

Case C-270/24**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:**

17 April 2024

Referring court:

Fővárosi Törvényszék (Hungary)

Date of the decision to refer:

3 April 2024

Applicant:

Granulines Invest Kft.

Defendant:

Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága

Subject matter of the main proceedings

A dispute between Granulines Invest Kft and the Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága (Appeals Directorate of the National Taxation and Customs Authority, Hungary) concerning the right to deduct the input value added tax (VAT) stated in an invoice for the purchase of machinery.

Subject matter and legal basis of the request

Interpretation of Article 167, Article 168(a), Article 178(a) and Article 226 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, in light of the principles of fiscal neutrality, effectiveness and proportionality, and also Article 47 of the Charter of Fundamental Rights of the European Union.

Basis: Article 267 TFEU.

Questions referred for a preliminary ruling

1. Is a practice of a tax authority consistent with Article 167, Article 168(a), Article 178(a) and Article 226 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax ('the VAT Directive') and with the right to a fair trial recognised as a general principle of law by Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'), in light of the principles of fiscal neutrality, effectiveness and proportionality, where that practice involves refusing a taxable person the right to a refund of VAT, arguing that, even though the delivery of the goods has actually taken place and there is an invoice and other supporting accounting documents, the invoice is fictitious because the business transactions recorded in it did not actually take place and, consequently, the transactions were not concluded between the parties appearing in that invoice, because

- a) it was the taxable person who negotiated all of the details with the manufacturers and only after the taxable person had abandoned the transaction did the issuer of the invoice, established in the national territory, become involved in it, in order to satisfy the requirements for the loan,
- b) the machines were delivered to the establishment of the taxable person by the manufacturer directly,
- c) the execution date stated in the invoice is false,
- d) the price appearing in the invoice has been inflated,
- e) the issuer of the invoice only complied with its obligation to pay [the VAT] in part and late?

2. Must Article 178(a) of the VAT Directive be interpreted as meaning that it precludes the national tax authority from being able to refuse the right to a refund of VAT for the sole reason that the taxable person has an invoice which does not comply with the requirements laid down in Article 226(6) and (7) of that directive, even if that authority has at its disposal all of the documentation and information necessary to be able to check, on the basis of that documentation and information, whether the substantive requirements established by law for the exercise of that right are satisfied?

- a) If the answer to the second question referred is in the affirmative, does it, in such a case, constitute a prerequisite for the refund of the VAT that the taxable person be requested to rectify the invoice?
- b) If the answer to the second question referred is in the negative, and in view of the principles of fiscal neutrality and proportionality, is it, in such a case, proportional to impose on the taxable person a tax penalty of 200%, which is the amount of the fine which may be imposed in cases of concealment of income or

falsification or destruction of supporting documents, accounting documents and records?

3. Is a practice of a tax authority consistent with the above-mentioned provisions of the VAT Directive, with the right to a fair trial conferred by Article 47 of the Charter and with the principles of effectiveness, proportionality and fiscal neutrality, where that practice involves refusing a taxable person the right to a refund of VAT, arguing that, even though the business transaction recorded in the invoice actually took place, on the basis that the invoice is fictitious in nature – for the reasons enumerated in the first question referred and considered to be objective by the tax authority – without examining any other factors, it automatically finds the conduct of the taxable person to be contrary to the requirements for the legitimate exercise of that right and, on the basis of that conduct and without expressly examining the aspect of what the taxable person knew, finds the taxable person to have deliberately avoided payment of the tax by means of the artificial transactions recorded in the invoice?

Provisions of European Union law and case-law relied on

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

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, Article 9(1), Article 167, Article 168(a), Article 178(a), Articles 219 and 220, Article 226(6) and (7) and Article 273.

Judgment of the Court of Justice of 21 February 2006, *Halifax and Others* (C-255/02, EU:C:2006:121).

Judgment of the Court of Justice of 6 July 2006, *Kittel* (C-439/04 and C-440/04, EU:C:2006:446).

Judgment of the Court of Justice of 21 June 2012, *Mahagében and Dávid* (C-80/11 and C-142/11, EU:C:2012:373).

Order of the Court of Justice of 16 May 2013, *Hardimpex* (C-444/12, EU:C:2013:318).

Order of the Court of Justice of 3 September 2020, *Crewprint* (C-611/19, EU:C:2020:674).

Order of the Court of Justice of 3 September 2020, *Vikingo Fővállalkozó* (C-610/19, EU:C:2020:673).

Provisions of national law relied on

Az adózás rendjéről szóló 2003. évi XCII. törvény (Law XCII of 2003 on general taxation procedure), Paragraph 1(7), Paragraph 2(1), Paragraph 97(4) and (6) and Paragraph 170(1).

Az általános forgalmi adóról szóló 2007. évi CXXVII. törvény (Law CXXVII of 2007 on value added tax), Paragraph 119(1), Paragraph 120(a) and Paragraph 127(1)(a).

Opinion 5/2016 of 26 November of the Administrative and Social Division of the Kúria (Supreme Court, Hungary).

Succinct presentation of the facts and procedure in the main proceedings

- 1 The applicant is a commercial company involved in the waste trade. In order to carry on its activity, it ordered a crusher from Germany. To purchase that machine, it took out an interest-free loan under a loan scheme which stipulated that only machinery purchased in the national market could be financed. The applicant abandoned the purchase in order to apply for the loan and made the purchase through a reseller.
- 2 The reseller delivered the applicant a crusher and a separator, from Germany and Slovakia, respectively. The gross purchase price of the machines came to HUF 14 516 100 (approximately EUR 37 000). To purchase the machines, [the applicant] took out a loan for HUF 12 461 100 (approximately EUR 31 600), which was partially secured by means of a security interest in the machines in question.
- 3 On the basis of the contract, the applicant received an invoice for the crusher and the separator from the reseller ('the issuer of the invoice'), which stated 16 November 2016 as the issue and execution date. The applicant paid the invoice amount in two instalments, on 16 November and 1 December 2016, and it claimed a refund of the VAT included in the invoice (for a total of HUF 3 086 100, approximately EUR 7 800) in November 2016.
- 4 The tax authority carried out an inspection of the applicant and of the issuer of the invoice, requesting information from the German tax authority, and subsequently concluded that the applicant was not entitled to claim a refund of the VAT and issued it with a fine.
- 5 The tax authority determined that the applicant had, without justification, included the issuer of the invoice in the distribution chain, that the execution date appearing in the invoice was false and that the price of the machines had been inflated. According to the tax authority, that conduct constituted an abuse of rights and, consequently, tax evasion, since its aim was to allow the applicant to claim a

refund of the tax and as the issuer of the invoice only partially complied with its obligation to pay the VAT.

- 6 The applicant brought a legal challenge to the decision issuing it with a fine. The court of first instance (the referring court) modified the decision of the tax authority and cancelled the fine imposed on the applicant.
- 7 At second instance, the Supreme Court set aside the judgment of the court of first instance and ordered that court to initiate new proceedings and give a new decision.
- 8 In the repeated proceedings, the applicant acknowledged an error in the invoice as regards the stated execution date and maintained its previous claims. In the context of those proceedings, the court of first instance has formulated questions which it wishes to refer to the Court of Justice for a preliminary ruling.

The essential arguments of the parties in the main proceedings

- 9 In the proceedings, **the applicant** argued that the defendant had not checked the facts, since it did not take into consideration the factors which supported the applicant's position and based its findings on irrelevant factors. In particular, the defendant did not prove that the applicant had purchased the machine directly from the German vendor.
- 10 The applicant did not obtain any tax advantage, nor did it engage in any tax avoidance. It was obliged to purchase the chosen machine from a reseller because there was no distributor in Hungary. The issuer of the invoice sold the machines to the applicant at a reasonable price in the national market and declared the tax on the profit in full.
- 11 The invoice is authentic and a tax liability cannot be found to exist on the basis of an incorrectly stated execution date. The tax authority must prove, based on objective factors, that the principal purpose of the transactions in question was to obtain a tax advantage – something which has not happened in this case.
- 12 **The defendant** showed – based, inter alia, on the statement of a false execution date in the invoice – that the applicant did engage in tax avoidance with the transaction, since the business transaction recorded in the invoice did not actually take place between the parties. The fictitious transactions recorded in the invoice were intended to obtain an unlawful advantage by avoiding the application of the provisions of the tax legislation, while, for its part, the issuer of the invoice consciously and deliberately engaged in tax avoidance, of which the applicant was also aware.
- 13 The transactions served two purposes: on the one hand, they allowed the applicant to purchase the machines in the national market and obtain the loan and, on the other, they allowed it to claim a refund of the tax. Furthermore, the issuer of the

invoice only partially complied with its obligation to pay the tax. The applicant cannot, therefore, exercise the right to deduct the VAT.

Summary of the decisions of the courts of first and second instance

- 14 **The court of first instance**, taking the order of the Court of Justice of 3 September 2020, *Vikingo Fővállalkozó* (C-610/19) as its point of reference, found that the tax authority had refused the applicant the right to deduct the VAT on the basis of factors which cannot, by themselves, be regarded as objective factors capable of being relied on in order to refuse the taxable person its right to deduct the VAT. In the present case, the factual requirements for [a finding of] tax avoidance are not satisfied and nor has it been possible to prove the intention to reduce the tax burden.
- 15 Furthermore, in accordance with the judgment of the Court of Justice of 21 February 2006, *Halifax and Others* (C-255/02), the contractual structure created by the applicant and the issuer of the invoice is not contrary to law and its purpose was not to obtain a tax advantage.
- 16 According to the court of first instance, the transaction was executed in accordance with the contract and, therefore, the execution dates stated in the invoice, in the absence of a causal link, were not sufficient to support a [finding of] tax avoidance. The prices stated in the invoice had not been inflated, as the parties are free to determine the price in the context of their business transactions and the tax obligation must be complied with in accordance with that price.
- 17 The **Supreme Court** held that the reasoning in the judgment given at first instance was flawed, as the court of first instance did not analyse the facts as a whole. According to the Supreme Court, the obligation to issue the invoice is connected with the execution of the transaction and not with the duty to pay which falls on the purchaser of the goods. The court of first instance should have explained the reason why the right to deduct the VAT may be exercised before the transaction is actually executed.

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

- 18 According to the referring court, the questions referred are relevant and the correct application of the EU law directly applicable to the present case is not, in view of the national case-law, so obvious as to exclude any reasonable doubt.
- 19 Based on the order of the Court of Justice of 3 September 2020, *Vikingo Fővállalkozó* (C-610/19), to which the present case bears some relation, the referring court examined whether the factors relied on by the tax authority in its decision and questioned by the applicant may be regarded as objective and, consequently, relevant, and also whether the tax authority had adequately satisfied the burden of proof imposed on it by legislation.

- 20 However, according to the judgment given at second instance by the Supreme Court, the referring court must examine all of the factual elements related to the business transaction recorded in the invoice. In such a case, the referring court would also have to examine facts which, in view of the case-law of the Court of Justice, it did not consider relevant.
- 21 Given that, even as regards the most basic questions, there are disagreements between national courts which inevitably lead to differences of orientation and approach when it comes to judicial control, that, to a considerable degree, affects both the right of the parties to a fair trial and to an effective remedy and also the primacy of EU law and legal certainty.

Regarding the first question referred

- 22 The referring court is uncertain as to whether, in approving the VAT Directive, the EU legislature intended that the right of the taxable person to deduct VAT, where the carrying out of the economic activity recorded in the invoice has been proved and acknowledged, should also be excluded and whether the fact that the undertakings involved at a stage prior to that at which the applicant was involved declared the VAT and other taxes, but only paid them to the tax authority in part or late, and that, for its part, the applicant asserted its right to a refund of the VAT constitutes an unlawful tax advantage.
- 23 To ascertain that, it is necessary to determine whether the factors mentioned may be regarded as objective factors within the meaning of the case-law of the Court of Justice.
- 24 The referring court is uncertain as to whether the fact that the parties to a contract for the delivery of goods are modified or that the place of delivery of the goods is established according to current practice in international trade may constitute an objective reason for refusing the right to a refund of the VAT.
- 25 Moreover, according to the referring court, contrary to the position of the Supreme Court, the right to a refund of the VAT is not based on the formal correctness of the invoice, but rather on the financial result, and the determination of the price belongs to the sphere of the parties' freedom of contract. In that regard, however, the Supreme Court requires an examination and a justification which go beyond the that criterion.

Regarding the second question referred

- 26 In the course of the proceedings, the referring court reached the conclusion that the transactions took place in accordance with the terms of the contract and, consequently, the error in the invoice cannot constitute a basis for refusing the right to a refund of the VAT.

- 27 However, according to the decision of the Supreme Court, how the right to a refund of the VAT on the basis of the invoice could be exercised prior to the actual execution of the transaction, that is, in November 2016, must be examined.
- 28 The referring court considers it necessary to refer questions regarding the formal error in the invoice, its impact on the right of the applicant to a refund of the VAT, its possible rectification and the penalty it may give rise to, since the Supreme Court has ordered it to repeat the proceedings.

Regarding the third question referred

- 29 With this question, the referring court seeks clarification as to whether the fact that, in the proceedings conducted by the tax authority, the main object of scrutiny was the reconstruction of all the elements of the chain established between the parties and the fact that the tax authority found a right to have been exercised unlawfully and tax avoidance to have taken place on the basis of facts which, according to the case-law of the Court of Justice, cannot be grounds for refusing the deduction of VAT, with the consequent refusal of the right to a refund of the VAT, are consistent with the provisions and fundamental principles of EU law.
- 30 The tax authority did not mention the rule which it believed the parties intended to evade. In this case, the referring court considers that the exercise of the right to a refund of the VAT does not, in itself, constitute tax evasion, even where the issuer of the invoice does not pay the tax in full. Accordingly, it is also necessary to examine whether the applicant was aware or should have been aware of that fact.
- 31 Given that, as regards whether the involvement of the other undertaking was or was not justified, the tax authority did not cite any objective fact considered acceptable by the Court of Justice, the referring court considers the action of that authority to contravene EU law, in view of the principles of fiscal neutrality and effectiveness.
- 32 The conduct of the defendant therefore gives rise to the suspicion that it does not comply with the provisions of EU law, since the defendant avoids examining what the taxable person knew (that is, whether the taxable person was aware or should have been aware of the unlawfulness) and, in that case, the exemption from VAT of an intra-Union purchase would by itself and automatically – without any need to prove due diligence – signify the evasion of tax rules. The consequence of that is the refusal of the right to deduct the VAT. Such a situation, if the subjective elements (actual knowledge or knowledge which would necessarily have been acquired if due diligence had been exercised) referred to by the Court of Justice in the judgment of 6 July 2006, *Kittel* (C-439/04 and C-440/04) are not analysed, leads to the right to deduct the tax, conferred by Articles 168 and 178 of the VAT Directive and recognised in the judgments of the Court of Justice, being rendered ineffective.