

**Case C-387/22**

**Request for a preliminary ruling**

**Date lodged:**

10 June 2022

**Referring court:**

Tribunalul Satu Mare (Romania)

**Date of the decision to refer:**

2 June 2022

**Applicant:**

Nord Vest Pro Sani Pro SRL

**Defendants:**

Administrația Județeană a Finanțelor Publice Satu Mare

Direcția Generală Regională a Finanțelor Publice Cluj-Napoca

...

TRIBUNALUL SATU MARE  
SECȚIA A II-A CIVILĂ, DE CONTENCIOS ADMINISTRATIV ȘI FISCAL  
(Regional Court, Satu Mare, Second Civil Chamber for Administrative and Tax  
Matters)

...

**DECISION**

delivered following the public hearing on 2 June 2022

...

In the administrative tax appeal brought by the applicant, NORD VEST PRO SANI PRO SRL ..., against the defendants ADMINISTRAȚIA JUDEȚEANĂ A FINANȚELOR PUBLICE SATU MARE (Regional Directorate of Public Finances of Satu Mare) ... and DIRECȚIA GENERALĂ REGIONALĂ A FINANȚELOR PUBLICE CLUJ-NAPOCA SERVICIUL SOLUȚIONARE

CONTESTAȚII 2 (Regional Directorate-General of Public Finances of Cluj-Napoca, Complaints Office 2) ..., challenging administrative fiscal acts.

...

[procedural matters governed by national law]

Subject matter of the proceedings – appeal against administrative fiscal acts:

- Partial annulment of tax assessment notice no F/SM 178/10.05.2021 and of report of tax inspection no F/SM 167/10.05.2021, issued by the Regional Directorate-General of Public Finances of Cluj-Napoca, Regional Directorate of Public Finances of Satu Mare.
- Annulment of Decision No 338 of 18 October 2021, ruling on the administrative complaint, issued by Complaints Office 2 of the Regional Directorate-General of Public Finances of Cluj-Napoca.

**THE TRIBUNALUL,**

pursuant to Article 267 of the Treaty on the Functioning of the European Union,  
makes the following

**REQUEST FOR A PRELIMINARY RULING**

**A. FACTS**

...

[the applicant's request, reformulated by the referring court in the operative part]

In accordance with Article 94 of the Rules of Procedure of the Court of Justice of the European Union, this court states the following:

**Facts**

A. The tax authorities carried out a tax inspection of the applicant company, as a result of which a tax assessment notice was issued, concerning the principal tax liabilities relating to the differences in the bases of assessment established in the course of the tax inspection of legal persons no F-SM 178/10.05.2021 ... Following the drafting of tax inspection report no F/SM 167/10.05.2021, it was stated that, 'in the case of employees providing services in Germany and Austria, the company is not entitled to the tax exemption, provided for by Article 60(5) of Legea nr. 227/2015 privind Codul fiscal (Law No 227/2015 establishing the Tax Code, 'the Tax Code'), relating to the tax on employment income, and that the applicable [rate] was 10%, in accordance with Article 78(2)(a) of the Tax Code, resulting in a discrepancy of 59 065 Romanian lei (RON).

In addition, Order No 611/2019 of 31 January 2019 and Order No 2165/837/743/2019 of 10 May 2019 approving the format, content, methods of submission and processing of form 112, set out in Annex 6 – Instructions for completing Form 112 ‘Declaration relating to the obligations to pay social security contributions and income tax and the register of insured persons’, state that ‘The tax relief referred in in Article 60(5), Article 138<sup>1</sup>, Article 154(1)(r) and Article 220<sup>3</sup>(2) of the Tax Code shall not be granted in respect of employment income and analogous income earned by employees on secondment’.

To that same effect, the defendant authorities held that, in respect of employees providing services in Germany and Austria, the company was not entitled to the exemptions provided for in Article 154(1)(r) of the Tax Code, and that the rate of health insurance contributions was 10%, in accordance with Article 156 of the Tax Code, resulting in a discrepancy of RON 194 882.

With regard to the exemptions provided for in Article 138<sup>1</sup>(1) of the Tax Code, it was held that they did not apply to the applicant company and that the rate of social security contributions was therefore 25%, in accordance with Article 138(a) of the Tax Code, pursuant to which, ‘the rates of social security contributions shall be: (a) 25% for natural persons who are employees or who are under an obligation to pay social security contributions’. For that reason, a discrepancy of RON 77 959 was established.

Lastly, the defendant authorities found that the company had wrongly applied the tax relief for the construction sector, in respect of employees who were working in Germany and Austria, having declared social security contributions for work payable by natural and legal persons carrying on business independently in the construction sector. In this connection, it was found that the company had correctly calculated the social security contributions for work, in the sum of RON 17 544, having applied the rate of 2.25% in accordance with Article 220<sup>3</sup>(1) of the Tax Code, in the case of the employees who had worked in Germany and Austria between 1 October 2019 and 28 February 2021, but, with regard to those employees, it had wrongly declared it as ‘tax relief in the construction sector’ in the account headed ‘Social security contributions for work payable by natural and legal persons having the status of employers and who operate in the construction sector’.

In substance, all of these corrections were made because the defendant authorities were of the view that the explanatory memorandum to Ordonanța de urgență a Guvernului n.114/2018 (Government Emergency Order No 114/2018) indicated that the aim of enacting that legislation was to support the construction sector in Romania and that the legislature’s intention had therefore been to grant tax relief for construction work carried out within the national territory.

## **Legal basis for establishing an administrative offence under national law**

B. In the context of the contentious administrative appeal, the legal basis of the tax decision is Article 60(5) of the Tax Code, in conjunction with Order No 611/2019 of 31 January 2019 and Order No 2165/837/743/2019 of 10 May 2019 approving the format, content, methods of submission and processing of form 112, set out in Annex 6 – Instructions for completing Form 112.

### Article 60 – Exemptions

5. Natural persons, in respect of employment income and analogous income as referred to in Article 76(1), (2) and (3), in the period between 1 January 2019 and 31 December 2028 inclusive, provided that the following cumulative conditions are met:

- (a) Employers carry on activities in the construction sector which include:
  - (i) Building activities as defined by CAEN code 41.42.43 – section F – Constructions;
  - (ii) The fields of activity concerning the manufacturing of construction materials, defined by the following CAEN codes:
    - 2312 – The processing and trimming of flat glass;
    - 2331 – The manufacturing of ceramic tiles and plaques;
    - 2332 – The manufacturing of bricks, tiles and other building products made from burnt clay;
    - 2361 – The manufacturing of building products made from concrete;
    - 2362 – The manufacturing of building products made from gypsum;
    - 2363 – The manufacturing of concrete;
    - 2364 – The manufacturing of mortar;
    - 2369 – The manufacturing of other building products made from concrete, cement, and gypsum;
    - 2370 – The cutting, trimming and polishing of stone;
    - 2223 – The manufacturing of building materials made from plastic;
    - 1623 – The manufacturing of other carpentry and joinery products for construction;
    - 2512 – The manufacturing of metal doors and windows;

2511 – The manufacturing of metal constructions and component parts of metal constructions;

0811 – The extraction of ornamental and building stone, the extraction of calcareous stone, gypsum, chalk, and of slate;

0812 – The extraction of sand and gravel;

2351 – The manufacturing of cement;

2352 – The manufacturing of lime and plaster;

2399 – The manufacturing of other products made from non-metallic minerals (otherwise unclassified);

(iii) 711– Architecture, engineering, and technical consultancy services;

(b) Employers achieve a turnover from the activities referred to in point (a) and other activities specific to the construction sector of at least 80% of total turnover. For newly established companies, that is, companies registered in the commercial register as from January 2019, the turnover is calculated cumulatively from the beginning of the year, including the month in which the exemption applies, and for companies existing on 1 January of each year, the cumulative turnover for the previous tax year is taken as the basis for calculation. For companies in existence on 1 January of each year which had a cumulative turnover from the activities referred to in point (a) above of 80% or more in the previous tax year inclusive, the tax relief shall be granted for the whole of the current year, and for companies in existence on the same date which do not achieve this minimum turnover limit the principle of newly established companies shall apply. This turnover is achieved on a contract or order basis and covers labour, materials, machinery, transport, equipment, fixtures and fittings and other ancillary activities necessary for the activities referred to in (a). Turnover shall include production carried out and not invoiced.

(c) The gross monthly income from employment and analogous income, as referred to in Article 76(1), (2) and (3), earned by the natural persons to whom the exemption applies shall be calculated on the basis of a gross employment income for 8 working hours per day of at least RON 3 000 per month. The exemption shall apply to the amounts of gross monthly income from employment and analogous income, as referred to in Article 76(1), (2) and (3), earned by the natural persons, up to a maximum of RON 30 000. Any such gross monthly income exceeding RON 30 000 shall not benefit from tax relief.

(d) The exemption shall apply in accordance with the instructions set out in a Joint Order of the Minister for Public Finances, the Minister for Employment Social Justice and the Minister for Health referred to in Article 147(17), and the Declaration relating to the obligations to pay social security contributions and

income tax and the register of insured persons shall constitute a sworn statement of compliance with the conditions for applying the exemption.

(e) The method of calculation of the turnover referred to in point (b), for the purposes of applying the tax relief, shall be determined by Order of the President of the National Committee on Strategy and Planning, and shall be published on that body's website.

**Order No 611/2019 of the Minister for Finance, Annex 6, point 8**

'The tax relief referred to in Article 60(5), Article 138<sup>1</sup>, Article 154(1)(r) and Article 220<sup>3</sup>(2) of the Tax Code shall not be granted in respect of employment income and analogous income earned by employees on secondment.'

**Order No 2165/837/743/2019 of the Minister for Finance, approving the format, content, methods of submission and processing of form 112, 'Declaration relating to the obligations to pay social security contributions and income tax and the register of insured persons', Annex 6, point 8**

'The tax relief referred to in Article 60(5), Article 138<sup>1</sup>, Article 154(1)(r) and Article 220<sup>3</sup>(2) of the Tax Code shall not be granted in respect of employment income and analogous income earned by employees on secondment.'

**[EU] law apparently applicable in the present case**

In the opinion of this court, the application of [EU] law takes precedence and the claim against the applicant company is based on the provisions of Articles 26 and 56 TFEU and, in particular, on Directive 2006/123/EC ... on services in the internal market, which refers to Article 26 TFEU.

Article 26 TFEU (formerly Article 14 of the Treaty establishing the European Community)

1. The Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market, in accordance with the relevant provisions of the Treaties.
2. The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties.
3. The Council, on a proposal from the Commission, shall determine the guidelines and conditions necessary to ensure balanced progress in all the sectors concerned.

Article 56 TFEU (formerly Article 49 of the Treaty establishing the European Community)

Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may extend the provisions of the Chapter to nationals of a third country who provide services and who are established within the Union.

Directive 2006/123/EC ... on services in the internal market

#### Article 20, Non-discrimination

1. Member States shall ensure that the recipient is not made subject to discriminatory requirements based on his nationality or place of residence.
2. Member States shall ensure that the general conditions of access to a service, which are made available to the public at large by the provider, do not contain discriminatory provisions relating to the nationality or place of residence of the recipient, but without precluding the possibility of providing for differences in the conditions of access where those differences are directly justified by objective criteria.

In light of the facts set out above and the applicable legislation, it is obvious that, under Romanian legislation, Romanian companies which conduct business in Romania are treated differently ..., from a tax ... perspective, from those which conduct business in other Member States, such as [the applicant company], which has provided services mainly in Austria and Germany and does not benefit from the tax exemptions enjoyed by other companies in the construction sector that conduct their businesses in Romania.

The approach taken in the relevant Romanian legislation runs counter to one of the principal objectives of the European Union, the creation of an internal market, since any company that carries on business outside Romania bears a far heavier tax burden than companies that carry on business in Romania, and the fiscal policy which discourages companies in the construction sector from providing services outside Romania constitutes, in practice, a major obstacle to the creation of a common ... market.

#### **D. CONCLUSION**

Consequently, the national court considers that, in the light of Article 267 TFEU, it must refer the following question to the Court of Justice for a preliminary ruling:

...

**ON THOSE GROUNDS,  
IN ACCORDANCE WITH THE LAW,  
DECIDES**

That the request made by the applicant NORD VEST PRO SANI PRO SRL for a reference to be made to the Court of Justice of the European Union is granted.

Pursuant to Article 267 of the Treaty on the Functioning of the European Union, the following question is referred to the Court of Justice for a preliminary ruling:

*Are the abovementioned provisions of [EU] law to be interpreted as precluding or not precluding a legal situation such as that at issue in the present case, in which the Romanian legislature may treat differently, from a tax perspective, Romanian companies which conduct business on the territory of the Romanian State and those which conduct business on the territory of other Member States, with the result that the applicant company, which has provided services principally in Austria and Germany, does not benefit from the tax exemptions enjoyed by other companies in the construction sector that conduct their businesses in Romania?*

...

... [procedure, signatures]