Case C-835/18

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:

24 December 2018

Referring court:

Curtea de Apel Timișoara (Romania)

Date of the decision to refer:

21 November 2018

Appellant:

SC Terracult SRL

Respondents:

Direcția Generală Regională a Finanțelor Publice Timișoara — Administrația Județeană a Finanțelor Publice Arad — Serviciul Inspecție Fiscală Persoane Juridice 5

Agenția Națională de Administrare Fiscală — Direcția Generală Regională a Finanțelor Publice Timișoara — Serviciul de Soluționare a Contestațiilor

Subject matter of the main proceedings

Appeal lodged by the appellant/complainant TERRACULT SRL ('Terracult' or 'the appellant') against the civil judgment given by the Tribunalul Arad (Regional Court, Arad, Romania), in proceedings between the appellant and the respondents/defendants Direcția Generală Regională a Finanțelor Publice Timișoara — Administrația Județeană a Finanțelor Publice Arad — Serviciul Inspecție Fiscală Persoane Juridice 5 (Regional Directorate-General for Public Finance, Timișoara — District Public Finance Administration of, Arad — Tax Inspection Department for Legal Persons No 5) and Agenția Națională de Administrare Fiscală — Direcția Generală Regională a Finanțelor Publice Timișoara — Serviciul de Soluționare a Contestațiilor (National Agency for Tax

Administration — Regional Directorate-General for Public Finance, Timișoara — Department for the Settlement of Complaints) ('the respondents')

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

Interpretation of Articles 167, 168, 179, 180 and 182 of Directive 2006/112/EC ('the VAT Directive') and the principles of fiscal neutrality, effectiveness and proportionality deriving from those articles is sought pursuant to Article 267 TFEU

Question referred

Do the VAT Directive and the principles of *fiscal neutrality*, *effectiveness and proportionality* preclude, in circumstances such as those in the main proceedings, an administrative practice and/or an interpretation of provisions of national legislation which prevents the correction of certain invoices and, consequently, the entry of the corrected invoices in the VAT return for the period in which the correction was made, in respect of transactions carried out during a period which was the subject of a tax inspection, following which the tax authorities issued a tax assessment which has become final, when, after the issue of the tax assessment, additional data and information have been discovered which would entail the application of a different tax regime?

Provisions of EU law relied on

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax: Articles 167, 168, 178 to 180 and 182

Judgment of 22 March 2012, *Klub* (C-153/11, EU:C:2012:163)

Judgment of 26 April 2018, *Zabrus Siret SRL* (C-81/17, EU:C:2018:283)

Provisions of national law relied on

Ordonanța Guvernului nr. 92/2003 privind Codul de procedură fiscală, republicată (Government Order No 92/2003 on the Code of Tax Procedure, republished): Article 7 on the active role of the tax authorities, pursuant to which the tax authority is entitled to examine the factual situation of its own motion and to obtain and use all the information and documents required to establish correctly the tax position of the taxpayer, and is to identify and take into account all the circumstances relevant to each case; Article 12 on good faith; Article 47 on the annulment or amendment of fiscal administrative acts; Article 205 on the possibility of bringing a complaint; Article 207 which lays down a time limit of 30 days for lodging a complaint; Article 213, paragraph 4 of which provides that the complainant, the interveners or their representatives may present new evidence in

support of their case, while the tax authority which issued the contested fiscal administrative act or, as the case may be, the authority which carried out the inspection activity will, in that situation, have an opportunity to comment thereon.

Legea nr. 571/2003 privind Codul fiscal (Law No 571/2003 establishing the Tax Code), amended and supplemented by Legea nr. 343/2006 (Law No 343/2006), which, in Title VI, transposed into national law, inter alia, Directive 2006/112/EC: Article 159, on the correction of documents:

'(1) Correction of the information entered in the invoice or in other documents used in its place shall be carried out as follows:

(a) where the document has not been sent to the recipient, it shall be annulled and a new document shall be issued;

(b) where the document has been sent to the recipient, either a new document, which must contain, first, the information from the initial document, the number and date of the corrected document, and the values with a minus sign and, second, the correct information and values, shall be issued, or a new document containing the correct information and values shall be issued at the same time as a document with the values with a minus sign in which the number and date of the corrected document are entered.

...

(3) Taxable persons who have been subject to a tax inspection and in respect of whom errors have been detected and established as regards the correct determination of the tax charged, and who are required to pay those amounts on the basis of the administrative act issued by the competent tax authority, may issue to the recipients corrected invoices within the meaning of paragraph (1)(b). The invoices issued shall state that they were issued following an inspection and be entered under a separate heading in the tax return. The recipients have the right to deduct the tax entered in those invoices within the limits and under the conditions laid down in Articles 145 to 147^2.'

Hotărârea Guvernului nr. 44/2004 pentru aprobarea Normelor metodologice de aplicare a Legii nr. 571/2003 privind Codul fiscal (Government Decree No 44/2004 approving the detailed rules for the implementation of Law No 571/2003 establishing the Tax Code), paragraph 81^2:

'(1) For the purposes of Article 159(1) of the Tax Code, the document used in the place of the invoice is the document issued for a supply of goods or services, in accordance with obligations imposed by an agreement or a treaty to which Romania is party, which contains at least the information provided for in Article 155(19) of the Tax Code.

(2) Where a taxable person has issued invoices applying the tax regime and subsequently acquires supporting documents entitling him to apply a VAT

exemption under Article 143, 144 or 144[1] of the Tax Code, he may correct the invoices issued under Article 159(1)(b) of the Tax Code, applying the corresponding exemption regime to the transactions carried out.

(3) The tax inspection authorities shall allow VAT to be deducted where the inspected documents relating to the purchases do not contain all the information referred to in Article 155(19) of the Tax Code and/or are incorrect, if, during the period in which a tax inspection is being conducted in respect of the recipient, those documents are corrected by the supplier in accordance with Article 159 of the Tax Code. Even if he has been subject to a tax inspection, the supplier may apply Article 159(1)(b) of the Tax Code in order to correct certain invoice information which is mandatory under Article 155(19) of the Tax Code and was incorrectly omitted or entered, but is not such as to change the taxable amount and/or the tax on the transactions or does not change the tax regime applicable to the transactions initially invoiced. That invoice shall be attached to the initial invoice without giving rise to recordings in the tax return for the tax period in which the correction is made in respect of either the supplier or the recipient.

(4) Suppliers who issue corrected invoices following a tax inspection, in accordance with Article 159(3) of the Tax Code, must enter those invoices in the sales register under a separate heading and must likewise enter those invoices under a separate heading of the tax return, without being obliged to charge the VAT entered in those invoices. In order to avoid situations of abuse and in order to allow situations in which invoices have been issued following a tax inspection to be identified, the supplier must state in those invoices that they were issued following a tax inspection. The recipients have the right to deduct the VAT entered in those invoices within the limits and under the conditions laid down in Articles 145 to 147[1] of the Tax Code, and the tax shall be entered under the headings of the tax return relating to purchases of goods and services. The issue of corrected invoices may not take place after expiry of the time limit laid down in Article 147[1](2) of the Tax Code.’

Succinct presentation of the facts and the main proceedings

1 The company DONAULAND SRL (‘Donauland’), which on 1 August 2016 was incorporated into Terracult, was subjected to a tax inspection completed in March 2014, following which it was found that, in the period from 10 to 14 October 2013, it had supplied rape to Almos Alfons Mosel Handels GmbH (Germany) (‘Almos’), and issued invoices, delivery notes and waybills to that effect. On finding that the company subjected to an inspection was unable to provide the supporting documents certifying that the goods had left the territory of Romania, the tax authorities considered that the VAT exemption for intra-Community supplies of goods was not applicable to it.

2 On 4 March 2014 those authorities issued a tax assessment (‘the initial tax assessment’) and a tax inspection report which set out certain additional liabilities

on Donauland, including the amount of RON 440 241 by way of VAT for certain supplies of rape made to Almos in October 2013, which were regarded as national supplies, applying the standard VAT rate of 24%.

3 Donauland did not contest the initial tax assessment.

4 On 28 March 2014 Almos informed Donauland that it had found that the invoices had been issued to Almos with the tax identification code ('the TIC') for Germany and Romanian VAT, but stated nevertheless that the goods had not left the territory of Romania and requested invoicing with the identification details of Almos' tax representative in Romania.

5 In March 2014 Donauland, on the basis of the documents produced by Almos, recorded in the accounts 180 corrected invoices, pursuant to Article 159(3) [of the Tax Code], issued to Almos (addressed to both Almos Germany and its tax representative in Romania), showing the following transactions: (1) the cancellation of the intra-Community supplies made and the reclassification thereof as national supplies, applying the standard VAT rate of 24%, and (2) the cancellation of those national supplies to which the standard VAT rate had been applied and the inclusion thereof in the category of supplies of goods to which simplification measures had been applied, claiming that the incorrect purchaser identification had been detected as a result of the communication of 28 March 2014.

6 The corrected invoices issued by Donauland were included in the VAT return of March 2014 and the company deducted the VAT relating to those invoices from the VAT owed for the current period.

7 As a result of an application for a refund of VAT, a new tax inspection was carried out during the period from 28 November 2016 to 10 February 2017, at the end of which the tax assessment of 10 February 2017 ('the subsequent tax assessment') was issued, which established an obligation for Terracult to pay, by way of additional VAT, the amount of RON 440 241 entered in the initial tax assessment.

8 The appellant brought a preliminary administrative complaint against the subsequent tax assessment, which was rejected by the Direcția Generală Regională a Finanțelor Publice Timișoara (Regional Directorate-General for Public Finance, Timișoara, Romania) on 14 July 2017.

9 On 2 February 2018 Terracult brought an administrative action before the Tribunalul Arad (Regional Court, Arad) requesting, first, the partial annulment of the subsequent tax assessment with regard to the amount of RON 440 241, and the annulment of the decision on the preliminary administrative complaint and the decisions relating to the ancillary tax liabilities by way of interest and default interest and, second, a refund of the amount paid by that company on the basis of the tax assessment referred to above. Terracult argued, in essence, that although, by issuing corrected invoices, it had merely conformed to the actual tax situation

and complied with Article 160(2)(c) of the Tax Code, which was applicable in the case at hand, the tax inspection authority, by the contested fiscal administrative acts, again imposed on it additional VAT in the amount of RON 440 241 (together with ancillary liabilities and a penalty for non-declaration) corresponding to the same supplies of rape made in October 2013, since, for a number of formal reasons, it did not have the right to recover that amount by entering it in the VAT return for the month in which the final corrected invoices were issued, thus infringing the principle of VAT neutrality.

10 The Tribunalul Arad (Regional Court, Arad) dismissed the action brought by Terracult on the ground that, in essence, since that company had not lodged a complaint in which it was able to rely, by producing the communication received from Almos on 28 March 2014 pursuant to Article 213(4) of Government Order No 92/2003, on the change in the tax situation described in the initial tax assessment, the latter is a fiscal administrative act which has established definitively that the transactions concerned constitute national supplies subject to the VAT rate of 24%, and therefore the additional VAT in the amount of RON 440 241 has become due definitively.

11 On 29 June 2018 the appellant brought an appeal against the judgment of the Tribunalul Arad (Regional Court, Arad) before the referring court.

Essential arguments of the parties in the main proceedings

12 Firstly, Terracult has emphasised that the situation established by the tax inspection unit is correct from the point of view of the commercial cycle of the goods supplied to the client Almos in October 2013, inasmuch as, initially, on the basis of the information provided by Almos, which informed it that the goods were about to leave the territory of Romania, the company treated the transaction as an intra-Community supply and issued the relevant delivery invoices, stating the German TIC of its commercial partner, without applying VAT to the amounts invoiced. On the occasion of the tax inspection which concluded with the issue of the initial tax assessment, that company became aware of the fact that the information was incorrect, inasmuch as the goods had been purchased with the TIC obtained in Romania and not the German TIC, and that, having purchased the goods, Almos had not exported them directly into the Community, but resold them in the territory of Romania to another entity, Secusigiu SRL, which in turn resold them to Almos, and the goods were subsequently exported to Germany.

13 Terracult regards the tax inspectors' conclusion that the deduction of the amount of RON 440 241 by way of VAT as a result of the reclassification of the transactions as national supplies was unjustified as incorrect. It argues that, from a legal and contractual point of view, Almos is a sole contracting partner, since there are not two separate companies (Almos Alfons Mosel Handels GmbH Germany and Almos Alfons Mosel Handels GmbH Romania), and therefore the mere change in the place of delivery of the goods did not, in any event, require the

conclusion of a new sale contract or the addition of supplementary clauses to the sale contract concerning the change in the person of the purchaser, or another receipt of the price in addition to the initial one. In fact, the only change in the commercial cycle initially known to the appellant was the place of delivery of the goods and, by implication, the TIC.

14 Terracult also regards as incorrect the tax authorities' conclusion that the objective pursued by that company by means of the measures adopted following the initial tax inspection, consisting in the cancellation of the invoices initially issued for an intra-Community supply and the re-issue thereof in accordance with the actual situation, that is to say in respect of a national supply, applying the standard rate of VAT, was to gain an unfair tax advantage, which infringed the principle of good faith in tax matters, and that its actions constituted fraudulent practice, according to the judgment of the Court of Justice of 22 March 2012, *Klub* (C-153/11, EU:C:2012:163).

15 In the appellant's view, the principle of fiscal neutrality is a fundamental principle of the common system of VAT, designed to exempt entirely undertakings registered for VAT purposes from the tax relating to all their economic activities, ensuring neutrality of taxation of all economic activities, whatever their purpose or results, provided that they are themselves subject in principle to VAT. In the context of transactions between two taxable persons registered for VAT purposes (as in the present case), the VAT must have a neutral effect on both the seller and the purchaser. From that point of view, any attempt by the appellant, as the seller, to restore the principle of VAT neutrality in relation to the transaction at issue constitutes the exercise of a legitimate right.

16 In particular, Terracult notes that, following the initial tax assessment, it was required to pay from its own funds the entire amount of VAT on the supplies which did not meet the requirements of an intra-Community supply. On that occasion, it had complied with that obligation and actually paid that amount. However, from the point of view of the principle of fiscal neutrality an imbalance was created, inasmuch as the tax on that supply transaction did not have a neutral effect on the appellant, as the seller, but instead it sustained the loss of the amount thus paid without the purchaser being invoiced. That imbalance was particularly unfair since the appellant was in no way to blame for the situation established by the inspection authority, but was misled as to the actual place of destination of the goods supplied and the TIC of the purchaser. Consequently, after having been informed by the tax authority of the actual cycle of the goods supplied, and after Almos had acknowledged its error of communication, Terracult exercised its legitimate right to restore the principle of fiscal neutrality by bringing the documents relating to the supply into line with the factual reality.

17 Since, by the corrections made, it merely corrected the documents recorded in the accounts in accordance with the factual reality of the transactions, and as the objective pursued was to restore and observe fully the principle of fiscal neutrality, the appellant argues that it was wrong to take the view that the

measures which it had adopted infringed the principle of good faith and that it had sought to gain an unfair tax advantage. On the contrary, the transaction relating to the supply of the goods to Almos was all the more real.

18 In their defence, the respondents have remarked, in a response added to the file, that the appellant did not contest the initial tax assessment, although by lodging a complaint it was able to exercise the option conferred by the legislature in Article 213(4) of the Code of Tax Procedure by submitting in its statement of reasons for that complaint, as new evidence, the communication from Almos of 28 March 2014.

19 The respondents consider that, since it has not been contested, that additional VAT in the amount of RON 440 241 has become due definitively. It therefore follows that the initial tax assessment is a fiscal administrative act which establishes definitively that the supplies made by Donauland to Almos constitute taxable national supplies.

20 According to the respondents, after the conclusion of the tax inspection carried out in respect of Donauland, that company carried out, in March 2014, a number of formal transactions whereby it cancelled the effects of the initial tax assessment even though, under Article 50 of the Code of Tax Procedure, a fiscal administrative act may be annulled, revoked or amended solely by the competent tax authority and only within the limits and under the conditions of the tax procedure. Therefore, in the respondents' view, the measures adopted by Donauland infringe the principle of good faith set out in the Code of Tax Procedure.

21 At the end of the 2017 tax inspection, the tax authorities found that, by the data included in the return of March 2014, the company had unlawfully influenced the overall amount of VAT due, by reporting a negative amount of VAT which includes the VAT resulting from the issue of the corrected invoices of March 2014.

22 The tax authorities argued that the legal rules on the drawing up of VAT returns had not been complied with in so far as the amounts recorded in the VAT return of March 2014 did not correspond to the amounts recorded in the stock accounts (sales register of March 2014), and therefore Donauland had infringed the provisions of national legislation regarding the model for and content of Form (300) 'Value Added Tax Return', which lays down the obligation to enter in the return the information taken from the sales register relating to transactions which have become chargeable during the reference period.

23 If Donauland had not carried out the formal transactions of March 2014, it would have recorded a negative amount of VAT, as defined in Article 147^{3}(l) of the Tax Code, consisting in the difference between the amount of VAT deductible and the amount of VAT charged. Donauland was unable to provide evidence of the recordings made in the VAT return.

24 The tax authorities remarked that the reclassification of the intra-Community supplies in question was carried out after the initial tax inspection. At the end of the inspection, Donauland's legal representative expressly stated that the agreement between the parties, also known as the sale purchase agreement concluded with Almos, had not been amended by other contracts, supplementary clauses or other documents and that, from Donauland's point of view, the supplies made were in accordance with the agreement between the parties, and by the payment made by Almos the transaction was concluded in accordance with the agreement.

25 Those authorities maintained that the substance of the transaction had not changed — the supplies were always made to Almos, the payment was received by the intra-Community partner, the payer being Almos (Germany) —, and that Donauland had presented no additional documents confirming the annulment of certain transactions and the implicit reclassification thereof in the category of national supplies (no transport documents confirming the supply of goods to the intra-Community recipient's tax representative in Romania had been presented, nor had any documents relating to the receipt of the payment for the supplies made by the Romanian economic operator).

26 Consequently, the tax inspection authorities considered that that liability relating to the additional VAT had become final for that company, which is why the appellant does not have the right to repayment of the entire amount of the refundable VAT entered in the return of September 2016.

27 Before the Curtea de Apel (Court of Appeal), the parties to the proceedings maintain the arguments which were also set out in the proceedings on the merits.

28 Terracult has requested that a reference be made to the Court of Justice for a preliminary ruling on the ground that a company may not be deprived of the right to recover unduly paid VAT for the simple reason that the supplies were made during a period which was the subject of a tax inspection, following which the tax authority issued a tax assessment which became final because it was not contested, since the common system of VAT ensures fiscal neutrality. The solution adopted by the tax authority infringes that principle since the company has been irreparably damaged by the amount of RON 440 241 by way of VAT which it was never actually required to charge and pay into the budget.

Succinct presentation of the reasons for the reference

29 The question referred turns on the compatibility with the principles of fiscal neutrality, effectiveness and proportionality deriving from Articles 167, 168, 179, 180 and 182 of VAT Directive 2006/112/EC of provisions of national legislation which lay down a specific procedure for contesting fiscal administrative acts and correcting invoices where certain additional data and information, which could lead to the application of a different tax regime, are discovered after a tax inspection.

30 The referring court considers that the point of law which is the subject of the present case is identical to that in Case C-81/17, *Zabrus*, invoked by the appellant, but, in the light of the interpretation provided by the Court of Justice in Case C-81/17, and the fact that it is called upon to give judgment as the court of last instance, considers it necessary to make a reference to the Court of Justice regarding the point of law concerned.