**Case C-69/23**

**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:**

7 February 2023

**Referring court:**

Curtea de Apel București (Romania)

**Date of the decision to refer:**

29 November 2022

**Applicant:**

Streaming Services Srl – in liquidation, represented by the receiver Cabinet Individual de Insolvență ‘Mihai Florea’

**Defendants:**

Agenția Națională de Administrare Fiscală – Direcția Generală de Soluționare a Contestațiilor

Administrația Județeană a Finanțelor Publice Călărași

…

**Subject matter of the main proceedings**

Administrative action brought by Streaming Services Srl (in liquidation), represented by the receiver Cabinet Individual de Insolvență ‘Mihai Florea’ (the applicant), against the defendants Agenția Națională de Administrare Fiscală – Direcția Generală de Soluționare a Contestațiilor (National Tax Administration Agency – Directorate-General for the Settlement of Complaints) and Administrația Județeană a Finanțelor Publice Călărași (District Administration of Public Finances of Călărași), seeking the annulment of certain VAT assessment notices.

**Subject matter and legal basis of the request**

Under Article 267 TFEU, an interpretation is sought of Articles 44, 53 and 59a of Directive 2006/112, Article 10(1) and (2) and Article 32(1) and (2) of

Implementing Regulation No 282/2011, and the principles of VAT neutrality and the prevention of double taxation.

**Questions referred for a preliminary ruling**

1. For the purposes of the uniform interpretation and application of [EU] law, does the supply of digital content such as that at issue in the main proceedings, consisting in interactive erotic sessions, filmed and transmitted in real time by electronic/internet means, provided by a taxable person in one Member State of the European Union (P1, video chat studio) to another taxable person in another EU Member State (P2, online live streaming platform), constitute an intra-Community supply of services subject to the general rules laid down in Article 44 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (VAT Directive), or does it constitute the grant of admission to an entertainment event within the meaning of Article 53 of the VAT Directive?

2. When interpreting and applying Article 53 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (VAT Directive) and Article 32(1) of Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for the VAT Directive, in which place are the events to be regarded as actually taking place, in the case of activities consisting in interactive erotic sessions, filmed and transmitted in real time by electronic/internet means (used in video chat activity), such as those at issue in the main proceedings, where:

(a) the natural person (model) and the video chat studio,

(b) the live streaming platform and

(c) the natural person paying a fee for access to such live streaming services (end customer)

are located in different Member States or third states?

3. Depending on the reply given to the first two questions: in which of the three EU Member States should value added tax on the supply of services be, respectively, declared and paid?

4. Do the VAT Directive and the principle of the prevention of double taxation preclude national tax legislation, such as Article 307 of Legea nr. 227/2015 (Law No 227/2015), under which:

(a) the national tax authorities of the State of the provider may classify cross-border services provided by a taxable person in one EU Member State (P1 – video chat studio), consisting in the supply (transfer) of digital content such as that at issue in the main proceedings to a taxable person in another Member State (P2), by means of an online live streaming platform in another State (P3), as services

giving admission to an entertainment event, pursuant to Article 53 of the VAT Directive, with the result that the VAT relating to those services must be collected and paid to the Treasury of the State in which the provider's registered office is situated, whereas, at an earlier point in time, the same services were classified by the tax authorities of the State in which the recipient of the services is established (P2), by way of a fiscal administrative act which became final in the absence of any judicial challenge, as intra-Community supplies of services covered by the general rule laid down in Article 44 of the VAT Directive? Is it possible for the tax authorities of a State to which the matter is subsequently referred or which are acting on their own initiative to make a legal classification of the cross-border services that are subject to a tax inspection in that State that differs from the legal classification already adopted for the same services, under a fiscal administrative act that has become final in the absence of any judicial challenge, by the tax authorities of the other State to which the matter was originally referred or which acted on their own initiative, thereby giving rise to the double taxation of VAT, or are the tax authorities to which the matter is subsequently referred or which act on their own initiative bound by the legal classification of the cross-border services in question by the tax authorities to which the matter was originally referred, which has become final as a result of the absence of any challenge and is [therefore] not open to judicial review?

(b) In the light of the answer given to the above questions, in a case such as that at issue in the main proceedings, pursuant to the VAT Directive and the principle of the prevention of double taxation, which place is to be regarded as the place of supply of services?

**Provisions of European Union law and case-law relied on**

Articles 44, 53 and 59a of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax ('the VAT Directive')

Article 10(1) and (2) and Article 32(1) and (2) of Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax

Article 1 of Council Directive (EU) 2022/542 of 5 April 2022 amending Directives 2006/112/EC and (EU) 2020/285 as regards rates of value added tax

Principle of prevention of double taxation

Judgment of the Court of Justice of 8 May 2019, *Geelen*, C-568/17, EU:C:2019:388

**Provisions of national law relied on**

Legea nr. 227/2015 privind Codul fiscal (Law No 227/2015 establishing the Tax Code)

Article 268 – Taxable transactions

‘1. For the purposes of VAT, transactions which satisfy all of the following conditions shall be taxable in Romania:

(a) transactions which, pursuant to Articles 270 to 272, constitute, or are treated as, a supply of goods or services, subject to VAT, for consideration;

(b) the place where goods or services are supplied is considered to be in Romania, pursuant to the provisions of Articles 275 and 278;

(c) the supply of goods or services is carried out by a taxable person, as defined in Article 269(1), acting as such;

(d) the supply of goods or services is the result of one of the economic activities referred to in Article 269(2).

…’.

Article 278 – Place of supply of services

‘2. The place of supply of services rendered to a taxable person acting as such shall be the place where the customer has established his or her business. If those services are provided to a fixed establishment of the taxable person located in a place other than the place where he or she has established his or her business, the place of supply of those services shall be the place where the fixed establishment of the customer is located. In the absence of such a place of business or fixed establishment, the place of supply of services shall be the place where the taxable person to whom the services in question are supplied has his or her permanent domicile or usually resides.

…

6. By way of derogation from paragraph 2, the place of supply of the following services shall be deemed to be:

…

(b) the place where the events are actually held, in respect of the supply of services relating to admission to cultural, artistic, sporting, scientific, educational, entertainment or similar events, including fairs and exhibitions, and the supply of ancillary services relating to such admission, to a taxable person.

…’.

Article 307 – Person liable for payment of tax on taxable transactions in Romania

1. The person liable for payment of value added tax, where it is due pursuant to the provisions of this Title, shall be the taxable person carrying out supplies of goods or services, except in cases in which the recipient is liable for payment of the tax under paragraphs 2 to 6 hereof and under Article 331.

2. Value added tax shall be payable by any taxable person, including any non-taxable legal persons identified for VAT purposes in accordance with Article 316 or 317, in receipt of services provided in Romania in accordance with Article 278(2), by a taxable person who is not established in Romania or who is not regarded as such for the purposes of such supply in accordance with Article 266(2), even if he is registered in Romania in accordance with Article 316(4) or (6).

…

6. In cases other than those referred to in paragraphs 2 to 5, where the supplies of goods/services are effected by a taxable person who is not established in Romania or who is not regarded as established in the territory of Romania for the purposes of those supplies of goods/services in accordance with Article 266(2) and who is not registered in Romania in accordance with Article 316, the person liable for payment of value added tax shall be the taxable person, or the non-taxable legal person, established in Romania, whether or not identified for VAT purposes in accordance with Article 316, or the taxable person not established in Romania but registered in Romania in accordance with Article 316, in receipt of goods/services supplied in Romania, in accordance with Article 275 or 278. By way of derogation, a taxable person, or a non-taxable legal person, established in Romania and not identified for VAT purposes in accordance with Article 316 or 317, who is in receipt of services in accordance with Article 278(5)(h), shall not be liable for payment of value added tax if the supplier applies one of the special schemes provided for in Article 314 or 315.

…’

**Succinct presentation of the facts and procedure in the main proceedings**

1 The applicant, Streaming Services Srl, is a taxable person registered for VAT purposes in Romania, whose principal activity is the supply or transfer of copyright, for consideration, in audiovisual material — generally in the context of online interactive erotic sessions (but also the supply of offline recorded material) — for the benefit of owners of digital platforms (websites) in the video chat sector, which are taxable legal persons in EU Member States and in third countries.

2 Specifically, the company, as a video chat studio, provides to various natural persons in Romania (known as models or video chat artists), streaming services

and equipment, decorations, furniture, technical assistance services, specialist and language courses and beauty services, thus facilitating access by the models to digital live streaming platforms owned by the party with which it has a contract, and at the same time providing the necessary logistical foundations so the models may obtain maximum revenue from their activity.

3 Video chat models are self-employed, do not report to the studio and are not employees of it; they enter into a contract for the provision of services with the applicant company and assign image and/or copyright rights to it. At the same time, they are not employed by the website operators, since the relationship is established through the intermediary of the applicant, Streaming Services Srl.

4 The video chat models carry out interactive erotic sessions and transfer, for consideration, the content created, and the related copyright, for the benefit of the applicant company – the video chat studio – in return for a price determined as a percentage of the revenue generated by the activity carried out. The applicant, in turn, then transfers the digital content together with all copyrights to the website owner, at a price that is also determined as a percentage of the revenue generated by the model's activity. Thus, the owner of the streaming platform ultimately acquires the copyright in the digital content.

5 The owner of the streaming platform organises interactive sessions for the beneficiary/end customer, a natural person, in exchange for a price that it has set. In that regard, the owner of the streaming platform controls access by end-users to the live content, filters the content by category, provides information about the streaming rules, imposes sanctions or removes content in the event of breach of the internal rules of conduct and collects the fee for the service provided to the end user (in the pay-per-view system).

6 The owner of the streaming platform is the only party actually offering access to the event and collecting the final fee from the video chat session customer. The models are not in the same State as the end consumer. The applicant does not know the end customers, does not issue them with invoices, does not ask them for money or receive money from them and does not have access to customer data. The owner of the website is the only person in direct contact with the customers, namely the natural persons who are the consumers of the digital content.

7 Between 23 December 2020 and 16 March 2021, a tax inspection was carried out at the applicant's premises to verify VAT compliance for the period from 1 November 2015 to 31 July 2020.

8 On 31 March 2021, a tax assessment notice was issued by which additional tax charges were established against the company, consisting in the VAT to be collected in respect of the services at issue, regarded as taxable in Romanian territory, in the amount of RON 3 852 908 (Romanian lei) (approximately EUR 780 000), plus some ancillary obligations (interest and late-payment penalties).

9 The applicant lodged a tax objection, which was rejected by decision of 14 October 2021. In those circumstances, it brought an action before the Curtea de Apel București (Court of Appeal, Bucharest), the referring court, requesting that the fiscal administrative acts issued pertaining to it be annulled.

**The essential arguments of the parties in the main proceedings**

10 The applicant submits that the tax authorities incorrectly established both the nature of the services it provides and the place where they are supplied. It submits that such services have already been regarded as being governed by Article 44 of the VAT Directive by the owners of the streaming platforms that collect VAT from the end user, and that the place of supply of such services is the place in which such owners are established.

11 The applicant noted that the website operators have collected the VAT due in each Member State in which the natural persons benefiting from the video chat services are established, and have paid it to the Treasury; thus, the tax authorities of the respective States have issued fiscal administrative acts confirming both the fact that the website operators are the persons liable to pay VAT and the fact that they have paid that tax. In that regard, the applicant produced evidence in the administrative file showing that one of its customers collects VAT from its own customers.

12 The applicant also claimed that, on 14 January 2021, the Romanian tax authorities had referred a question to the EU VAT Committee concerning the tax regime applicable to the supply of services by video chat studios. The reply, contained in the document of 22 March 2021, was that, in the case of the online transmission of erotic digital content, VAT should be applied in the place of supply of the activity which, according to that committee, is the registered office of the owner of the streaming site since it is the only body granting access to the entertainment event, and not the office of the video chat studio.

13 The Romanian tax authorities argue that, for this type of service, the applicant is the person who is required to collect VAT because video chat constitutes an online entertainment service for adults, the place of performance of which is in Romania, and that the services thus provided constitute taxable transactions in Romania for tax purposes. In support of that line of argument, they rely on the judgment of the Court of Justice of 8 May 2019, *Geelen* (C-568/17, EU:C:2019:388), which held that the place of supply is the place where the service provider has its business, although the models (in the specific case analysed by the Court) carried out their activities in studios in the Philippines. Thus, the applicant, they submit, is the sole entity responsible to the website operator for the services provided by the models; Streaming Services Srl owns and supplies the working tools for the models (IT tools), and the amounts paid by the visitors to the website operator are paid by the operator to the applicant. Consequently, since the applicant's activity is similar to that of Mr Geelen, the

organiser of interactive erotic sessions filmed and transmitted by websites, the Romanian tax authorities take the view that in the present case Streaming Services Srl is, for VAT purposes, the taxable person granting admission to the events.

14 The National Tax Administration Agency states that the guidelines produced by the VAT Committee are not binding on the Member States and do not constitute an official interpretation of EU law. The Direcția generală de legislație fiscală și reglementări Vamale și contabile din cadrul Ministerului Finanțelor (Directorate-General for Tax Legislation and Customs and Accounting Regulations of the Ministry of Finance) disagrees with the interpretation given by the VAT Committee, noting that such an interpretation would require the VAT Directive to be amended.

15 In addition, that opinion is also based on the proposal to amend the VAT Directive, which sought to introduce rules concerning the place of supply of services as regards activities broadcast via the internet or made available by other virtual means.

That amendment, which was necessary in order to ensure that services that may be supplied to a customer by electronic means are taxable at the place of establishment of the customer, was adopted on 5 April 2022, becoming Council Directive (EU) 2022/542 amending Directives 2006/112/EC and (EU) 2020/285 as regards rates of value added tax.

Consequently, the National Tax Administration Agency (the defendant) considers that until 1 January 2025, the date from which the new provisions adopted by that directive will apply, the place where those entertainment events or activities are actually provided must be regarded as being, in accordance with the judgment of the Court in Case C-568/17 *Geelen*, in the Member State where the supplier (organiser) of the interactive sessions is established.

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

16 The Court of Appeal points out that, in order to resolve the dispute, it is necessary to determine the correct tax treatment applicable to services supplied by the applicant to a recipient which is a taxable legal person, with place of business (tax residence) in another State, whether or not that is an EU Member State. The question is therefore whether the general rule laid down in Article 278(2) of the Codul fiscal (Tax Code) (transposing the provisions of Article 44 of the VAT Directive) applies — according to which the place of supply of services to a taxable person is deemed to be the place where the recipient is established, which would mean that the VAT relating to those services was to be collected in the State of residence of the recipient (the applicant's submission) — or whether the exception to the general rule, namely that laid down in Article 278(6)(b) of the Tax Code (transposing the provisions of Article 53 of the VAT Directive) applies, according to which, in the case of services relating to the grant of access to entertainment events supplied to a taxable person, the place of supply of those

services is to be regarded as the place where the events actually take place, which would mean, according to the tax authority, that it is in Romania (the view of the tax authority).

17 Consequently, the outcome of the dispute in the main proceedings depends on the interpretation of Articles 44 and 53 of the VAT Directive, and of Article 10(1) and (2) and Article 32(1) and (2) of Implementing Regulation (EU) No 282/2011. The above-mentioned text of Articles 44 and 53 was introduced by Directive 2008/8/EC and is applicable from 1 January 2010, for Article 44, and from 1 January 2011, for Article 53. The request for a preliminary ruling in the *Geelen* case concerned the provisions of EU law in force no later than 1 January 2007. The referring court considers that the interpretation of the applicable rules of EU law is unclear and that the Court's interpretation in *Geelen* cannot be regarded as applicable in the present case.

18 In addition, the Court of Appeal considers that, for the purposes of resolving the dispute, it is necessary to determine whether, when interpreting and applying the principles of VAT neutrality and the prevention of double taxation laid down by the VAT Directive — in particular in light of the provisions of Article 59a of the VAT Directive — the Romanian tax authority is legally entitled to carry out, as regards tax services already classified by the tax authorities of third countries by means of definitive fiscal administrative acts as falling within Article 44 of the VAT Directive, a new legal classification of those services as falling within Article 53 of that directive, thereby determining a different place for the supply of services, with the result that the VAT due is liable to be paid by another legal person within the commercial chain. In practice, it is necessary to determine whether tax acts that have become final by administrative means, without having been challenged before the courts, as regards the determination of the legal nature of services such as those in question, and the place of supply of those services, in a Member State or in a third country, may be relied on against the tax authorities in Romania which, in a subsequent tax inspection, are required to respect the legal classification of the nature of the services and the findings as to the place of payment of the VAT determined by the first tax inspection body to have examined the services in question.

19 The national court cannot determine, directly and beyond any doubt, whether the provisions of EU law referred to preclude national legislation that allows the Romanian tax authorities to reclassify in legal terms services already classified by third-party tax authorities in a certain way, by establishing a different place of supply in a material context such as that at issue.

20 In view of the particular nature of the case (the fact that the applicant is insolvent, that the amount of VAT due determined by the tax authority is high, and that the fiscal administrative act ordering payment of that amount by the applicant is an enforceable instrument), the referring court requests, pursuant to Article 105 et seq. of the Rules of Procedure of the Court of Justice, that the expedited procedure be applied to the present reference for a preliminary ruling.