Case C-171/23

Request for a preliminary ruling

Date lodged:

20 March 2023

Referring court:

Upravni sud u Zagrebu (Croatia)

Date of the decision to refer:

9 March 2023

Applicant:

UP CAFFE d.o.o.

Defendant:

Ministarstvo financija Republike Hrvatske

[…]

The Upravni sud u Zagrebu (Administrative Court, Zagreb) […] in proceedings initiated by the applicant, UP CAFFE d.o.o., […] Čakovec […],

[…]

against the defendant, Ministarstvo financija Republike Hrvatske (Ministry of Finance of the Republic of Croatia) […], Zagreb, […]

[…]

requests

an interpretation of the first paragraph of Article 19 and of Article 28 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax […]

Subject matter of the main proceedings and relevant facts

1 The applicant, UP CAFFE d.o.o. in Čakovec […], has brought an action before the referring court for an assessment of the lawfulness of a decision of Republika

Hrvatska, Ministarstvo financija (Republic of Croatia, Ministry of Finance) […] of 24 August 2020 ('the contested decision').

2 The contested decision dismissed the appeal which the applicant had lodged against the tax decision of Republika Hrvatska, Ministarstvo financija, Porezna uprava, Područni ured Čakovec (Republic of Croatia, Ministry of Finance, Tax Administration, Regional Branch, Čakovec) […] of 17 October 2018 ('the tax decision'), which determined the applicant's liability for understated value added tax for the period from 1 January 2018 to 31 July 2018 in the amount of the tax base of HRK 552 936.08, on which its VAT liability was calculated, at a rate of 25%, in the amount of HRK 138 234.02, plus interest on the tax arrears up to the date on which the report was drawn up in the amount of HRK 2 425.12. Paragraph II of the operative part of the tax decision specifies how the applicant is to pay the determined amount of the liability and interest. Paragraph III of the operative part of the tax decision requires the applicant to make the appropriate entries in the accounts in such a way as to correct the amount of the tax base after the payment has been made. Paragraph IV of the operative part of the tax decision sets a time limit for implementation of that decision, while Paragraph V contains a warning as to the consequences of failure to comply with it.

3 The tax decision was adopted on the basis of the results of a special investigation carried out by the defendant, during which it was established that the applicant, as the legal successor to the business of the tied legal predecessor, SS-UGO d.o.o, is a person tied to the latter and that the sole reason for creating the applicant is aggressive [tax] planning to avoid inclusion in the VAT scheme and therefore the newly founded company (the applicant) should be required to pay public taxes in such a way that it is considered that the new company was never founded, that is to say, that the previous company's business was never interrupted. On the basis of that fact, value added tax was calculated for the applicant and the VAT payable on input transactions in connection with that business was taken into account.

4 Opposing the defendant's stated position, which forms the basis for the contested decision, the applicant argues that it is a 'small taxable person' which, pursuant to Article 3 of Directive 2006/112, chose not to be included in the value added tax scheme. It further notes that it was only after the expiry of the tax period that it became possible, pursuant to the amendments to Article 49(1)(4) of the Opći porezni zakon (Tax Code), to regard a person carrying on, by virtue of the maintenance of continuity, a business using the same equipment and on the same premises, as a tied person. Since the retroactive effect of legislation is contrary to the Ustav Republike Hrvatske (Constitution of the Republic of Croatia) and the Republic of Croatia in that respect transposed Articles 19, 59 and 80 of the Sixth VAT Directive only on 1 January 2020, the applicant considers that the contested decision is unlawful.

5 The defendant does not dispute the above circumstances (that the decision in question was adopted in respect of a period when there was no legal basis for doing so), but points out that, under the first indent of Article 2 of the Zakon o

porezu na dodanu vrijednost (Law on value added tax) (*Narodne novine*, No 77/13), the Sixth VAT Directive was transposed into the legal order of the Republic of Croatia, and thus the Republic of Croatia undertook to adopt the *acquis* of the European Union. On the basis of that fact and of that *acquis*, the defendant concludes that actions taken solely for the purpose of obtaining a tax advantage, without any other economic purpose, whilst artificially creating conditions for carrying out the activity, cannot be considered valid. It refers to the position set out in the judgments of the Court of Justice of 21 February 2006, *Halifax and Others*, C-255/02, and of 18 December 2014, *Schoenimport 'Italmoda' Mariano Previti and Others*, C-131/13, C-163/13 and C-164/13, according to which the State may, on the basis of a non-transposed directive, refuse the right to refund of input tax to a person who participates in, or knows that he or she is participating in, an evasion of value added tax.

Applicable Croatian law

6 Article 5 of the Opći porezni zakon (Tax Code) (*Narodne novine*, Nos 115/16 and 106/18) stipulates that, in tax proceedings, the provisions which were in force at the time of the facts giving rise to taxation are to apply.

7 Article 49(1)(4) of the Opći porezni zakon (Tax Code) provides that tied persons within the meaning of that law are persons who meet at least one of the following conditions: two or more natural and/or legal persons who, for the purposes of fulfilling obligations arising under a legal tax relationship, bear a single risk in such a way that there is continuity of business on the same premises using the same equipment.

8 Article 90(4) of the Ustav Republike Hrvatske (Constitution of the Republic of Croatia) (*Narodne novine*, Nos 56/90, 135/97, 113/00, 28/01, 76/10 and 5/14) provides that laws and other provisions of State bodies and bodies with public powers may not have retroactive effect.

9 Pursuant to Article 1 of the Zakon o izmjenama i dopunama Općeg poreznog zakona (Law amending and supplementing the Tax Code) (*Narodne novine*, No 121/19), Article 12a was added to the Opći porezni zakon (Tax Code), which stipulates that a taxable person who obtains tax benefits by taking advantage of the tax system through the use of organisational forms which are taxed at lower rates, and which were not intended for a particular group of taxable persons, is to be considered to constitute use of tax benefits contrary to the purpose of the law, in particular where a trader frequently changes the organisational form in which its business is conducted, that is to say, where it uses one organisational form for particular transactions, which it then replaces with another subject to taxation at lower rates, or avoids meeting other tax liabilities.

European Union law

10 The first paragraph of Article 11 of Directive 2006/112 provides that, after consulting the advisory committee on value added tax (hereafter, the 'VAT

Committee'), each Member State may regard as a single taxable person any persons established in the territory of that Member State who, while legally independent, are closely bound to one another by financial, economic and organisational links.

11 The first paragraph of Article 19 of Directive 2006/112 stipulates that, in the event of a transfer, whether for consideration or not or as a contribution to a company, of a totality of assets or part thereof, Member States may consider that no supply of goods has taken place and that the person to whom the goods are transferred is to be treated as the successor to the transferor.

12 Article 28 of the directive provides that, where a taxable person acting in his own name but on behalf of another person takes part in a supply of services, he is to be deemed to have received and supplied those services himself.

13 Article 80(1) of Directive 2006/112 stipulates that, in order to prevent tax evasion or avoidance, Member States may in any of the following cases take measures to ensure that, in respect of the supply of goods or services involving family or other close personal ties, management, ownership, membership, financial or legal ties as defined by the Member State, the taxable amount is to be the open market value:

(a) where the consideration is lower than the open market value and the recipient of the supply does not have a full right of deduction under Articles 167 to 171 and Articles 173 to 177;

(b) where the consideration is lower than the open market value and the supplier does not have a full right of deduction under Articles 167 to 171 and Articles 173 to 177 and the supply is subject to an exemption under Articles 132, 135, 136, 371, 375, 376, 377, 378(2), 379(2) or Articles 380 to 390;

(c) where the consideration is higher than the open market value and the supplier does not have a full right of deduction under Articles 167 to 171 and Articles 173 to 177.

Reasoning in the request for a preliminary ruling

14 First of all, and in the light of the foregoing, the referring court points out that, at the time when the chargeable event occurred, there was no national legislation which prohibited tax advantages from being obtained through a tax scheme involving a change of organisational form and, therefore, such legislation could not be applied in the present case. Moreover, at the time when the chargeable event occurred, national legislation did not contain a general provision prohibiting any conduct that would constitute an abuse of tax law. In clarifying this point of the request, the referring court states that the chargeable event (or more precisely, the avoidance of tax liability through the creation of a new organisational form) occurred in 2018 (from 1 January to 31 July 2018), while the Zakon o izmjenama i dopunama Općeg poreznog zakona (Law amending and supplementing the Tax Code), which introduced into national legislation a provision under which a

change of organisational form made for the purpose of tax avoidance can be taxed, entered into force on 1 January 2020.

15 On the other hand, EU law contained, at the time when the applicant was carrying on its economic activity, general provisions prohibiting any conduct by a taxable person which constitutes an abuse of tax law, and Member States were required to transpose those provisions into their national legal orders, something which the Republic of Croatia did only after the chargeable event had occurred in the present case.

16 The referring court goes on to state that, according to the settled case-law of the Court of Justice, a directive cannot of itself impose obligations on an individual and cannot therefore be relied upon as such against an individual (see judgments: *Pfeiffer and Others*, C-397/01 to C-403/01, EU:C:2004:584, paragraph 108, and *Kücükdeveci*, C-555/07, EU:C:2010:21, paragraph 46).

17 The referring court also notes that, in its judgment of 18 December 2014, *Schoenimport 'Italmoda' Mariano Previti and Others*, C-131/13, C-163/13 and C-164/13, the Court of Justice set out its position that 'Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment, as amended by Council Directive 95/7/EC of 10 April 1995, must be interpreted as meaning that it is for the national authorities and courts to refuse a taxable person, in the context of an intra-Community supply, the benefit of the rights to deduction of, exemption from or refund of value added tax, even in the absence of provisions of national law providing for such refusal, if it is established, in the light of objective factors, that that taxable person knew, or should have known, that, by the transaction relied on as a basis for the right concerned, it was participating in evasion of value added tax committed in the context of a chain of supplies'.

18 Analysing the abovementioned position, the referring court notes that in this case, however, the situation is different. That position provides a clear answer to the question concerning the situation where a taxable person is refused 'the rights to deduction of, exemption from or refund of value added tax'. It is based on the statement of the Court of Justice of the European Union concerning 'the impossibility for the taxable person to claim a right under the Sixth Directive, the objective criteria for the granting of which have not been satisfied either because of fraud'. The right provided by the Sixth Directive in this case is the right to a refund of input tax.

19 The referring court states that the tax refund is an EU right established by a directive, but notes that the present case does not concern a tax refund but the determination of a tax liability, which distinguishes the present case from the case decided previously.

Question referred for a preliminary ruling

20 In the light of the foregoing, the Upravni sud u Zagrebu (Administrative Court, Zagreb) has the following doubts as to the interpretation of EU law regarding whether the public authorities may determine the tax liability (rather than refuse the right to refund, as already decided by the Court of Justice in its judgment of 18 December 2014, *Schoenimport 'Italmoda' Mariano Previti and Others*, C-131/13, C-163/13 and C-164/13) under a general provision of a directive which has not been transposed into the national legal system and in a case where national law contains no provision to that effect.

21 In order to be able to consider the lawfulness of the described conduct of the public authorities, the Upravni sud (Administrative Court), pursuant to Article 45(2)(1) of the Zakon o upravnim sporovima (Law on administrative court proceedings) (*Narodne novine*, Nos 20/10, 143/12, 152/14, 29/17 and 110/21), by order Usl – 3014/2020-15 of 9 March 2023, stays the administrative proceedings and requests that the Court of Justice provide an interpretation of EU law:

Does EU law impose an obligation on the national authorities and courts to determine liability for value added tax (and not to refuse a claim for a refund) where the objective facts of the case indicate that VAT fraud has been committed through the creation of a new company, that is to say, by interrupting the continuity of the previous company's taxable activity, in the case where the taxable person knew, or ought to have known, that it was participating in such an activity, and where, at the time when the chargeable event occurred, national law did not provide for such a determination of liability?

[…]