of point 6, clarifying what is meant by the concept of the transfer of a totality of assets referred to in Article 128(7) of the Tax Code.

Succinct presentation of the facts and procedure in the main proceedings

1 Between 23 November 2015 and 15 July 2016, the Direcția Generală Regională a Finanțelor Publice Galați – Administrația Județeană a Finanțelor Publice Vrancea (Regional Directorate-General of Public Finances of Galați – District Administration of Public Finances of Vrancea) ('the AJFP Vrancea') carried out a tax audit at the premises of Greentech SA ('Greentech'), as a result of which that company was found to have additional tax liabilities in the amount of 4 388 720 Romanian lei (RON) for VAT and related charges. Those tax liabilities resulted from the new legal classification of the transaction for the sale of equipment by Greenfiber International SA ('GFI') to Greentech (a transaction which the latter regarded as a supply of goods subject to VAT) and which the AJFP Vrancea classified as a transfer of a partial totality of assets between two related companies (a transaction not subject to VAT).

2 The complaint brought by Greentech against those tax liabilities was rejected by the Direcția Generală de Administrare a Marilor Contribuabili (Directorate-General for the Administration of Large-Scale Taxpayers) ('the DGAMC').

3 In response to that decision of the DGAMC rejecting the tax complaint, Greentech brought an administrative appeal before the Curtea de Apel Ploiești (Court of Appeal, Ploiești), which was partially upheld.

4 By decision of 23 November 2021, the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice) ('the ÎCCJ') partially upheld the appeals brought by the AJFP Vrancea and the DGAMC against the judgment of the Court of Appeal, Ploiești.

5 Greentech submitted an application for revision of the ÎCCJ's decision, claiming that it infringed the case-law of the Court, in particular the judgments in *Tibor Farkas*, C-564/15, EU:C:2017:302, and *PORR Építési*, C-691/17, EU:C:2019:327; according to that case-law, the right to deduct VAT must also be recognised in cases where the transactions at issue do not fall within the scope of VAT, where it is clear from the particular circumstances of the case that it would be impossible or extremely difficult for the person who paid the VAT to recover it, unless the principles of neutrality and effectiveness of VAT were breached.

6 By decision of 31 January 2023, the ÎCCJ granted the application for revision, partially annulled the decision being contested by means of the application for revision as regards the ground of appeal relating to the legal reclassification of the sale of equipment as a transfer of a totality of assets, and upheld the case for re-examination of the appeal on that ground.

The essential arguments of the parties in the main proceedings

7 Greentech, the respondent and applicant at first instance, argues that it is necessary to clarify whether, in interpreting the provisions of Directive 2006/112

and the principles of fiscal neutrality, legal certainty and the protection of legitimate expectations, the tax authorities of a Member State may refuse to recognise the right to deduct the VAT paid in respect of a sales transaction which is subsequently reclassified by the tax authorities as a transfer of assets not subject to VAT, where the VAT has been collected by the State budget, the refund of that tax to the person who paid it is impossible, since the limitation period in tax matters has expired, and national legislation does not provide for the procedural instruments and mechanisms for the refund by the tax authorities of the amount paid by way of VAT where such reclassification is carried out.

8 Greentech contends that, under the principle of fiscal neutrality, VAT must have a neutral effect, that is to say, it must produce the same final result irrespective of the intermediaries, by means of the mechanism for exercising the right to deduct. The only situation in which this principle does not apply is where a good or service is received by a final consumer, in which case the latter must bear the VAT. It has been consistently held in the case-law of the Court that any limitation on the right to deduct constitutes a breach of the principle of fiscal neutrality (judgment of 26 April 2017, *Tibor Farkas*, C-564/15, EU:C:2017:302).

9 According to Greentech, GFI could not correct the invoice relating to the sale in question once the tax audit at Greentech had been completed, since GFI had previously been the subject of a tax audit, following which the group of auditors concluded that that commercial transaction had been correctly regarded by the parties as a transaction subject to VAT and that GFI had therefore correctly collected VAT and paid it to the State budget.

10 Thus, the same national tax authority treated the commercial transaction in question in a completely different way: as subject to VAT for GFI, to which Greentech paid VAT, and as not subject to VAT for Greentech. Greentech argues that it was therefore deprived of the right to deduct the VAT paid.

11 The AJFP Vrancea, one of the appellants and defendants at first instance, submits that account should be taken of the particular features of the present case, inasmuch as the transaction between the two related companies involved the sale of a production line and, on the same date, a lease agreement was signed under which Greentech was to use the same premises as the related party, namely GFI, to carry on its business at the same industrial site, and take on the specialist staff. It was not apparent that the identity of the related entity would be maintained following the takeover of the latter's economic activity.

12 According to the AJFP Vrancea, in the context of the transfer of a totality of assets or part thereof from a taxable person, which does not constitute a supply of goods within the meaning of Article 128(7) of the Tax Code, the right to deduct is not applicable, in so far as such a transfer does not fall within the scope of VAT.

13 However, the AJFP Vrancea argues that the tax authorities have not limited the taxpayer's right to correct the VAT returns. Greentech had the opportunity to

recover the non-deductible VAT from GFI by correcting the invoice that had been incorrectly issued and by refunding the tax paid on the basis of that invoice, a procedure about which Greentech was informed during the tax audit.

Succinct presentation of the reasoning in the request for a preliminary ruling

14 The referring court states that the answer to the question raised is relevant to the analysis to be carried out, in relation to compliance with the principle of fiscal neutrality, in three respects: first, whether Greentech may recover VAT from its trading partner GFI; second, whether the transaction falls within the scope of VAT for the purpose of obtaining tax advantages; and, third, whether there is fraud that is detrimental to the State budget.

15 According to the referring court, Articles 2, 19, 168 and 203 of Directive 2006/112, in respect of which interpretation is sought, are essential to the resolution of the dispute since the common system of VAT is based on a series of binding principles of EU law. On the basis of the Court's interpretation of those provisions, the referring court will determine whether the tax authorities' approach in this instance is consistent with the spirit of the EU legislation or, on the contrary, whether it is incorrect.

16 The referring court states that it is not aware of a judgment of the Court of Justice concerning the interpretation of EU law for the purpose of determining whether, in the event of the reclassification of a supply of goods falling within the scope of VAT as a transfer of assets which falls outside the scope of VAT, the national tax authorities may refuse the right to deduct VAT where there is no effective means of recovering the amount paid by way of VAT.

17 Moreover, according to the referring court, it follows from the existing case-law of the Court in cases dealing with similar questions that, for the purpose of determining the right to deduct, priority must be given to compliance with the principles of fiscal neutrality, legal certainty and the protection of legitimate expectations, and that the measures adopted by the national authorities must take account of whether or not there has been any detriment to the State budget and of whether it is possible to establish the good or bad faith of the parties concerned.

18 First, as regards the principle of fiscal neutrality, it has been consistently held in the case-law of the Court that any limitation of the right to deduct constitutes a breach of that principle resulting in double taxation of the transactions carried out by taxpayers.

19 According to the referring court, the judgment of 26 April 2017, *Tibor Farkas* (C-564/15, EU:C:2017:302), in which the Court held as follows, is relevant in the present case:

'The provisions of [Directive 2006/112] and the principles of fiscal neutrality, effectiveness and proportionality must be interpreted to the effect that, in a

situation such as that in the main proceedings, they do not preclude the purchaser of an item of property from being deprived of the right to deduct the [VAT] which he paid to the seller when that tax was not due, on the basis of an invoice drawn up in accordance with the rules of the ordinary [VAT] regime, where the relevant transaction came under the reverse charge mechanism, and the seller paid that tax to the Treasury. However, to the extent that reimbursement of the unduly invoiced [VAT] by the seller to the purchaser becomes impossible or excessively difficult, in particular in the case of the insolvency of the seller, those principles require that the purchaser be able to address his application for reimbursement to the tax authority directly.'

20 Unlike in the *Tibor Farkas* case, in the present case, the impossibility of recovering VAT does not result from the seller's insolvency, but from the impossibility of correcting the invoice in relation to VAT because of the expiry of the limitation period for the right to make such a correction.

21 The referring court notes that, although it cannot speculate as to the fault of the parties with regard to the expiry of the limitation period, as it would risk prejudging that case, there are a number of relevant arguments according to which it is not possible to find that the parties have failed to take action to recover VAT and which support the view that it is impossible to correct the invoice in relation to VAT before the expiry of that period.

22 The referring court also refers to other cases decided by the Court in which similar questions have been examined. Thus, in the judgment of 11 April 2019, *PORR Építési* (C-691/17, EU:C:2019:327), the Court held as follows:

'[Directive 2006/112] and the principles of fiscal neutrality and effectiveness must be interpreted as not precluding a practice of the tax authority whereby, in the absence of any suspicion of tax evasion, that authority refuses an undertaking the right to deduct the [VAT] which that undertaking, as the recipient of services, unduly paid to the supplier of those services on the basis of an invoice drawn up by that supplier in accordance with the rules on the ordinary [VAT] regime, whereas the relevant transaction fell under the reverse charge mechanism, and where the tax authority did not

– examine, prior to refusing the right to deduct, whether the issuer of that incorrect invoice could reimburse the recipient of the invoice the amount of VAT unduly paid and could correct that invoice under a self-correction procedure, in accordance with the applicable national rules, in order to recover the tax which it unduly paid to the Treasury, or

– itself decide to reimburse the recipient of that invoice the tax which the recipient unduly paid to the issuer of the invoice and that the latter, subsequently, unduly paid to the Treasury.

Those principles require, however, in the situation where the reimbursement by the supplier of services to the recipient of those services of the VAT unduly

invoiced would be impossible or excessively difficult, […] that the recipient of the services must be able to address its application for reimbursement to the tax authorities directly.'

23 The referring court considers that the case before it is similar to that in the *PORR Építési* case as regards the condition that the recovery of VAT from the issuer of the invoice has not become impossible or excessively difficult, which appears to be the case here, since Greentech cannot correct the invoice in so far as (i) the limitation period for the right to make that correction has expired and (ii) that correction must be carried out by GFI, a company in respect of which, following the audit that was carried out, the tax authorities confirmed that the tax had been correctly levied.

24 Second, as regards the principles of legal certainty and the protection of legitimate expectations, the referring court observes that it has been consistently held in the case-law of the Court that the possibility of relying on those principles extends to any economic operator to which an institution has given rise to justified hopes. Within the meaning of that case-law, in whatever form it is given, information which is precise, unconditional and consistent and comes from authorised and reliable sources constitutes assurances capable of giving rise to such hopes (judgment of 14 March 2013, *Agrargenossenschaft Neuzelle*, C-545/11, EU:C:2013:169, paragraphs 24 and 25).

25 In the light of those principles, the referring court considers it relevant that the tax authorities which carried out the audit of GFI, before the audit of Greentech, confirmed the tax treatment – namely the supply of goods subject to VAT – applied by both companies to the transaction for the sale of equipment. Thus, the same national tax authority treated the commercial transaction concerning the equipment whose transfer gave rise to VAT in a completely different manner: it held that GFI, the company from which Greentech acquired the equipment in question and to which it paid VAT, was liable for VAT, and that Greentech was not, and thus denied Greentech the right to deduct the VAT paid.