

Case C-537/22**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:**

11 August 2022

Referring court:

Fővárosi Törvényszék (Hungary)

Date of the decision to refer:

31 May 2022

Applicant:

Global Ink Trade Kft.

Defendant:

Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága (Appeals Division of the National Tax and Customs Administration, Hungary)

Principle of the primacy of EU law – Effective judicial protection – Tax evasion – VAT Directive – Principle of fiscal neutrality – Scope of the taxable person’s general obligation to exercise scrutiny – Due diligence – Objective evidence

Subject matter of the main proceedings

Action for judicial review brought against a decision of the national tax authority refusing the right to deduct VAT on the basis that that authority required, in connection with invoices, evidence additional to that stipulated by EU law and, in the absence of such evidence, classified the transactions concerned as fictitious.

Questions referred for a preliminary ruling

1) Does the fact that a court in a Member State, adjudicating at last instance, interprets a decision of the Court of Justice (adopted in the form of an order in response to a request for a preliminary ruling specifically concerned with the case-law developed by the self-same court adjudicating at

last instance) as meaning that there is nothing in that decision which has or is likely to have the effect of overturning earlier decisions of the Court of Justice or bringing about a change in the previous national case-law developed by the court adjudicating at last instance, constitute an infringement of the principle of the primacy of EU law and of the right to effective judicial protection guaranteed in Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter')?

2) Must the principle of the primacy of EU law and the right to effective judicial protection guaranteed in Article 47 of the Charter be interpreted as meaning that the principle of the primacy of decisions of the Court of Justice applies even in the case where a court in a Member State, adjudicating at last instance, also relies on [the] earlier judgments [of the Court of Justice] as precedent? Is a different answer conceivable, in the light of Article 99 of the Rules of Procedures of the Court of Justice, where the decision of the Court of Justice takes the form of an order?

3) Within the framework of the taxable person's general obligation to exercise scrutiny, irrespective of the performance and nature of the economic transaction shown on the invoices concerned, and regard being had to Articles 167, 168(a) and 178(a) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax ('the VAT Directive') and to the principles of legal certainty and fiscal neutrality, may the taxable person be required, as a condition of benefiting from the right to deduct VAT — and notwithstanding the absence of a legislative provision to this effect in the Member State concerned —, to maintain contact in person with the issuer of the invoice or to contact his supplier only at the officially communicated e-mail address? May these circumstances be regarded as revealing a failure, demonstrated by objective facts, to exercise the due diligence to be expected of the taxable person, account being taken of the fact that those circumstances did not yet exist at the time when the taxable person carried out the relevant checks before entering into the business relationship in question, but are features of the existing business relationship between the parties?

4) Are a legal interpretation and a practice developed in a Member State, whereby a taxable person who has an invoice in conformity with the VAT Directive is refused the benefit of the right to deduct VAT on the ground that he has not acted with due diligence in the course of trade because he has failed to demonstrate conduct such as to support the determination that his activity was not simply confined to the mere receipt of invoices meeting the formal requirements laid down, consistent with the aforementioned articles of the VAT Directive, with the principle of fiscal neutrality and, above all, with the case-law of the Court of Justice — which, when interpreting those provisions, places the burden of proof on the tax authority —, even in the case where the taxable person has enclosed all documentation relating to the

transactions at issue and the tax authority has rejected other offers to furnish evidence made by the taxable person during the tax proceedings?

5) In the light of the aforementioned articles of the VAT Directive and the fundamental principle of legal certainty, may the finding, reached in connection with due diligence, that the issuer of the invoice was not engaged in any economic activity at all, constitute an objective fact, in the case where the tax authority takes the view that there has been a failure to demonstrate the actual performance (and, therefore, the genuine existence) of an economic transaction — as documented by means of invoices, contracts and other supporting accounting documentation, and by correspondence, and as confirmed by the statements of the warehousing undertaking and the taxable person's director and employee —, and bases that view exclusively on the statement of the supplier undertaking's director denying the existence of that transaction, without taking into account the circumstances in which that statement was made, the interests of the person making the statement or the fact that, according to the documents in the case file, that undertaking had been founded by the very person making the statement and, according to the information available, an agent was acting on its behalf?

6) Must the provisions of the VAT Directive relating to the deduction of VAT be interpreted as meaning that, in the case where the tax authority discovers during the tax proceedings that the goods mentioned on the invoices concerned are of Community origin and that the taxable person is the second member of a chain [of supplies], the configuration of that scenario — given that goods of Community origin are exempt from VAT and the first Hungarian purchaser is not therefore entitled to deduct VAT, only the second member of that chain being so entitled — is an objective fact sufficient in itself to demonstrate tax evasion, or must the tax authority, in that case, also show, on the basis of objective facts, which member or members of that chain committed tax evasion, by what *modus operandi* it or they did so, and whether the taxable person was or could have been aware of this through the exercise of due diligence?

Provisions of European Union law relied on

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax

Charter of Fundamental Rights of the European Union: Article 47

Provisions of national law relied on

A közigazgatási hatósági eljárás és szolgáltatás általános szabályairól szóló 2004. évi CXL. törvény (Law CXL of 2004 laying down general provisions on administrative procedures and services): Articles 2(3), 6(2) and 50(1)

Az adózás rendjéről szóló 2017. évi CL. törvény (Law CL of 2017 on General Taxation Procedure): Articles 86(1) and 97(6)

Az általános forgalmi adóról szóló 2007. évi CXXVII. törvény (Law CXXVII of 2007 on value added tax; ‘the Law on VAT’): Articles 119(1), 120(a) and 127(1)(a)

Succinct presentation of the facts and procedure in the main proceedings

- 1 The main business of the applicant, Global Ink Trade Kft., is as a wholesale trade intermediary. During the period from July 2012 to June 2013, which forms the subject of the main proceedings, the applicant purchased mainly office supplies and ink cartridges. Its main supplier was Office Builder Kft., from which it received 68 invoices during that period.
- 2 The tax authority determined that Office Builder Kft. was not engaged in any economic activity, did not have a principal place of business or any branches, did not have the material and personal attributes necessary to carry on an economic activity, had not engaged any employees and had not discharged its tax obligations. The company director, who was questioned in a penal establishment, stated that he did not perform any role in that company, which did not conclude contracts or issue invoices. As a result, the tax authority determined that the financial transactions reflected on the invoices sent to the applicant had not in fact taken place between the parties and that Office Builder Kft. operated exclusively as an intermediate undertaking.
- 3 The tax authority questioned the applicant’s director, who explained, with respect to the scrutiny of suppliers, that, in the case of potential business partners (and Office Builder Kft., too, therefore), administrative checks (including on the data contained in the commercial register) and material checks (whether any orders have actually been placed) were carried out, and that, on the basis of those checks, he would decide whether a contract was to be concluded. The applicant’s director and the director of Office Builder Kft. concluded the contract in person but maintained day-to-day contact by e-mail and did not meet face to face.
- 4 In its assessment of the evidence obtained, the tax authority noted that the statements made by the directors of the two undertakings were contradictory from the point of view of their content and, on the basis of those contradictions, considered it proved beyond any doubt that the transactions reflected on the invoices had not taken place as certified by those invoices with respect to their form and substance.
- 5 According to the tax authority’s conclusions, the issuer of the invoice was not engaged in any genuine economic activity but merely issued invoices the content of which was unreliable, its function, as an intermediate undertaking, therefore being confined to creating for the benefit of the applicant input tax on goods purchased within the European Union, with a view to enabling the applicant to

effect the improper recovery of VAT on ostensibly national transactions. The tax authority did not consider the invoices received by the applicant to be reliable, because the company which had issued them did not recognise them and even expressly denied having issued them, and for that reason refused to grant the applicant the right to deduct the VAT in question.

- 6 The first-tier tax authority declared there to be a tax difference payable by the applicant in the amount of HUF 348 876 000 by way of VAT for the period from July 2012 to June 2013, of which HUF 348 773 000 was considered to constitute a 'tax shortfall'. The tax authority imposed a fine for that shortfall and applied a late-payment surcharge.
- 7 The second-tier tax authority declared that the applicant had not demonstrated any conduct such as to show that its activity was not simply confined to the mere receipt of invoices meeting the formal requirements laid down, which is to say that it concluded that the applicant had not acted with due diligence in the course of trade. For that reason, the second-tier tax authority upheld the decision given by the first-tier authority.
- 8 The applicant brought an action for judicial review against that decision before the Fővárosi Törvényszék (Budapest High Court).

The essential arguments of the parties in the main proceedings

- 9 The applicant submits that the tax authority has failed to furnish irrefutable evidence that its invoices are unreliable, inasmuch as that authority based its decisions on irrelevant facts, unilaterally assessed the available evidence to the applicant's detriment and rejected the applicant's offers to submit evidence, with the result that its conclusions are founded on supposition and the established facts are incomplete.
- 10 The applicant also challenges the assertion that the purpose of the supplier's intermediation was to disguise the provenance of goods of unverified origin purchased in the European Union and to facilitate the exercise of the right to deduct VAT by passing them off as national purchases.
- 11 The applicant further contests the veracity of the statement made by the supplier's director and criticises the fact that the defendant based its decision solely on that statement while at the same time rejecting the applicant's offers to furnish evidence in rebuttal of that statement, even though it should have dispelled the contradictions in question by taking into account other evidence.
- 12 The applicant also submits that the defendant has not explained why or shown how the applicant failed to act with due diligence or on what grounds it was alleged to have knowingly participated in tax evasion.

- 13 The defendant argues that its decision is lawful in the light of the case-law of the Court of Justice and the Kúria (Supreme Court, Hungary). In reference to the case-law of the Court of Justice, it submits that taxable persons must take such reasonable measures as may be expected of them in order to prevent tax evasion, and that such measures may consist in particular in collecting information on the identity of the supplier, a step which the applicant clearly failed to take. As regards the case-law of the Kúria, it notes that this case constitutes passive tax evasion and that it has been shown to be an objective fact that, owing to the lack of information on the supplier and the non-existence of any personal contact, the applicant failed to act with due diligence in the course of trade.

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

- 14 The referring court states that the interpretation of the provisions of the VAT Directive has been the subject of numerous decisions of the Court of Justice, the most recent of these in Hungarian cases being the orders in *Vikingo Fővállalkozó* (C-610/19, EU:C:2020:673) and *Crewprint* (C-611/19, not published, EU:C:2020:674). It also points out that it has stayed the proceedings that were being conducted in the main action pending the conclusion of this reference for a preliminary ruling, given in particular that the disputes in all of the aforementioned cases were concerned with designating the party carrying the burden of proof and determining the relevant and objective facts justifying the refusal to refund VAT.
- 15 As the aforementioned orders confirm, it is for national courts to establish whether the objective evidence relied on by the tax authority satisfies the requirements of EU law. Nonetheless, the judicial decisions given since those orders of the Court of Justice support the inference that there continue to be differences of opinion between national courts, in connection with the allocation of the burden of proof as between the taxable person and the tax authority, as regards not only the interpretation and application of EU law but also the interpretation of the orders made by the Court of Justice in the aforementioned cases. In particular, notwithstanding the decisions of the Court of Justice, the correct application of the provisions of the VAT Directive is not so obvious to the various Hungarian courts and their chambers as to leave no room for reasonable doubt.
- 16 In its judgment in *Crewprint*, the Kúria's position in principle continues to be that it must be examined first and foremost whether 'genuine economic transactions took place between the parties, and not whether [...] the applicant has an invoice'. In the view of the referring court, however, Article 178(a) of the VAT Directive, applicable pursuant to the principle of the primacy of EU law, is to be interpreted as meaning that an invoice which meets the requirements laid down in that directive *is* a suitable means of evidencing the deductibility of VAT.
- 17 Account being taken of the fundamental principles of accounting, including the true and fair view principle, and in the light of the presumption of good faith, it is

lawfully presumed that the invoice is authentic and that the taxable person whose right to deduct is based on that invoice is acting in good faith. That lawful presumption must be rebutted by the party opposing it, which, in tax matters, is the tax authority.

- 18 The referring court considers that the reason for those different interpretations is that, while the Kúria bases its interpretation on Article 127(1)(a) of the Law on VAT, the referring court does so on Article 178(a) of the VAT Directive, which prescribes compliance with a number of formal and material requirements attached to invoices, with the result that the aforementioned presumption applies only to invoices which meet those requirements. Those requirements ensure that the invoice can be regarded as evidence of performance of the transaction [shown on it] and can be used as the basis for deducting VAT without the need for any other supporting documentation.
- 19 On the basis of all of the foregoing, the referring court considers it necessary for the Court of Justice to provide some guidance so as to ensure that a taxable person who did not know and could not have known that a transaction prior to the transaction which he performed in the chain of supplies was irregular from the point of view of VAT cannot be penalised by having his right to deduct VAT denied.
- 20 By the first and second questions it has referred for a preliminary ruling, the referring court, relying on the principle of the primacy of EU law, ask how to resolve the contradiction between two decisions having the character of precedent. Although the judgments of the Court of Justice are binding on all the Member States of the European Union, the Hungarian courts have an obligation to take into account the reasoning set out in the judgments of the Kúria. In particular, the referring court asks whether it is permissible not to take into account a judgment of the Kúria given in a case which also gave rise to a preliminary ruling, or, conversely, whether what is decisive is the Kúria's assertion that, since the orders cited contain nothing new by comparison with the rulings of the Court of Justice in previous decisions, the fact of not taking into account the content of those orders is not contrary to EU law, which is to say that it is permissible not to take that content into account.
- 21 The other four questions raised by the referring court seek an interpretation of Articles 167, 168(a) and 178(a) of the VAT Directive from the point of view of the principles of fiscal neutrality and effectiveness.
- 22 According to paragraph 45 of the judgment in *Mahagében and Dávid* (C-80/11 and C-142/11, EU:C:2012:373), the right to deduct tax can be denied only if the tax authority establishes, on the basis of objective factors, that the taxable person knew or ought to have known that that transaction was connected with fraud previously committed by the supplier or another trader.

- 23 However, the way in which the tax authority and the Kúria interpret and apply the law has not changed even since the orders in *Vikingo Fővállalkozó* and *Crewprint*: they still seek to refuse the benefit of the right to deduct VAT on the basis of the fictitious nature of the economic activity and the invoices concerned, and in turn to base such fictitiousness on circumstances which they describe as objective but which the Court of Justice does not recognise as objective circumstances that adequately demonstrate in law that the taxable person was or should have been aware of that irregularity.
- 24 Finally, the referring court, relying on paragraph 27 of the order in *Hardimpex* (C-444/12, not published, EU:C:2013:318), asks whether the requirement laid down by the tax authority to the effect that it recognises the economic transaction between the taxable person and the issuer of the invoice (notwithstanding that it is undisputed that that transaction has taken place) as a genuine economic transaction justifying the deduction of VAT, and, consequently, grants the right to deduct VAT, only if the communication and contacts which the taxable person maintains with his supplier take place in the manner (personally or by e-mail) required by the tax authority and the supplier meets the personal and material requirements for purchasing goods under the supply contract in the manner prescribed by that authority, may not be regarded as an indirect extension of the general obligation to exercise scrutiny incumbent on a taxable person who wishes to exercise his right to deduct tax and a reversal of the burden of proof by comparison with that established by the Court of Justice (and, therefore, an infringement of the principle of legal certainty).