

Case C-262/24

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 April 2024

Referring court:

Fővárosi Törvényszék (Hungary)

Date of the decision to refer:

29 February 2024

Applicant:

Pegazus Busz Fuvarozó Kft.

Defendant:

Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága

Subject matter of the main proceedings

Challenge to the administrative rulings denying value added tax (VAT) deductions on invoices issued by subcontractors.

Subject matter and legal basis of the request

Conditions for restricting the right to deduct VAT.

Procedure to be followed by the lower court if, in deciding a particular dispute, there is a conflict between the guidelines received from the higher national court and the case-law of the Court of Justice.

Legal basis: Article 267 TFEU.

Questions referred for a preliminary ruling

1. Do Article 167, point (a) of the first paragraph of Article 168 and point (a) of the first paragraph of Article 178 of the VAT Directive, as well as the right to a fair trial enshrined as a general principle of law in Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'), in conjunction with the fundamental principles of proportionality and legal certainty, preclude the practice of the tax authority whereby:

(a) the taxable person is denied the right to deduct VAT, despite acknowledgement that the economic transaction shown on the invoice took place, on the grounds that, from all the circumstances deemed relevant – such as the use of subcontractors, the personal, organisational and ownership ties revealed, the behaviour towards workers of the person designated in the main contract between the client and the applicant as responsible for maintaining daily contact and the fact that the working conditions of workers remained unchanged with successive subcontractors – it could be inferred that the applicant's behaviour was contrary to the requirements of a legitimate exercise of the right and the economic activity is therefore considered to be contrived and created for the sole purpose of obtaining a tax advantage contrary to the purpose of the legislation on VAT, although the disputed circumstances necessarily follow from contractual freedom in the private sector, as well as the civil, labour and tax regulations governing those contracts, and there is no causal link to the right of the taxable person to deduct VAT?

(b) it is considered tax avoidance if the issuer of the invoice is in arrears in the payment of taxes declared and contributions, even if the tax authority gives the issuer the option to pay in instalments to rectify the situation and eventually recovers the amount owed in an enforced collection procedure against the subcontractor, so that there is no cost to the public purse, or does only concealment of tax from the tax authority, that is to say, failure to declare and pay tax, constitute fraudulent conduct?

(c) on the ground of tax secrecy, the tax authority does not inform the taxable person during the proceedings of the conduct that allegedly constitutes tax avoidance – that is to say, the nature of the non-compliance with the obligation to pay tax and contributions – and, therefore, does not identify the subcontractor specifically affected by the non-compliance, the type of tax (or contribution) or the scope and period of the non-compliance, but merely makes generic references to that effect?

(d) as a prerequisite for the exercise of the right to deduct, by merely claiming that there are personal and organisational ties between the taxable person and the subcontractor, the tax authority not only imposes on the taxable person an obligation to carry out checks (on the tax liability of the subcontractor) for which it is not responsible and is not even authorised but, solely on the basis of that circumstance, presumes that the taxable person knows about the subcontractor's tax liability, without carrying out an examination of the knowledge of the taxable

person and whether that knowledge could be obtained lawfully (taking into account tax secrecy), physically and logically? Is the fact that personal and organisational ties have been established by private individuals relevant when considering that that knowledge has been demonstrated?

(e) without conducting a thorough examination of the relevant legal basis, the tax authority determines who is the employer with whom the worker has an employment relationship based not on the employment contract establishing the employment relationship, the identity of the person who registers employment relationships or the concordant declaration of the employers and employees – which confirms the documents – but on the statement to the contrary of two workers (currently only one), on the circumstances on the basis of which employment relationships were established with former subcontractors, on the similarities in working conditions and on the behaviour of the manager of the main employer, who is also the contact person under the main contract?

(f) that tax authority applies its findings regarding previous periods literally to subsequent periods, without taking into account changes in the relevant facts in each period, in particular the disappearance of personal and organisational ties, and, despite such changes in the facts, does not examine the effect of those changes, in the period in question, on the tax authority's assessment of whether there was an abuse of rights, the contrived nature of the economic activity, whether there was fraudulent conduct or the knowledge of the taxable person in that regard?

2. In view of the answer to the previous question, are the aforementioned articles of the VAT Directive and, in particular, the principle of legal certainty consistent with the principle established in case-law according to which, where a personal tie can be established between the applicant and the issuers of the invoices that may also affect the implementation of the invoiced economic transaction, it can be concluded, without additional examination of the knowledge of the taxable person, that the latter is aware of the tax avoidance arising from unpaid tax?

3. Does the overall conduct of the tax authority as described comply with the obligation incumbent upon that authority to prove, to the requisite legal standard, the objective circumstances as regards VAT deduction, or does it constitute an assessment based on assumptions and suppositions, taking into account also the principle established by the Court of Justice according to which rules of evidence laid down in national law may not undermine the effectiveness of EU law?

4. Do Article 267 TFEU, the principle of the primacy of EU law and the right to an effective remedy and to a fair trial enshrined in Article 47 of the Charter preclude:

– a situation in which the national court of last instance, claiming that there are differences in the factual circumstances, does not implement the decision of the

Court of Justice on the grounds that the subject matter of the proceedings that led to the decision of the Court of Justice is a delivery of goods, whereas the subject matter of the proceedings before it is a provision of services, or on the grounds that the objective circumstance relied on in the case before it is only one of the objective circumstances assessed in the applicable decision of the Court of Justice, and therefore only part of it at most would be relevant;

– a situation in which the national court of last instance, in connection with appeal proceedings, deviates from the judgment of the Court of Justice in the case in question as a result of preliminary ruling proceedings and takes a decision contrary to that judgment without bringing preliminary ruling proceedings itself, despite the contradictions with regard to the interpretation of EU law demonstrated in its decision?

5. Given the necessary respect for the rights and principles mentioned in the previous question and the obligation to disregard national law that is contrary to EU law, can a court of a Member State, ordered by the court of last instance to initiate new proceedings, deviate in the second proceedings from the guidelines given by the court of last instance – without referring a question for a preliminary ruling – if it deems those guidelines contrary to EU law, or if, following the order to initiate new proceedings, the Court of Justice delivers a decision on the same point of law in a case with similar facts that is contrary to the legal interpretation on which the obligation to initiate new proceedings is based? Or is it only possible to avoid the obligation imposed by the national court of last instance and to implement the subsequent decision of the Court of Justice if the court responsible for initiating new proceedings makes a request for a preliminary ruling in the new proceedings?

Provisions of European Union law relied on

Article 47 of the Charter of Fundamental Rights of the European Union.

Article 9, Article 167, point (a) of the first paragraph of Article 168, point (a) of the first paragraph of Article 178, Article 220 and Article 226 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1; ‘the VAT Directive’).

Judgments of 21 June 2012, *Mahagében and Dávid* (C-80/11 and C-142/11, EU:C:2012:373); and of 1 December 2022, *Aquila Part Prod Com* (C-512/21, EU:C:2022:950); and orders of 3 September 2020, *Vikingo Fővállalkozó* (C-610/19, EU:C:2020:673); of 3 September 2020, *Crewprint* (C-611/19, EU:C:2020:674); and of 9 January 2023, *A.T.S. 2003* (C-289/22, EU:C:2023:26).

Provisions of national law relied on

Paragraph 1(7), Paragraph 2(1) and Paragraph 97(4) and (6) of the az adózás rendjéről szóló 2003. évi XCII. törvény (Law No XCII of 2003 establishing a Code of Tax Procedure).

Paragraph 119(1), point (a) of the first subparagraph of Paragraph 120 and Paragraph 127(1)(a) of the az általános forgalmi adóról szóló 2007. évi CXXVII. törvény (Law No CXXVII of 2007 on value added tax).

Paragraph 110 and Paragraph 115(2) of the a közigazgatási perrendtartásról szóló 2017. évi I. törvény (Law No I of 2017 on administrative justice).

Succinct presentation of the facts and procedure in the main proceedings

- 1 Pegazus Busz Kft. ('the applicant') entered into a contract with Bombardier Transportation Hungary Kft. ('the client') for the provision of road-based passenger transport services for the period between 1 September 2012 and 30 June 2016. To provide those services, the applicant used various subcontractors for successive periods: Pegazus Travel Kft., Zoccoli Építőipari Kft., Déda Szerviz Kft. and HEPA Busz Kft. However, the same staff carried out the transport for the duration of the contract.
- 2 The main proceedings refer to the second, third and fourth quarters of 2015, periods in which the applicant's subcontractor was Déda Szerviz Kft. There had been family or friendship ties between the owners and managers of those two companies, but those had disappeared during the period covered by the main proceedings. Both companies also had branches at the same address. There were also similar ties between the applicant and some of the other subcontractors.
- 3 Déda Szerviz Kft. had fallen significantly behind in the payment of its employer contributions. To rectify that situation, it asked to pay in instalments, to which the tax authority agreed. However, due to compound interest, the debt continued to grow and, when the company was no longer able to meet payments, the tax authority sold its buses at public auction and withdrew its tax identification number. The applicant was then forced to use a new subcontractor.
- 4 As a result of a tax inspection carried out by the first-level tax authority, that authority handed down two decisions establishing a tax liability, resulting from the denial of the right to deduct, to be paid by the applicant in VAT in respect of the aforementioned tax years. The Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága (Appeals Directorate of the National Tax and Customs Authority, Hungary; 'the defendant'), as the second-level tax authority, confirmed those decisions.
- 5 According to the defendant, the contractual relationships between the applicant and its subcontractors were devoid of any real economic content and were used,

on the one hand, to avoid its obligations to pay contributions for workers, and on the other hand, significantly to reduce the applicant's tax liability in the long term through invoices issued by subcontractors. Due to its personal and organisational ties with the subcontractors, the applicant knew, or should have known, that it was participating in tax avoidance operations. Consequently, a VAT deduction cannot be accepted based on those invoices.

- 6 The applicant filed an appeal against those decisions before the referring court. In its judgment, that court varied the defendant's decisions and cancelled the applicant's tax liability, as well as the tax penalty and surcharges for late payment. The statement of reasons for that judgment referred to the judgment of 21 June 2012, *Mahagében and Dávid* (C-80/11 and C-142/11, EU:C:2012:373), and the order of 3 September 2020, *Crewprint* (C-611/19, EU:C:2020:674). In particular, it stated that non-payment or partial payment of VAT or contributions by the subcontractor issuing the invoices cannot in itself result in denial of a VAT deduction, nor can the fact that the defendant believed that the use of the subcontractor was not economically reasonable or that there was an organisational or personal tie between the taxable person and the issuer of the invoice.
- 7 The Kúria (Supreme Court, Hungary), which heard the appeal, set aside the judgment of the referring court and ordered it to initiate new proceedings. In its view, on the one hand, it can be inferred from all the circumstances and the personal, organisational and ownership ties revealed that the invoices were fictitious; on the other hand, in issuing supporting documents, the subcontractors allowed the applicant to carry on its activities without paying tax and contributions, but deducting VAT. This is confirmed by the fact that the workers carrying out the services were always the same for the duration of the contract with the client and its employment relationships were not affected. Their tasks and wages were the same, regardless of the subcontractor for whom they worked. Therefore, the purpose of those agreements was not to obtain the income that the market offers, but to obtain an unlawful tax advantage. Due to the aforementioned ties, the applicant should have known about the subcontractors' activities, their economic situation and their willingness to pay tax and contributions.
- 8 Consequently, the Kúria (Supreme Court) provided the referring court with guidelines, when taking its new decision, to take into account the aforementioned assessments, as well as those contained in similar decisions of the Kúria (Supreme Court) handed down as a result of decisions of the tax authority relating to previous tax years based on the same facts. Those guidelines are binding on the lower court pursuant to Paragraph 110(3), in conjunction with Paragraph 115(2), of the a közigazgatási perrendtartásról szóló 2017. évi I. törvény (Law No 1 of 2017 on administrative justice).

The essential arguments of the parties in the main proceedings

- 9 The *applicant* claims that it subcontracted the operations in question because it wanted to focus on other activities. Its own contract with the client stipulated that its managers had to be in direct contact with the bus drivers, who were employees of the subcontractors. Furthermore, the personal ties between the applicant and its subcontractor relied on by the defendant no longer existed in the period covered by the main proceedings. The fact that the group of employees was always the same, despite successive changes of subcontractor, was explained by the fact that the nature and frequency of the transport services that had to be provided required local drivers, who were limited in number.
- 10 According to the *defendant*, the subcontracting was devoid of any real economic content. Through personal and organisational ties with the subcontractors, it was actually the applicant's representative who exercised employer's rights over the workers throughout the period covered by the inspection. The subcontracting was carried out with the sole purpose of allowing the applicant to avoid paying contributions for the workers and to reduce its tax liability by deducting VAT from the invoices issued by the subcontractors.

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

- 11 To begin with, the referring court submits that, in the main proceedings, the requirements for VAT deduction laid down in the judgment of 21 June 2012, *Mahagében and Dávid* (C-80/11 and C-142/11, EU:C:2012:373), have been met: the applicant is a taxable person; the provision of services was actually carried out; it has been proved that the applicant used the services to carry out taxable transactions, as evidenced through supporting documents and witness statements; and the applicant paid consideration, including VAT, for services rendered, on the basis of invoices issued according to the applicable formal requirements.
- 12 Regarding *point (a) of the first question referred for a preliminary ruling*, the referring court maintains that, according to the case-law of the Court of Justice, choosing the most appropriate organisational and contractual structure to reduce the tax burden does not in itself constitute an abuse of rights. The fact that the cost of the worker contributions is borne by the subcontractors is based on the legislation in force. Furthermore, the contracts between main contractor and subcontractor in question stipulated the payment of consideration, which means that their purpose was to obtain income.
- 13 Regarding *point (b) of the first question referred for a preliminary ruling*, the referring court asks whether the fact that a company is in default with regard to its tax liability, in respect of which it requested and was granted payment by instalments, although, in the end, the amount of the debt was only recovered through an enforced collection procedure, is sufficient in itself to prove the existence of tax avoidance.

- 14 *Point (c) of the first question referred for a preliminary ruling* refers to whether, in the main proceedings, the tax authority satisfied the burden of proof as regards the classification of the invoicing regime as contrived. In that regard, the referring court refers to the judgment of 1 December 2022, *Aquila Part Prod Com* (C-512/21, EU:C:2022:950), in which the Court of Justice held that it is for the tax authority to provide a precise description of the constituent elements of the fraud, to adduce evidence of the fraudulent conduct and to establish that the taxable person participated in that fraud or should have been aware thereof. In the main proceedings, it is not clear from the tax authority's decisions what tax or contributions were owed by the subcontractor and the amount thereof. The defendant did not disclose that information to the applicant on the ground of tax secrecy.
- 15 *Point (d) of the first question referred for a preliminary ruling* refers to the contradiction made clear by the fact that the tax authority, with regard to personal and organisational ties, expected the applicant, as part of due diligence, to be aware of information relating to the subcontractors that constituted tax secrecy, while in its decision it did not explicitly mention specific details on the ground that they constituted tax secrecy. The referring court also notes that the ties cited in the statement of the facts in the main proceedings are more likely to have resulted in the disclosure of information in the opposite direction, and that, furthermore, such ties had already disappeared during the period in question.
- 16 *Point (e) of the first question referred for a preliminary ruling* refers to the defendant's assessment that, following the transfer of workers from one subcontractor to another, their occupational category, duties and pay remained the same, which led it to conclude that the applicant acted fraudulently in so far as it was in fact the employer, since those workers' activity was carried out in the interest of the applicant. However, the referring court contends that the fact that those circumstances remained the same was a necessary consequence of the fact that the subject matter of the main contract entered into with the client remained unchanged and therefore did not constitute an objective justification for the denial of the right to deduct VAT.
- 17 With regard to the assessment of the Kúria (Supreme Court) that the workers' employment relationship was not affected, the referring court explains that, pursuant to the labour legislation in force at the material time, workers' freedom of choice with regard to the creation of an employment relationship was generally limited to the choice of whether or not to sign the employment contract. Furthermore, pursuant to the labour legislation in force, it is possible and lawful for a new employer to take charge of workers under the same conditions. Consequently, the conduct of which the applicant is accused actually arose from labour law provisions, was favourable to the workers and, therefore, cannot be considered fraudulent conduct.
- 18 As regards the intervention of the applicant's representatives in the worker transfer process, to which both the defendant and the Kúria (Supreme Court)

attached great importance, the referring court considers that it has no relevance to the exercise of the applicant's right to deduct VAT. Under the contract entered into with the client, those persons were responsible for maintaining contact with the client. They intervened in that capacity when reporting that the subcontractors were taking charge of the workers and their intervention did not affect the creation of new employment relationships.

- 19 Finally, the referring court considers it necessary to point out that, according to the documents in the orders, the vast majority of workers stated that it was the manager of Déda Szerviz Kft. who exercised employer rights over them during the period in question. The only statement to the contrary contained other factual errors that call into question its reliability.
- 20 Regarding *point (f) of the first question referred for a preliminary ruling*, the referring court maintains that, as regards Zocoli Kft. and – from 19 September 2014 – Déda Szerviz Kft., the personal and organisational ties invoked by the defendant no longer existed, and that that had no impact on the workers' employment conditions. Furthermore, following termination of the contract between the applicant and the client, the new main contractor, who was completely independent of the applicant, also provided services through a similar structure and mostly with the same workers. This raises the question of whether the defendant is required to take into account the changes in circumstances in its decisions relating to subsequent periods or whether it can base them solely on the circumstances invoked in relation to previous periods.
- 21 By the *second question referred for a preliminary ruling*, the referring court asks whether, on the basis of the case-law of the Court of Justice, there are objective circumstances under which the defendant can dispense with the examination of the knowledge of the taxable person.
- 22 The *third question referred for a preliminary ruling* refers to whether, as a prerequisite for the exercise of the right to deduct VAT, the tax authority can legitimately require the taxable person to monitor whether the party with whom it contracts has complied with its obligations to declare and pay not just VAT, but also other taxes.
- 23 The *fourth and fifth questions referred for a preliminary ruling* relate to the contradiction the referring court perceives between the case-law of the Court of Justice and national judicial practice in respect of the requirements for restricting the right to deduct VAT. In its view, the national courts, claiming differences in the facts or objective circumstances, and without referring a question for a preliminary ruling, avoided applying the principles set out in the orders of 3 September 2020, *Crewprint* (C-611/19, EU:C:2020:674), and of 3 September 2020, *Vikingo Fővállalkozó* (C-610/19, EU:C:2020:673).
- 24 By the *second part of the fourth question referred for a preliminary ruling*, the referring court wants to know whether, where the Kúria (Supreme Court), in the

context of an appeal, wishes to deviate from a judgment handed down on the basis of a decision of the Court of Justice in a case subject to preliminary ruling proceedings – due to the contradiction with the legal interpretation outlined in its decision – it is required, as the court of last instance, to bring preliminary ruling proceedings.

- 25 The context of the *fifth question referred for a preliminary ruling* is the fact that the decision of the Kúria (Supreme Court) in the main proceedings – handed down without referring a question for a preliminary ruling – was handed down before the Court of Justice delivered the judgment of 1 December 2022, *Aquila Part Prod Com* (C-512/21, EU:C:2022:950), and the order of 9 January 2023, *A.T.S. 2003* (C-289/22, EU:C:2023:26), which raise points of law identical to those in the present case with regard to the circumstances in which the right to deduct VAT was denied, the classification of such circumstances by the tax authority as an abuse of rights and the similar system for assessing evidence. However, given that the main proceedings are now under way again, the referring court could only take those EU decisions into account if it decided to disregard the guidelines given by the Kúria (Supreme Court).