

Case C-146/21

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:

3 March 2021

Referring court:

Curtea de Apel București (Court of Appeal, Bucharest, Romania)

Date of the decision to refer:

9 December 2020

Appellant:

Direcția Generală Regională a Finanțelor Publice București –
Administrația Sector 1 a Finanțelor Publice

Respondents:

VB

Direcția Generală Regională a Finanțelor Publice București –
Serviciul Soluționare Contestații 1

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Subject matter of the main proceedings

Appeal brought by the Direcția Generală Regională a Finanțelor Publice București – Administrația sector 1 a finanțelor publice (Regional Directorate-General of Public Finances of Bucharest – Public Finance Office, Sector 1, Romania) (appellant and defendant at first instance) against VB (respondent and applicant at first instance) and the Direcția Generală Regională a Finanțelor Publice București – Serviciul soluționare contestații 1 (Regional Directorate-General of Public Finances of Bucharest – Complaints Office 1, Romania) (respondent and defendant at first instance) against the judgment of the Tribunalul București (Regional Court, Bucharest, Romania) concerning the annulment of certain administrative fiscal acts relating to VAT

Subject matter and legal basis of the reference for a preliminary ruling

Pursuant to Article 267 TFEU, the referring court seeks interpretation of Directive 2006/112/EC and of the principle of neutrality

Question referred for a preliminary ruling

In circumstances such as those in the main proceedings, do Directive 2006/112/EC and the principle of neutrality preclude national legislation or a tax practice in accordance with which the reverse charge mechanism (simplification measures), which is mandatory for the sale of standing timber, is not applicable to a person who has been the subject of an inspection and who has been registered for VAT purposes following that inspection, on the grounds that the person subject to the inspection had neither applied for nor obtained registration for VAT purposes either before the transactions were carried out or by the date on which the upper limit [for exemption] was exceeded?

Provisions of EU law and the case-law cited

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, in particular, Article 9(1), Article 193 and Article 395(1)

Council Implementing Decision 2010/583/EU of 27 September 2010 authorising Romania to introduce a special measure derogating from Article 193 of Directive 2006/112/EC on the common system of value added tax

Council Implementing Decision 2013/676/EU of 15 November 2013 authorising Romania to continue to apply a special measure derogating from Article 193 of Directive 2006/112/EC on the common system of value added tax

Council Implementing Decision (EU) 2016/1206 of 18 July 2016 amending Implementing Decision 2013/676/EU authorising Romania to continue to apply a special measure derogating from Article 193 of Directive 2006/112/EC on the common system of value added tax

Judgments of 6 October 1982, *CILFIT v Ministry of Health*, 283/81, EU:C:1982:335, paragraph 21; of 9 September 2015, *Ferreira da Silva e Brito and Others*, C-160/14, EU:C:2015:565, paragraphs 37 and 38; of 7 March 2018, *Dobre*, C-159/17, EU:C:2018:161, paragraphs 32 and 33; of 20 October 2016, *Plöckl*, C-24/15, EU:C:2016:791, paragraphs 22 and 23, and of 6 February 2014, *Fatorie*, C-424/12, EU:C:2014:50, paragraph 59

Provisions of national law cited

Legea nr. 571/2003 privind Codul fiscal, în forma în vigoare în 2011 (Law No 571/2003 establishing the Tax Code, in the version in force in 2011)

Article 134, *paragraphs 2 and 3*, pursuant to which tax becomes chargeable on the date on which the tax authority becomes entitled to require its payment by a person liable for payment of the tax, which is to say, on the date on which a person incurs the obligation to pay the tax to the treasury; *paragraph 4*, in accordance with which the tax regime that applies to a taxable transaction is the regime in force on the date on which the chargeable event occurs, and *paragraph 6*, in accordance with which, by way of derogation from the provisions of paragraph 4, in respect of the transactions provided for in Article 160, the applicable regime is that which applies on the date when the tax becomes chargeable

Article 134(1), which provides that the chargeable event occurs on the date of the sale of goods or the provision of services

Article 160(1), which provides, by way of derogation from Article 150(1), that, in the case of taxable transactions, the person liable for payment of the tax is the recipient in the context of the transactions referred to in paragraph 2, provided that both the supplier and the recipient are registered for VAT purposes; Article 160(2)(b), which provides that reverse charging applies, *inter alia*, on the supply of standing timber and woody material

Ordonanța de urgență a Guvernului nr. 44/2008 privind desfășurarea activităților economice de către persoanele fizice autorizate, întreprinderile individuale și întreprinderile familiale (Government Emergency Order No 44/2008 on the economic activities of authorised natural persons, sole traders and family businesses), Article 6(1) of which provides that any economic activity carried on in Romania on a permanent, occasional or temporary basis by an authorised natural person, a sole trader or a family business must be registered and authorised, in accordance with that emergency order

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 procedure for the application of Law No 571/2003 establishing the Tax Code), Paragraph 62(2)(a) of which provides that, where a taxable person reaches or exceeds the upper limit for exemption and has not applied for registration, the tax authorities shall require payment of the tax which the taxable person should have collected during the period between the date on which he should have applied for registration and the date on which non-compliance with the relevant legislative provisions is established, and shall, at the same time, register the taxable person in question *ex officio*

Outline of the facts and the main proceedings

- 1 The respondent and applicant at first instance, VB, is the owner of forested land which, between 2011 and 2017, was utilised on the basis of a contract for the sale of standing timber concluded with a number of companies.

- 2 Between 5 December 2017 and 2 February 2018, a tax inspection was carried out the purpose of which was to review the tax obligations relating to the period from 1 October 2011 to 30 September 2017.
- 3 The tax inspectors checked the sales of standing timber and found that, in September 2011, the turnover of the applicant at first instance had exceeded the 119 000 Romanian Lei (RON) special upper limit for exemption for small businesses laid down in Article 152(1) of the Tax Code, in accordance with which VB should have registered for VAT purposes within 10 days of the end of September 2011 and become liable to VAT with effect from 1 November 2011.
- 4 Since VB had failed to register for VAT purposes, the tax inspectors made a retroactive calculation of the VAT due from November 2011 onwards, applying the ‘percentage increase’ method on the basis that the sale price included VAT. The tax inspectors also required VB to register for VAT purposes and to submit declaration 70. VB complied with this on 20 November 2017, within the period of 10 days granted him.
- 5 In those circumstances, on the basis of the tax inspection report and by way of a tax assessment notice dated 16 February 2018, VAT was calculated on all the sales made by VB after he had exceeded the threshold of RON 119 000, without applying reverse charge measures, with the result that the VAT due was set at RON 196 634.
- 6 VB lodged an objection against the assessment notice, arguing, in essence, that sales of standing timber are subject to the reverse charge mechanism, the application of which is not conditional on the supplier having a VAT registration number, since, in that regard, it is necessary for both parties to be taxable persons, irrespective of whether they have complied with the obligation to register for VAT purposes or not.
- 7 That objection was rejected on 12 July 2018 on the ground that, in order for reverse charging to apply, it is a necessary condition that both the supplier and the recipient are registered for VAT purposes.
- 8 In those circumstances, VB brought an action before the Tribunalul București (Regional Court, Bucharest, Romania), seeking annulment of the assessment notice and of the decision on his objection. The action was upheld on 24 June 2019 and the assessment notice and the decision were annulled. VB was relieved of the obligation to pay RON 196 634 and the interest thereon, as well as the penalties applied.
- 9 The Tribunalul București (Regional Court, Bucharest) held that, in accordance with the case-law of the Court, registration for the purposes of VAT is a purely formal requirement that did not alter the substance of the right of the applicant at first instance and that, where there is no specific evidence of tax evasion, the right to apply the mechanisms established by EU law cannot be denied. Consequently,

in the absence of any suspicion of tax evasion, the tax authority could not oppose the application of the reverse charge mechanism.

- 10 It appeared from a systematic interpretation of the provisions of Article 160 of the Tax Code of 2003 and Paragraph 62(2)(a) of the procedure for the application of the Tax Code that, when it establishes that a taxable person has reached or exceeded the upper limit for exemption but has not applied for registration for VAT purposes, the tax authority is required to treat the taxable person as being registered for VAT purposes and to apply the reverse charge procedure governed by Article 160 of the Tax Code. Consequently, the tax authority had acted unlawfully in finding that the reverse charge procedure did not apply.
- 11 On 5 September 2019 the Direcția Generală Regională a Finanțelor Publice București – Administrația Sector 1 a Finanțelor Publice brought an appeal against that judgment before the referring court.

Principal arguments of the parties to the main proceedings

- 12 The appellant claims that the judgment at issue is incorrect, since VB not only failed to register for VAT purposes, but also took no legal steps to register in the companies' register or with the competent tax authorities with reference to his economic activity. He never declared the income obtained and paid no taxes, duties or contributions to the treasury.
- 13 VB has requested the Curtea de Apel București (Court of Appeal, Bucharest, Romania) to make a reference for a preliminary ruling on the interpretation of Directive 2006/112 and the principle of neutrality.

Outline of the reasons for the reference for a preliminary ruling

- 14 The referring court states that, in the present case, a decision must be given against which there is no judicial remedy under national law, within the meaning of Article 267 TFEU.
- 15 After setting out the case-law of the Court on the principle of fiscal neutrality and the consequences of a taxable person's failure to comply with a formal requirement, the referring court observes that the issue before it is whether reverse charging applies to sales of standing timber in the event that no VAT registration number has been obtained, bearing in mind that Romania was granted a derogation for the application of that simplification measure by means of several successive Council decisions.
- 16 The referring court points out that, in addition to the general rule that VAT should be collected at each stage of the distribution chain, the EU legislature has provided for a derogating mechanism for the collection of the tax, namely reverse charging, which is a simplification mechanism, inasmuch as there is no actual payment of

VAT between the recipient and the supplier of goods or services and it is the recipient that is liable for payment of the input tax relating to the transactions carried out. In addition, at the same time the recipient is entitled to deduct that tax. Thus, the mechanism presupposes that, in respect of transactions between taxable persons, VAT is not actually collected, with the result that the final sale or final supply of services triggers the payment to the treasury of the VAT relating to the entire value of the sale to the final consumer.

- 17 According to the referring court, even if VB had been registered for VAT purposes at the time he exceeded the upper limit for exemption laid down in the Tax Code, he would not have been under any obligation to collect VAT, as that obligation fell upon the purchasers of the timber, since the reverse charge mechanism would have applied to VB's sales of standing timber.
- 18 However, the principle of fiscal neutrality prohibits treating economic operators that carry on the same activity differently with regard to VAT, and the common system of VAT guarantees the complete neutrality of all economic activities as regards tax liability.
- 19 The Curtea de Apel (Court of Appeal) observes that, in the case-law of the Court dealing with the issue of the relevance of the VAT registration number, it has been held that that number cannot be a substantive requirement for the application of the VAT system.
- 20 The Curtea de Apel (Court of Appeal) is of the opinion that, although EU legislation and the case-law of the Court allow the Member States to adopt, in accordance with the principle of proportionality, measures to ensure the correct collection of VAT and to prevent tax evasion, an approach such as that taken by the Romanian tax authorities could adversely affect the recipient of supplies of goods or services, since, following tax inspection and registration for VAT purposes, the person regarded as liable for payment of the VAT retroactively is no longer able to issue invoices to his purchasers under the reverse charge procedure, but only under the normal taxation regime, given that the latter have no right to deduct the tax since, with reference to when the chargeable event occurred, the tax was not correctly invoiced.
- 21 The obligation to comply with the reverse charge system as a substantive condition of exercise of the right to deduct has already been established by the judgment of the Court in Case C-424/12, *Fatorie*.
- 22 Consequently, the issue arises as to the compatibility with Directive 2006/112 and the principle of neutrality of the tax provisions in accordance with which the reverse charge mechanism, which is mandatory for sales of standing timber, does not apply to a person who has been the subject of an inspection and who has registered for VAT purposes after that inspection on the ground that the person subject to the inspection had neither applied for nor obtained registration for VAT

purposes either before the transactions were carried out or by the date on which the upper limit was exceeded.

WORKING DOCUMENT