Reports of Cases

JUDGMENT OF THE COURT (Sixth Chamber)

16 July 2020*

(Reference for a preliminary ruling — Directive 2006/112/EC — Value added tax (VAT) — Article 9(1) — Concept of 'taxable person' — Person practising the profession of lawyer — Final judicial decision — Principle of *res judicata* — Scope of that principle if that decision is incompatible with EU law)

In Case C-424/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Curtea de Apel București (Court of Appeal, Bucharest, Romania), made by decision of 15 February 2019, received at the Court on 29 May 2019, in the proceedings

Cabinet de avocat UR

v

Administrația Sector 3 a Finanțelor Publice prin Direcția Generală Regională a Finanțelor Publice București,

Administrația Sector 3 a Finanțelor Publice,

MJ,

NK,

THE COURT (Sixth Chamber),

composed of M. Safjan, President of the Chamber, R. Silva de Lapuerta (Rapporteur), Vice-President of the Court, N. Jääskinen, Judge,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Cabinet de avocat UR, by D. Rădescu, avocat,

– the Romanian Government, initially by C.R. Canțăr, R.I. Hațieganu and A. Rotăreanu, and subsequently by E. Gane, R.I. Hațieganu and A. Rotăreanu, acting as Agents,

* Language of the case: Romanian.

– the European Commission, by L. Lozano Palacios and A. Armenia, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 9(1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1) and the principle of *res judicata*.

2 The request has been made in proceedings between Cabinet de avocat UR ('UR'), on the one hand, and the Administrația Sector 3 a Finanțelor Publice prin Direcția Generală Regională a Finanțelor Publice București (the Public Finance Authority, Sector 3, represented by the Directorate-General of Public Finances, Bucharest, Romania), the Administrația Sector 3 a Finanțelor Publice (Public Finance Authority, Sector 3, Romania), MJ and NK, on the other, concerning UR's liability to value added tax (VAT).

Legal context

European Union law

3 Under Article 2(1) of Directive 2006/112:

'The following transactions shall be subject to VAT:

…

(c) the supply of services for consideration within the territory of a Member State by a taxable person acting as such;

…'

4 Article 9(1) of that directive provides:

'"Taxable person" shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity.

Any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions, shall be regarded as "economic activity". The exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as an economic activity.'

Romanian law

5 Article 431 of the Codul de procedură civilă (Code of Civil Procedure), entitled 'Effects of *res judicata*', in the version applicable to the dispute in the main proceedings, provides:

'1. No person may be sued twice in the same capacity, for the same cause of action and with the same subject matter.

2. Any party may invoke the authority of *res judicata* in another case, if there is a connection with the settlement of that case.'

6 The referring court states that the 'negative or extinctive effect' of the authority of *res judicata* precludes a new judgment where the parties, the legal cause of action and the subject matter of the action are the same, whereas the 'positive effect' of the authority of *res judicata* allows any party to rely on *res judicata* in the context of a dispute where there is a connection with the settlement of that dispute, such as the same issues being raised.

7 Article 432 of that code, entitled 'Plea of *res judicata*', provides:

'A plea of *res judicata* may be raised by the court or by the parties at any stage of the proceedings, even before the appeal court. If the plea is upheld, that may have the effect of worsening the situation of the party concerned as a result of its own action, as compared with the situation arising from the contested decision.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

8 On 28 May 2015, UR, a law firm established in Romania, requested the Public Finance Authority of Sector 3 to remove UR, with effect from 2002, from the register of taxable persons for VAT purposes and to reimburse the VAT collected by that authority during the period 1 January 2010 to 31 December 2014, on the ground that UR had been entered in that register in error.

9 In view of the authority's failure to reply to that request, UR brought an action against the defendants in the main proceedings before the Tribunalul București (Regional Court, Bucharest, Romania) seeking an order that the Public Finance Authority of Sector 3 remove UR from the register of taxable persons for VAT purposes and that the defendants in the main proceedings jointly and severally reimburse UR in respect of the VAT collected.

10 By decision of 17 February 2017, the Tribunalul București (Regional Court, Bucharest) dismissed UR's action.

11 In support of its appeal brought against that decision before the Curtea de Apel București (Court of Appeal, Bucharest, Romania), UR relies on the authority of *res judicata* attaching to a judgment of 30 April 2018 which has become final, by which that court, upholding a judgment of 21 September 2016 of the Tribunalul București (Regional Court, Bucharest), held that a taxpayer such as UR which practises the profession of lawyer does not engage in any economic activity and, consequently, cannot be regarded as carrying out transactions for the supply of goods or services, since the contracts concluded with its clients are contracts for legal assistance and not contracts for the provision of services ('the judgment of 30 April 2018').

12 In those circumstances, the Curtea de Apel București (Court of Appeal, Bucharest) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) In the context of the application of Article 9(1) of [Directive 2006/112], does the concept of "taxable person" include persons who practise the profession of lawyer?

(2) Does the principle of the primacy of EU law permit an exception to be made, in subsequent proceedings, to the authority of *res judicata* attaching to a final judicial decision in which it has been established, in essence, that, in accordance with national VAT legislation, as it is interpreted and applied, lawyers do not supply goods, do not carry out an economic activity and do not conclude contracts for the supply of services, but instead conclude contracts for legal assistance?'

Consideration of the questions referred for a preliminary ruling

The first question

13 By its first question, the referring court asks, in essence, whether Article 9(1) of Directive 2006/112 must be interpreted as meaning that a person practising the profession of lawyer must be regarded as a 'taxable person' within the meaning of that provision.

14 Under the first subparagraph of Article 9(1) of that directive, 'taxable person' means any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity.

15 The terms used in that provision, in particular the term 'any person who', give the notion of 'taxable person' a broad definition focused on independence in the pursuit of an economic activity to the effect that all persons, natural or legal, both public and private, even entities devoid of legal personality, which, in an objective manner, satisfy the criteria set out in that provision, are regarded as being taxable persons for the purposes of VAT (judgments of 29 September 2015, *Gmina Wrocław*, C-276/14, EU:C:2015:635, paragraph 28, and of 12 October 2016, *Nigl and Others*, C-340/15, EU:C:2016:764, paragraph 27).

16 As regards the second subparagraph of Article 9(1) of Directive 2006/112, it defines 'economic activity' as any activity of producers, traders or persons supplying services, including, inter alia, activities of the professions.

17 Consequently, and since the profession of lawyer is a liberal profession, it follows from Article 9(1) of Directive 2006/112 that a person practising that profession carries out an economic activity and must be regarded as a 'taxable person' within the meaning of that provision.

18 Furthermore, it should be noted that, under Directive 2006/112, the scope of VAT is very wide, in that Article 2, which concerns taxable transactions, refers not only to the importation of goods but also to the intra-Community acquisition of goods, and the supply of goods or services for consideration within the territory of the country by a taxable person acting as such (judgments of 19 July 2012, *Rēdlihs*, C-263/11, EU:C:2012:497, paragraph 24, and 3 September 2015, *Asparuhovo Lake Investment Company*, C-463/14, EU:C:2015:542, paragraph 33).

19 Furthermore, in paragraph 49 of the judgment of 17 June 2010, *Commission* v *France* (C-492/08, EU:C:2010:348), the Court held that a Member State may not apply a reduced rate of VAT to the supply of services by lawyers for which they are paid in full or in part by the State under the legal aid scheme. That assessment necessarily presupposes that those services were regarded as being subject to VAT and that those lawyers, described as 'private profit-making entities' in that judgment, were regarded as acting as taxable persons.

20 In the light of the foregoing, the answer to the first question is that Article 9(1) of Directive 2006/112 must be interpreted as meaning that a person practising the profession of lawyer must be regarded as a 'taxable person' within the meaning of that provision.

The second question

21 By its second question, the referring court asks, in essence, whether EU law must be interpreted as meaning that a national court, in a dispute relating to VAT, may not apply the principle of the authority of *res judicata* where the application of that principle would prevent that court from taking into account EU legislation on VAT.

22 In that connection, attention should be drawn to the importance, both for the EU legal order and for the national legal systems, of the principle of *res judicata*. In order to ensure stability of the law and legal relations, as well as the sound administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time limits provided for in that regard can no longer be called into question (judgments of 3 September 2009, *Fallimento Olimpiclub*, C-2/08, EU:C:2009:506, paragraph 22; of 11 September 2019, *Călin*, C-676/17, EU:C:2019:700, paragraph 26; and of 4 March 2020, *Telecom Italia*, C-34/19, EU:C:2020:148, paragraph 64).

23 Therefore, EU law does not require a national court to disapply domestic rules of procedure conferring finality on a judgment, even if to do so would make it possible to remedy a domestic situation which is incompatible with EU law (judgment of 11 September 2019, *Călin*, C-676/17, EU:C:2019:700, paragraph 27 and the case-law cited).

24 In particular, EU law does not require a national judicial body automatically to go back on a decision having the authority of *res judicata* in order to take into account the interpretation of a relevant provision of EU law adopted by the Court (judgments of 11 September 2019, *Călin*, C-676/17, EU:C:2019:700, paragraph 28, and of 4 March 2020, *Telecom Italia*, C-34/19, EU:C:2020:148, paragraph 66).

25 In the absence of EU legislation in this area, the rules implementing the principle of *res judicata* are a matter for the national legal order, in accordance with the principle of the procedural autonomy of the Member States. However, those rules must not be less favourable than those governing similar domestic actions (principle of equivalence) nor may they be framed in such a way as to make it in practice impossible or excessively difficult to exercise the rights conferred by EU law (principle of effectiveness) (judgments of 3 September 2009, *Fallimento Olimpiclub*, C-2/08, EU:C:2009:506, paragraph 24; of 10 July 2014, *Impresa Pizzarotti*, C-213/13, EU:C:2014:2067, paragraph 54; and of 4 March 2020, *Telecom Italia*, C-34/19, EU:C:2020:148, paragraph 58).

26 Consequently, if the applicable domestic rules of procedure provide the possibility, under certain conditions, for a national court to go back on a decision having the authority of *res judicata* in order to render the situation compatible with national law, that possibility must prevail if those conditions are met, in accordance with the principles of equivalence and effectiveness, so that the situation at issue is brought back into line with EU law (judgment of 11 September 2019, *Călin*, C-676/17, EU:C:2019:700, paragraph 29 and the case-law cited).

27 In the present case, the referring court notes that the applicant in the main proceedings relies on the 'positive effect' of the authority of *res judicata* attached to its judgment of 30 April 2018.

28 That court states that, if it were to consider that that judgment has the authority of *res judicata*, the considerations in that judgment would likely create a tax precedent favourable to the applicant and would form the basis of the solution of the dispute in the main proceedings.

29 It is also apparent from the order for reference that the dispute in the main proceedings relates to the period 1 January 2010 to 31 December 2014, whereas the judgment of 30 April 2018 concerned the period 1 January 2011 to 30 November 2014. Moreover, the subject matter of the present dispute, namely a request for removal, with effect from 2002, from the register of taxable persons for VAT purposes and for a reimbursement of the VAT collected by the Romanian public finance authorities during the period in question, differs from the subject matter of the case which gave rise to the judgment of 30 April 2018.

30 Consequently, in the event that the referring court has the possibility, under the applicable procedural rules of Romanian law, of dismissing the action in the main proceedings, it is for that court to make use of that possibility and to ensure that EU law is given full effect, in the present case Directive

2006/112, and if necessary to disapply, on its own authority, the interpretation which it adopted in its judgment of 30 April 2018, since that interpretation is not compatible with EU law (see, by analogy, judgments of 4 March 2020, *Telecom Italia*, C-34/19, EU:C:2020:148, paragraph 61, and of 5 March 2020, *OPR-Finance*, C-679/18, EU:C:2020:167, paragraph 44).

31 If, on the contrary, that court considers that the application of the principle of *res judicata* would prevent a judicial decision such as the judgment of 30 April 2018 from being called into question, even if that decision entails a breach of EU law, the application of that principle cannot also prevent that court from calling into question any finding relating to a common issue decided by such a decision, during the judicial review of another decision taken by the competent tax authority in respect of the same taxpayer or taxable person, but relating to a different tax year (see, to that effect, judgment of 3 September 2009, *Fallimento Olimpiclub*, C-2/08, EU:C:2009:506, paragraph 29).

32 If the principle of *res judicata* were to be applied in that manner, the effect would be that, if ever the judicial decision that had become final were based on an incorrect interpretation of EU rules on VAT, those rules would continue to be misapplied for each new tax year, without it being possible to rectify that incorrect interpretation (see, to that effect, judgment of 3 September 2009, *Fallimento Olimpiclub*, C-2/08, EU:C:2009:506, paragraph 30).

33 Such extensive obstacles to the effective application of the EU rules on VAT cannot reasonably be regarded as justified in the interests of legal certainty and must therefore be considered to be contrary to the principle of effectiveness (see, to that effect, judgment of 3 September 2009, *Fallimento Olimpiclub*, C-2/08, EU:C:2009:506, paragraph 31).

34 In view of the foregoing, the answer to the second question is that EU law must be interpreted as meaning that a national court, in a dispute relating to VAT, may not apply the principle of the authority of *res judicata* where that dispute does not relate to a tax period identical to the one which was at issue in the dispute which gave rise to the judicial decision having the authority of *res judicata*, does not have the same subject matter as that dispute, and where the application of that principle would prevent that court from taking into account EU legislation on VAT.

Costs

35 Since these proceedings are, for the parties to the main proceedings, a step in the action before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Sixth Chamber) hereby rules:

1. **Article 9(1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning that a person practising the profession of a lawyer must be regarded as a 'taxable person' within the meaning of that provision.**

2. **EU law precludes a national court, in a dispute relating to value added tax (VAT), from applying the principle of *res judicata* where that dispute does not relate to a tax period identical to the one which was at issue in the dispute which gave rise to the judicial decision having the authority of *res judicata*, does not have the same subject matter as that dispute, and where the application of that principle would prevent that court from taking into account EU legislation on VAT.**

[Signatures]