

**Case C-582/20**

**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:**

5 November 2020

**Referring court:**

Înalta Curte de Casație și Justiție (Romania)

**Date of the decision to refer:**

23 July 2020

**Appellant:**

SC Cridar Cons SRL

**Respondents:**

Administrația Județeană a Finanțelor Publice Cluj

Direcția Generală Regională a Finanțelor Publice Cluj-Napoca

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**Subject matter of the main proceedings**

Appeal brought before the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice) against the decision of the Curtea de Apel Cluj (Court of Appeal, Cluj, Romania) dismissing the action brought by the appellant SC Cridar Cons SRL seeking the annulment of certain fiscal administrative acts relating to VAT, namely a notice of assessment and a decision on a complaint brought against that notice of assessment.

**Subject matter and legal basis of the request for a preliminary ruling**

Pursuant to Article 267 TFEU, the referring court seeks interpretation of Directive 2006/112, in particular Articles 167, 168 and 178 thereof, and of Article 47 of the Charter of Fundamental Rights of the European Union.

## Questions referred for a preliminary ruling

1. Are Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax and Article 47 of the Charter of Fundamental Rights of the European Union to be interpreted as precluding national legislation pursuant to which the tax authorities, after issuing a notice of assessment refusing to grant a right to deduct input VAT, are permitted to suspend the examination of an administrative complaint pending the outcome of criminal proceedings that could provide additional objective evidence of the taxable person's involvement in tax fraud?

2. Would the answer given by the Court of Justice of the European Union to the first question be different if, during the period for which examination of the administrative complaint is suspended, the taxable person benefits from provisional measures which suspend the effects of the refusal of the right to deduct VAT?

## Provisions of EU law and case-law of the Court of Justice relied on

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, in particular Articles 167, 168 and 178

Charter of Fundamental Rights of the European Union, Article 47

Judgments of 21 June 2012, *Mahagében and Dávid* (C-80/11 and C-142/11, EU:C:2012:373, paragraphs 37 and 38); of 6 December 2012, *Bonik* (C-285/11, EU:C:2012:774, paragraphs 25 and 26); of 8 May 2013, *Petroma Transports and Others* (C-271/12, EU:C:2013:297, paragraph 22); of 19 October 2017, *Paper Consult* (C-101/16, EU:C:2017:775, paragraph 36); of 22 December 2010, *Dankowski* (C-438/09, EU:C:2010:818, paragraph 24); of 6 September 2012, *Tóth* (C-324/11, EU:C:2012:549, paragraphs 25 and 26); of 22 October 2015, *PPUH Stehcemp* (C-277/14, EU:C:2015:719, paragraphs 28 and 53); [and] of 13 February 2014, *Maks Pen* (C-18/13, EU:C:2014:69, paragraph 26).

## Provisions of national law relied on

*Legea nr. 207/2015 privind Codul de procedură fiscală* (Law No 207/2015 establishing the Tax Procedure Code), Article 95, concerning notices of assessment, and Articles 113, 118, 127, 128 and 131, concerning, respectively, the purpose of, and rules governing the conduct of tax inspections, the suspension of tax inspections, fresh tax inspections and the outcomes of tax inspections

Article 132 of Law No 207/2015 imposes an obligation on the tax inspection body to notify the criminal prosecution authorities where, in the course of a tax inspection, it makes findings that could constitute a criminal offence.

Article 268(1) of that law provides that a complaint may be lodged against a notice of liability or other fiscal administrative act, such complaint taking the form of an administrative appeal that does not prevent individuals who consider that they have been harmed by a fiscal administrative act from bringing an action before a court.

Article 273 thereof governs decisions on complaints, which are final within the system of administrative appeals and binding on the tax authority that has issued the contested fiscal administrative act.

Article 277 of Law No 207/2015 governs the suspension of administrative proceedings for the resolution of complaints and provides, in this connection, that the competent decision-making body may, by reasoned decision, suspend the proceedings, inter alia, where the review body has notified the competent authorities of the existence of indicia of the commission of an offence, in relation to evidence relevant to the determination of the taxable amount, which, if established, could affect the outcome of the administrative proceedings.

Article 278 of that law provides, in paragraph 1 thereof, that the lodging of an administrative complaint does not suspend the enforceability of a fiscal administrative act and, in paragraph 2 thereof, that Article 278 does not affect the complainant's right to apply for the suspension of enforcement of the fiscal administrative act in accordance with Legea nr. 554/2004 privind contenciosul administrativ (Law No 554/2004 on administrative proceedings).

Article 281 of Law No 207/2015 provides that the decision resolving the complaint is to be communicated, inter alia, to the complainant, who may challenge that decision together with the fiscal acts to which the decision relates before the competent administrative court.

Article 350 of that law provides that, in duly justified cases, once criminal proceedings have been initiated, a request may, with the opinion of the Public Prosecutor, be put to the tax authorities to carry out tax inspections in accordance with established objectives.

*Legea nr. 554/2004 privind contenciosul administrativ*

Article 14 'Suspension of the enforceability of an act':

'(1) In duly justified cases, in order to avert imminent harm, an injured party may, after notifying the public authority which issued the act or its hierarchical superior, in accordance with Article 7, apply to the competent court to order the suspension of enforcement of the unilateral administrative act pending the decision of the court ruling on the substance. If the injured party does not bring an action for the annulment of the act within 60 days, the suspension shall cease as of right and without any formality. ...'.

Article 15 'Application for suspension of the main action':

‘(1) A complainant may apply for the suspension of enforcement of the unilateral administrative act, for the reasons set out in Article 14, by application to the competent court seeking the annulment, in part or in full, of the contested act. In such case, the court may order the suspension of the contested administrative act pending a final and irrevocable decision in the case. The application for suspension may be made contemporaneously with the main action or separately, pending the resolution of the action on the merits. ...’.

### **Succinct presentation of the facts and the main proceedings**

- 1 The company Cridar Cons SRL, which carries out construction works for roads and motorways, was the subject of a tax inspection conducted by the Administrația Județeană a Finanțelor Publice Bistrița-Năsăud (Departmental Administration for Public Finances, Bistrița-Năsăud) concerning its value added tax (VAT) obligations relating to the period 1 January 2011 to 30 April 2014. In a tax inspection report and a notice of assessment dated 15 July 2014, the tax authority found that the substantive and formal requirements for recognition of the right to deduct VAT had been met and raised no objection regarding transactions that had been alleged to be fictitious.
- 2 In early 2015, the Office of the Public Prosecutor attached to the Curtea de Apel Cluj (Court of Appeal, Cluj) (‘the Curtea de Apel’) opened a criminal investigation file in which accusations of tax evasion were made against a number of persons, including the company director of Cridar Cons SRL. In that context, in early 2016, that Public Prosecutor’s Office requested the Direcția Generală Regională a Finanțelor Publice Cluj-Napoca (Regional Directorate-General for Public Finances, Cluj-Napoca) to carry out a fresh tax inspection of Cridar Cons SRL, as there was evidence that, between 1 January 2011 and 31 December 2015, that company had made fictitious purchases from various other companies.
- 3 The requested fresh tax inspection was carried out in October 2016 by the Administrația Județeană a Finanțelor Publice Cluj (Departmental Administration for Public Finances, Cluj). It concerned solely the VAT relating to the period 1 January 2011 to 30 April 2014. In a tax inspection report and a notice of assessment dated 3 November 2016, that authority refused to grant the right to deduct VAT in relation to all purchase transactions carried out by Cridar Cons SRL with five companies named by the Public Prosecutor’s Office, and imposed additional tax liabilities on the company in the sum of 2 103 272 Romanian Lei (RON) (VAT and corporation tax).
- 4 The decision to refuse the right to deduct was based on a series of irregularities detected upstream, concerning the five suppliers to the appellant, the tax authority concluding that there were reasonable grounds to suspect that the purchases from those five suppliers were fictitious and that there was no real substance to the purported subsequent supplies made by them to the appellant. This meant that a number of artificial situations had arisen, the purpose of which was to create the

necessary conditions for the company that was the subject of the inspection artificially to increase its costs and to deduct VAT in the absence of any real economic transaction justifying the same.

- 5 Following the issue of those fiscal acts, the tax authority referred the matter to the Public Prosecutor's Office on 3 November 2016, notifying it of the commission of acts constituting tax evasion in relation to the transactions analysed. Those same acts were already the subject of the abovementioned criminal investigation.
- 6 On 15 November 2016, the appellant challenged the notice of assessment of 3 November 2016. It subsequently applied to the Curtea de Apel, in accordance with Article 14 of Law No 554/2004, for suspension of that notice of assessment pending the decision of the court ruling on the merits. The Curtea de Apel granted the application for suspension and, following the dismissal of the tax authority's appeal, that decision became final on 17 January 2019.
- 7 By a [*decizie de soluționare a contestației*] ('decision resolving a complaint'), dated 16 March 2017, the Regional Directorate-General for Public Finances, Cluj-Napoca, suspended the examination of the tax complaint, pursuant to Article 277(1)(a) of the Tax Procedure Code. It stated that *'the authority entrusted with examining the complaint may not rule on the merits of the dispute prior to the conclusion of the criminal proceedings either confirming or refuting the suspicions of the review authority relating to the existence of the transactions carried out by the complainant'* with the five trading partners.
- 8 On 29 June 2017, the appellant company brought an action against that decision before the Curtea de Apel seeking the annulment, on procedural grounds, of the decision resolving a complaint and the notice of assessment and, in the alternative, the annulment of the decision resolving a complaint and an order requiring the tax authority to reach a decision on the merits of that complaint. That action was dismissed on 29 September 2017, the Curtea de Apel finding that the tax authority could lawfully decide to suspend the administrative tax complaint proceedings in order to avoid reaching potentially contradictory decisions relating to the same legal situation, and also that there were no grounds for suspending enforcement of the notice of assessment, in that the decision on the application made under Article 14 of Law No 554/2004 did not have the authority of *res judicata* in the context of the examination of an application made under Article 15 of that law.
- 9 Cridar Cons SRL brought an appeal on a point of law against the judgment of the Curtea de Apel before the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice), the referring court.

### **Essential arguments of the parties to the main proceedings**

- 10 The appellant maintains that, although its right to deduct had initially been acknowledged, subsequently, in the context of a fresh tax inspection expressly requested by the criminal prosecution authorities, it had been found, on the basis

of evidence provided by those same authorities, that the purchases it had made were fictitious. However, at the stage of the tax complaint, the authority entrusted with examining the complaint contradicted that interpretation and stated that the tax inspection team was merely in possession of certain indicia that the company's purchases might have been fictitious, and that these aspects would become clear only once the criminal proceedings were finally concluded.

- 11 In that context, the appellant argues that it has been prevented from exercising its right to deduct because of non-fulfilment of a condition – that is to say, confirmation, in criminal proceedings, of the reality of the transactions – which is not provided for in Directive 2006/112 or in the case-law of the Court.

### **Succinct presentation of the grounds for the reference for a preliminary ruling**

- 12 The referring court begins by recalling the case-law of the Court of Justice concerning the right to deduct VAT, the formal and substantive conditions for the exercise of that right, and the relationship between the right to deduct and the objective pursued by Directive 2006/112 of preventing fraud, tax evasion and potential cases of abuse. It also states that it is unable to establish whether, in the light of that case-law, the objective evidence taken into account in the notice of assessment is sufficient to justify refusal of the right to deduct, given that the substantive lawfulness of the notice of assessment is not the matter in dispute.
- 13 In its decision suspending the examination of the administrative complaint, the tax authority took into account the fact that the evidence taken in the course of the criminal proceedings might disclose objective evidence capable of supporting the suspicions that had led that authority to refuse the right to deduct VAT.
- 14 In that context, the appellant is unable to obtain a judicial decision on the merits of its complaint because, in accordance with the consistent practice of the courts in relation to Article 281 of the Tax Procedure Code, a notice of assessment may be challenged before a court only where there has been a decision resolving the administrative complaint. Even though it is called a '*decizie de soluționare a contestației*', the decision of 16 March 2017 does not resolve the appellant's complaint, but merely suspends the examination of it.
- 15 Moreover, in accordance with Article 278(1) of Law No 207/2015 establishing the Tax Procedure Code, the lodging of a complaint does not suspend the enforcement of a fiscal administrative act, and that is true for the duration of the suspension of the examination of the administrative complaint.
- 16 Suspension of the enforcement of the fiscal administrative act in accordance with Articles 14 and 15 of Law No 554/2004 could remedy this situation until the dispute is settled, but the procedure governed by Law No 554/2004 does not guarantee that the act will be suspended, inasmuch as the courts will assess each case individually.

- 17 Consequently, the referring court questions whether such a *modus operandi* – in accordance with which, first, a notice of assessment is issued which has the immediate effect of barring the right to deduct VAT, without the tax authority being in possession, at that time, of all the objective evidence relating to the taxable person's involvement in VAT fraud, and then subsequently, after an administrative complaint has been lodged, the examination of that complaint is suspended until such time as the facts are clarified in the course of criminal proceedings in which the taxable person's involvement in tax fraud is investigated – infringes the principal of neutrality derived from Directive 2006/112.
- 18 That *modus operandi* could also raise questions as to its compatibility with the right to a fair trial enshrined in Article 47 of the Charter of Fundamental Rights of the European Union, since, during the period for which examination of the administrative complaint is suspended, the notice of assessment will remain enforceable, without the taxable person being able to challenge it in court proceedings (such an action being dependent on the issue of a decision resolving the administrative complaint on the merits).
- 19 In so far as the relevant national case-law is concerned, the question of whether or not the examination of a complaint should be suspended is one that must be decided on a case-by-case basis. Accordingly, national courts have variously dismissed actions or upheld them, annulling the decision to suspend the examination of the complaint, inasmuch as the tax authority is required to resolve the administrative complaint on the merits. Decisions to suspend an administrative complaint have also been annulled on the ground that, the tax authority being in a position to issue the notice of assessment without requiring the clarification that criminal proceedings might provide, there is no reason for the administrative complaint not to be resolved.
- 20 The referring court also states that the decision which it is called upon to give is not amenable to appeal and so, in accordance with the third paragraph of Article 267 TFEU, it is required to make a reference to the Court of Justice for a preliminary ruling.