Case C-179/23

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:

21 March 2023

Referring court:

Înalta Curte de Casație și Justiție (Romania)

Date of the decision to refer:

15 November 2022

Appellants in cassation – Defendants:

Guvernul României

Ministerul Finanțelor

Respondent in cassation – Applicant:

Centrul Român pentru Administrarea Drepturilor Artiștilor Interpreți (Credidam)

Subject matter of the main proceedings

Appeal by which the Guvernul României (Romanian Government) and the Ministerul Finanțelor (Ministry of Finance), opposing the Centrul Român pentru Administrarea Drepturilor Artiștilor Interpreți (Romanian Centre for the Administration of Performing Artists' Rights, 'Credidam'), seek the setting aside of the judgment of 21 May 2019 of the Curtea de Apel București (Court of Appeal, Bucharest, Romania) and, after a fresh hearing, the dismissal as unfounded of the application for the annulment of paragraphs 12 and 13 of point 8 of the Normele metodologice de aplicare a Legii nr. 227/2015 privind Codul fiscal (Methodological Rules for the Application of Law No 227/2015 establishing the Tax Code).

Subject matter and legal basis of the request

Pursuant to Article 267 TFEU, interpretation is sought of Articles 24(1) and 25(c) of Directive 2006/112/EC.

Questions referred for a preliminary ruling

1. Does the collection, distribution and payment of remuneration by collective management organisations, in return for a fee, constitute a supply of services, within the meaning of Article 24(1) and Article 25(c) of Directive 2006/112/EC (the VAT directive), to copyright holders and holders of related rights?

2. If the first question is answered in the affirmative, does the work that collective management organisations do for rights holders constitute a supply of services within the meaning of the VAT directive even if the rights holders, on whose behalf collective management organisations collect remuneration, are not deemed to be providing a service to the users who are required to pay that remuneration?

Provisions of European Union 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 ('the VAT Directive'), Article 2(1)(c), Article 9(1), Article 24(1), Article 25(c) and Article 28;

Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, Article 3(a) and (i);

Judgment of 18 January 2017, *SAWP* (C-37/16);

Judgment of 12 January 2021, *UCMR – ADA* (C-501/19);

Judgment of 14 July 2011, *Henfling and Others* (C-464/10);

Provisions of national law and national case-law relied on

Normele metodologice de aplicare a Legii nr. 227/2015 privind Codul fiscal (Methodological Rules for the Application of Law No 227/2015 establishing the Tax Code), approved by Government Decision No 1/2016, point 8, paragraphs 12 and 13.

Paragraph 12 establishes the VAT treatment of compensatory remuneration for private copying and provides that collective management organisations that act in

their own name when collecting such remuneration are not subject to the provisions of Article 271(2) of the Tax Code, but, in such a situation, are instead supplying a service falling within the scope of VAT to holders of reproduction rights, the consideration for which is the management fee withheld from the sums collected.

Paragraph 13 establishes that the provisions of Article 271(2) of the Tax Code apply to sums other than those referred to in paragraph 12 collected by organisations for the collective management of copyright and related rights in respect of the rights they manage. This means that collective management organisations are participating in a supply of services falling within the scope of VAT in all other cases in which they act in their own name but on behalf of rights holders when collecting the remuneration due to the latter for the repertoires they manage.

Legea nr. 227/2015 privind Codul fiscal (Law No 227/2015 establishing the Tax Code), Article 268(1)(a), which provides that transactions which, in accordance with Articles 270 to 272, constitute or are assimilated to a supply of goods or a supply of services, within the scope of the tax, and are carried out in return for payment are transactions taxable in Romania, and Article 271, which governs the supply of services and provides, in paragraph 2 thereof, that where a taxable person acting in his own name but on behalf of a third party participates in a supply of services, he is deemed to have received or supplied the services in question himself.

Legea nr. 8/1996 privind dreptul de autor și drepturile conexe (Law No 8/1996 on Copyright and Related Rights), Article 144(1), Articles 145, 146, 147 and 150 and Article 169(1)(b), (d) and (h), which govern collective management organisations and how they operate.

Decizia nr. 48/2017 a Înaltei Curți de Casație și Justiție – Completul pentru dezlegarea unor chestiuni de drept (Decision No 48/2017 of the High Court of Cassation and Justice – Panel for the resolution of questions of law), in which the court held that the collection by a collective management organisation of remuneration due to performing artists for the radio broadcasting or communication to the public of sound recordings of their artistic performances is not a taxable transaction falling within the scope of VAT.

Succinct presentation of the facts and procedure in the main proceedings

1 Credidam is a collective management organisation that operates as an association of performing artists and whose function is to collect and distribute the remuneration due to performing artists from users of their artistic performances.

2 By an action of 20 July 2018, brought before the Curtea de Apel București (Court of Appeal, Bucharest, Romania), Credidam requested the annulment of the provisions at issue on the ground that they are inconsistent with the interpretation

of provisions of the VAT Directive provided by the Court of Justice in its judgment in *SAWP* and with the interpretation provided by the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice, Romania, 'the Court of Cassation'), in Decision No 48/2017, of Article 126(1)(a) and Article 129 of the Tax Code and Article 98(1)(g)[1] and Article 106[5] of Law No 8/1996.

3 The Ministry of Finance, the initiator of the contested legislative provisions, applied for leave to intervene in an ancillary capacity in support of the Romanian Government, which was granted by the Court of Appeal, Bucharest.

4 By civil judgment of 21 May 2019, the Court of Appeal, Bucharest, upheld Credidam's application, holding that the collection by the collective management organisation of the remuneration due to performing artists for cable retransmission falls outside the scope of VAT, in accordance with the Court of Cassation's decision to that effect and the criteria established in the case-law of the Court of Justice of the European Union. Indeed, there is no direct legal relationship within the context of which reciprocal services are provided between the collective management organisation and economic operators which provide cable retransmission, and it is not possible to characterise the fair compensation as direct consideration for any supply of services. Similarly, the management fee is ancillary to the payment of the remuneration due for the use of artists' associated rights and if the remuneration is VAT exempt, the management fee must come under the same tax regime. The court also held that Decision No 48/2017 of the Court of Cassation, even though it interpreted provisions of the previous Tax Code, also takes effect in the interpretation of Article 268(1)(a) and Article 271 of the Tax Code, which contain the same rules of substantive law.

5 In the appeal against the judgment of the Court of Appeal, Bucharest, the Romanian Government and the Ministry of Finance argue that collective management organisations are taxable persons for VAT purposes and that the fees which they receive from rights holders are consideration for a taxable service provided for the latter's benefit and, consequently, the contested provisions are not contrary to EU law.

6 In its defence, Credidam contends that the fees are not withheld as consideration for a service provided, but are a payment provided for by law, the money being used for the purposes of distributing the remuneration collected.

The essential arguments of the parties in the main proceedings

7 Credidam maintains that the Court of Justice's reasoning in the judgment in *SAWP* regarding the exclusion from the scope of VAT applies not only to compensatory remuneration in respect of private copying, but also to the fair compensation for other categories of copyright and related rights, in particular for cable retransmission. The fees which collective management organisations withhold from that fair compensation are ancillary to that compensation, but even if they were to be regarded as stand-alone fees, they would still not fulfil the criteria of

the VAT Directive for classification as consideration for a supply of services, since they are part of the compensation, are regulated by law, which fixes their upper limit, expressed as a percentage of the fair compensation, and are intended to cover the operating costs of the collective management organisation.

8 The appellants in cassation rely on the Guidelines of the VAT Committee and argue that the fees received by collective management organisations from rights holders are directly and effectively linked to the work carried out and constitute the consideration for the service of representing the interests of those rights holders, which is subject to VAT. That service is a separate operation from the collective management organisation's collection from users of the remuneration due to rights holders. Payment of the fee is based on the identification of the holders of the rights and their works, and that identification constitutes the link between the management organisation and rights holders.

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

9 The Court of Cassation has not identified specifically any case-law of the Court of Justice concerning the tax treatment of the fees withheld by collective management organisations from the remuneration collected or the question of the characterisation of the legal relationship arising between copyright holders or holders of related rights and collective management organisations as a supply of services within the meaning of the VAT Directive. The judgments in *SAWP* and *UCMR-ADA* concern the relationship between rights holders and end users or consumers, rather than the relationship between rights holders and collective management organisations. Both judgments address the question of the remuneration itself, not the question of fees, which are a percentage of the remuneration withheld by the collective management organisation.

10 The referring court points out that, according to the judgment in *UCMR-ADA*, the fee, or commission, is subject to VAT, being part of the remuneration, when rights holders supply services that are subject to VAT to end users or consumers. In such a case, the collective management organisation must issue an invoice to the users or licensees and charge VAT on the full amount of the revenue it collects, including the fee, and in turn the rights holders must invoice the collective management organisation for the full amount of the revenue received, which is to say the remuneration from which the fee has been deducted. On the other hand, where, as in the present case, the rights holders supply services not subject to VAT to end users or consumers, in accordance with paragraph 12 point 8 of the Methodological rules, the collective management organisation must invoice the remuneration without charging VAT, although it must be deemed to be supplying services to the rights holder, in respect of which it must collect VAT.

11 The question arises of whether, in the latter case, the collective management organisation may be deemed to be supplying services subject to VAT for the benefit of the rights holder, given that, in the former case, the fee is subject to

VAT as part of the remuneration which is itself subject to VAT. The ancillary nature of the fee appears to be confirmed by the fact that intermediation services are subject to VAT when the intermediation relates to a supply of services falling within the scope of VAT, according to the judgment in *Henfling and Others*. In the same sense, since the present case concerns a non-profit association whose sole function is to collect and distribute the remuneration due to copyright holders and holders of related rights, the fee does not represent consideration for a service supplied, but is rather part of the fair compensation. However, the contested provisions apply to all collective management organisations when they act in their own name, regardless or the type of management, be it mandatory or optional, and regardless of whether the rights holder being represented is a member or not.