Reports of Cases

JUDGMENT OF THE COURT (Sixth Chamber)

4 June 2020*

(Reference for a preliminary ruling — Principles of EU law — Observance of the rights of the defence — Tax procedure — Exercise of the right to deduct with regard to value added tax (VAT) — Refusal of the right to deduct on account of the allegedly improper conduct of the taxable person's suppliers — Administrative act issued by the national tax authorities without giving the taxpayer access to the information and the documents on which the act was based — Suspicion of tax evasion — National practice pursuant to which exercise of the right to deduct is subject to the possession of supporting documents other than the tax invoice — Whether permissible)

In Case C-430/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunalul Cluj (Regional Court, Cluj, Romania), made by decision of 15 May 2019, received by the Court on 3 June 2019, in the proceedings

SC C.F. SRL

v

A.J.F.P.M.,

D.G.R.F.P.C,

THE COURT (Sixth Chamber),

composed of M. Safjan (Rapporteur), President of the Chamber, L. Bay Larsen and C. Toader, Judges,

Advocate General: H. Saugmandsgaard Øe,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– SC C.F. SRL, by T.D. Vidrean-Căpuşan and D.F. Paşcu, lawyers,

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

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

* Language of the case: Romanian.

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 the general principle of EU law of observance of the rights of the defence and of the principles governing the application by the Member States of the common system of value added tax (VAT).

2 The request was made in proceedings between SC C.F. SRL ('CF'), on the one hand, and the Administrația Județeană a Finanțelor Publice M. (Regional Public Finance Administration, M., Romania, 'the Regional Administration') and the Direcția Generală Regională a Finanțelor Publice C. (Regional Directorate-General of Public Finances, C., Romania, 'the Regional Directorate-General'), on the other, concerning an action for the annulment of the administrative fiscal acts imposing on CF additional tax liabilities in terms of VAT and corporation tax.

Legal context

EU law

3 Article 178(a) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1), as amended by Council Directive 2010/45/EU of 13 July 2010 (OJ 2010 L 189, p. 1) ('the VAT Directive'), provides:

'In order to exercise the right of deduction, a taxable person must meet the following conditions:

(a) for the purposes of deductions pursuant to Article 168(a), in respect of the supply of goods or services, he must hold an invoice drawn up in accordance with Sections 3 to 6 of Chapter 3 of Title XI'.

Romanian law

4 Article 11(1) of Legea nr. 227/2015 privind Codul fiscal (Law No 227/2015 establishing the Tax Code) of 8 September 2015 (*Monitorul Oficial al României*, Part I, No 688 of 10 September 2015, 'the Tax Code') provides that, when establishing the amount of a tax, levy or mandatory social security contribution, the tax authorities may disregard a transaction that has no economic purpose and alter the fiscal effects of such a transaction and may reclassify the form of a transaction or activity so as to reflect the economic content of the transaction or activity.

5 Article 25(1) of the Tax Code provides that, for the purpose of establishing taxable profits, deductible expenses include costs incurred in order to carry on an economic activity, including those governed by applicable laws, as well as registration duties and contributions paid to chambers of commerce and industry and to employers' organisations and trade unions.

6 Article 299(1)(a) of the Tax Code lays down an obligation upon taxable persons for VAT purposes to be in possession of a tax invoice and, in certain specific cases, proof of payment for VAT paid or due upstream.

7 In accordance with Article 6(1) and (2) of Legea nr. 207 privind Codul de procedură fiscală (Law No 207 establishing the Tax Procedure Code) of 20 July 2015 (*Monitorul Oficial al României*, Part I, No 547 of 23 July 2015), in the version in force at the material time in the main proceedings ('the Tax Procedure Code'):

'1. The tax authority shall be entitled to assess, within the limits of its powers and competences, the relevance of facts of a fiscal nature, using the means of evidence provided for by law, and to adopt a solution based on statutory provisions and on the comprehensive findings relating to all the illuminating circumstances of the case at the time of the adoption of a decision. In carrying out that assessment, the tax authority shall take into account any written opinion addressed by the competent tax authority to the taxpayer concerned in the context of the provision of assistance and guidance to taxpayers and of the solution adopted by the tax authority, in any fiscal administrative act, or by a court of law, in an earlier final decision, in respect of similar facts concerning the same taxpayer. In the event that the tax authority observes discrepancies between the tax position of the taxpayer and the information taken into account in a written opinion or fiscal administrative act concerning the same taxpayer, the tax authority shall be entitled to make findings in accordance with the actual tax position and tax legislation and shall be under an obligation to set out in writing the reasons for which it does not take the earlier opinion into consideration.

2. The tax authority shall carry out its assessment within the bounds of reasonableness and fairness and shall strike a fair balance between the objective pursued and the means used to attain it.'

8 Article 9 of the Tax Procedure Code, entitled 'Right to be heard', provides, in paragraph 1 thereof:

'Before taking its decision, the tax authority shall ensure that the taxpayer has the opportunity to express his point of view concerning the facts and circumstances relevant to the taking of the decision.'

9 Article 46 of the Tax Procedure Code, entitled 'Contents of and statement of reasons for the fiscal administrative act' provides, in paragraph 2 thereof:

'A fiscal administrative act which is drawn up on paper shall state the following matters:

…

(j) statements relating to the hearing of the taxpayer.'

10 Article 49 of the Tax Procedure Code, entitled 'Invalidity of a fiscal administrative act', is worded as follows:

'1. A fiscal administrative act shall be invalid in any of the following situations:

(a) it has been issued in breach of statutory provisions relating to competence;

(b) it fails to include any of the following: the name, forename and capacity of the person representing the tax authority, the name and forename or designation of the taxpayer, the subject matter of the administrative act, the signature of the representative of the tax authority, except as provided for in Article 46(6), the issuing tax authority;

(c) it is vitiated by a serious and manifest error; a fiscal administrative act is vitiated by a serious and manifest error where the reasons for its issue are so significantly flawed that, had they been disregarded prior to or at the time of issue of the act, the act would not have been issued.

2. A finding of invalidity may be made by the competent tax authority or by the authority responsible for resolving a complaint, either upon application or of its own motion. Where a competent tax authority makes a finding of invalidity, it shall adopt a decision which shall be communicated to the taxpayer.

3. Fiscal administrative acts which infringe statutory provisions other than those of paragraph 1 may be declared invalid. The provisions of Article 50 shall apply, *mutatis mutandis*.'

11 Pursuant to Article 278(1) of the Tax Procedure Code:

'The initiation of an administrative complaint shall not suspend the enforceability of a fiscal administrative act.'

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

12 CF is a commercial company governed by Romanian law, which was established in 2008 and has as its main object the exploitation of forestry resources. Between 29 August 2016 and 13 April 2017, it was the subject of a tax inspection carried out by the Regional Administration concerning corporation tax relating to the period from 1 January 2011 to 31 December 2016 and VAT relating to the period from 1 March 2014 to 31 December 2016.

13 That tax inspection was suspended for a period of six months, to allow the Regional Directorate-General, which has responsibilities for combating fraud, to conduct an investigation in which the Public Prosecutor attached to the Tribunalul Cluj (Regional Court, Cluj, Romania) participated. The criminal investigation was brought to an end by a decision that no further action should be taken.

14 In its tax inspection report, the Regional Administration stated that the commercial transactions between CF and two of its suppliers were fictitious for the reason that the two suppliers, micro-enterprises subject to tax at 3% of turnover, while CF was taxed at 16%, did not have the technical or logistical capacity to provide the services for which they had invoiced CF.

15 CF's legal representative was invited to attend the offices of the Regional Administration to take receipt of a copy of the tax inspection report.

16 CF appealed against the tax inspection report and requested access to the full administrative file. It stated that it had not been informed at the time of the tax inspection of the manner in which the criminal investigation might have influenced the inspection carried out by the tax authorities.

17 Following the dismissal of its appeal by the tax authorities, CF brought an action before the referring court, the Tribunalul Cluj (Regional Court, Cluj).

18 The referring court points out that, according to the Romanian tax authorities, CF is liable for the improper fiscal conduct of its suppliers. According to those authorities, the fictitious nature of the commercial transactions between CF and the said suppliers could be assumed from the fact that CF had been unable to produce any supporting documents other than the tax invoice. However, under Romanian legislation, the only supporting document that a taxpayer is required to produce in order to exercise the right of deduction with regard to both VAT and corporation tax is the tax invoice.

19 The referring court observes that it is not possible to establish the manner in which the tax inspection carried out by the Regional Administration was influenced by the investigation carried out by the Regional Directorate-General with responsibilities for combating fraud. Similarly, the referring court is unaware of any evidence that might have led the tax authorities to regard the commercial transactions that took place between CF and its suppliers as fictitious.

20 In those circumstances, the Tribunalul Cluj (Regional Court, Cluj) decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'(1) In light of the principle of respect for the rights of the defence, as outlined to date in the case-law of the Court of Justice …, may or must an administrative fiscal document issued to an individual be declared null and void if that individual has not been allowed access to the information on the basis of which that document was issued, notwithstanding the fact that reference is made in that document to certain information in the administrative file?

(2) Do the principles of neutrality, proportionality and equivalence preclude the exercise of the right to deduct VAT and corporation tax in the case of a company the conduct of which with regard to fiscal matters is beyond reproach and which has been denied the right to deduct corporation tax on account of the fiscal conduct of its suppliers, which is alleged to be improper on the basis of factors such as a lack of human resources or a lack of means of transport, in the case where, in addition, the tax authority has adduced no evidence of any activity that suggests fiscal and/or criminal liability on the part of those suppliers?

(3) Is a national practice inconsistent with EU law if, pursuant to that practice, the right to deduct VAT and corporation tax is subject to the possession of other supporting documents in addition to the tax invoice, such as estimates of expenditure or reports on the progress of works, even though such additional supporting documents have not been clearly and precisely defined in the national tax legislation?

(4) In light of the judgment of 17 December 2015, *WebMindLicenses* (C-419/14, EU:C:2015:832), can the situation in which a taxable person purchases goods and services from a taxable person which benefits from a different tax regime from that of the taxable person in question constitute tax evasion?'

The questions referred

Admissibility

21 The Romanian Government disputes the admissibility of the request for a preliminary ruling both in the light of Article 94 of the Rules of Procedure of the Court of Justice and on the ground that there is no relevant EU legislation in so far as concerns the aspect of the case in the main proceedings that relates to corporation tax.

22 In this connection, it must first be recalled that, in accordance with the settled case-law of the Court, questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining, the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it and to understand the reasons for the referring court's

view that it needs answers to those questions in order to rule in the dispute before it (judgment of 12 December 2019, *Slovenské elektrárne*, C-376/18, EU:C:2019:1068, paragraph 24 and the case-law cited).

23 However, since the order for reference serves as the basis for the preliminary ruling procedure before the Court under Article 267 TFEU, it is essential that the national court should, in that decision, expand on its definition of the factual and legislative context of the dispute in the main proceedings and give at the very least some explanation of the reasons for the choice of the EU law provisions which it seeks to have interpreted and of the link it establishes between those provisions and the national law applicable to the proceedings pending before it. Those cumulative requirements concerning the content of a request for a preliminary ruling are expressly set out in Article 94 of the Rules of Procedure (judgment of 12 December 2019, *Slovenské elektrárne*, C-376/18, EU:C:2019:1068, paragraph 25 and the case-law cited).

24 As regards, more specifically, the requirements set out in Article 94 of the Rules of Procedure, it must be observed that the present request for a preliminary ruling contains the essential facts and indicates the tenor of the provisions of both EU law and national law that might apply to the case in the main proceedings.

25 Secondly, in so far as concerns the aspect of the case in the main proceedings that relates to corporation tax, it must be recalled that, where, in regulating purely internal situations, national legislation adopts the same solutions as those adopted in EU law in order, for example, to avoid discrimination against nationals of the Member State in question or any distortion of competition, or to ensure a single procedure is applied in comparable situations, it is clearly in the interest of the European Union that, in order to forestall future differences of interpretation, provisions or concepts taken from EU law should be interpreted uniformly, irrespective of the circumstances in which they are to be applied (judgment of 24 October 2019, *Belgische Staat*, C-469/18 and C-470/18, EU:C:2019:895, paragraph 22 and the case-law cited).

26 Thus, an interpretation by the Court of provisions of EU law in purely internal situations is warranted on the ground that they have been made applicable by national law directly and unconditionally, in order to ensure that internal situations and situations governed by EU law are treated in the same way (judgment of 24 October 2019, *Belgische Staat*, C-469/18 and C-470/18, EU:C:2019:895, paragraph 23).

27 Since the referring court has specifically stated that that is the case in this instance in so far as concerns the aspect of the main proceedings that relates to corporation tax, it must be held, having regard to the foregoing considerations, that the present request for a preliminary ruling is admissible.

The first question

28 By its first question, the referring court asks, in essence, whether the general EU law principle of observance of the rights of the defence must be interpreted as meaning that where, in the context of national administrative procedures for inspection and for determining the taxable amount for VAT purposes, a taxable person has not been allowed access to the information in the administrative file that was taken into consideration when an administrative decision imposing additional tax liabilities on that taxable person was adopted, that principle requires that that decision be annulled.

29 In this connection, it should be recalled that observance of the rights of the defence is a general principle of EU law, which is to be applied where the authorities are minded to adopt in respect of a person a measure that will adversely affect him. That general principle applies in circumstances in which an administrative authority submits taxpayers to a tax inspection procedure in order to ensure the collection of all the VAT due on the territory of the Member State concerned or to prevent tax

fraud (see, to that effect, judgments of 9 November 2017, *Ispas*, C-298/16, EU:C:2017:843, paragraphs 26 and 27, and of 16 October 2019, *Glencore Agriculture Hungary*, C-189/18, EU:C:2019:861, paragraph 40).

30 An integral part of observance of the rights of the defence is the right to be heard, which guarantees every person the opportunity to make known his views effectively during an administrative procedure and before the adoption of any decision liable to affect his interests adversely. In accordance with the Court's case-law, the purpose of the rule that the addressee of an adverse decision must be put in a position to submit his observations before that decision is adopted is to enable the competent authority effectively to take all relevant information into account. In order to ensure that the person concerned is in fact protected, a particular aim of that rule is to ensure that such a person can correct an error or that information relating to his personal circumstances is taken into account, such as will argue in favour of the adoption or non-adoption of the decision or in favour of its having a specific content (see, to that effect, judgment of 16 October 2019, *Glencore Agriculture Hungary*, C-189/18, EU:C:2019:861, paragraph 41 and the case-law cited).

31 Although national tax authorities are not under a general obligation to provide full access to the file or to communicate of their own motion the documents and information that support the intended decision, the fact remains that, in national administrative procedures of inspection and establishment of the basis for VAT assessment, an individual must have the opportunity to have communicated to him, at his request, the information and documents in the administrative file and considered by the public authority when it adopted its decision, unless objectives of public interest warrant restricting access to that information and those documents (judgment of 9 November 2017, *Ispas*, C-298/16, EU:C:2017:843, paragraphs 32 and 39).

32 In the present case, the referring court points out that the national tax authorities refused to apprise the taxable person of the relevant information which the latter had requested in due time, and mentions no objective of public interest warranting that refusal.

33 In that context, the referring court wonders whether it ought not to declare the administrative decision imposing additional tax liabilities on the taxable person automatically void.

34 In this connection, it must be recalled that, where neither the conditions under which observance of the rights of the defence is to be ensured nor the consequences of the infringement of those rights are laid down by European Union law, those conditions and consequences are governed by national law, provided that the rules adopted to that effect are the same as those to which individuals in comparable situations under national law are subject (principle of equivalence) and that they do not make it impossible in practice or excessively difficult to exercise the rights of defence conferred by the European Union legal order (principle of effectiveness) (judgment of 3 July 2014, *Kamino International Logistics and Datema Hellmann Worldwide Logistics*, C-129/13 and C-130/13, EU:C:2014:2041, paragraph 75).

35 As regards the principle of effectiveness specifically, the Court has held that it does not require that a disputed decision, because it was adopted in infringement of the rights of the defence, must in every case be annulled. An infringement of the rights of the defence results in the annulment of the decision taken at the end of the administrative procedure at issue only if, had it not been for such an irregularity, the outcome of the procedure might have been different (see, to that effect, judgment of 3 July 2014, *Kamino International Logistics and Datema Hellmann Worldwide Logistics*, C-129/13 and C-130/13, EU:C:2014:2041, paragraphs 78 and 79).

36 It is for the referring court to determine the extent to which the outcome of the tax inspection procedure might have been different if CF had been allowed access to the file during the course of the administrative procedure in question.

37 In light of the foregoing, the answer to the first question must be that the general EU law principle of observance of the rights of the defence must be interpreted as meaning that where, in the context of national administrative procedures for inspection and for determining the taxable amount for VAT purposes, a taxable person has not been allowed access to the information in the administrative file that was taken into consideration when an administrative decision imposing additional tax liabilities on that taxable person was adopted, and where the court hearing the case finds that, in the absence of that irregularity, the outcome of the procedure might have been different, that principle requires that that decision be annulled.

The second, third and fourth questions

38 By its second, third and fourth questions, which it is appropriate to examine together, the referring court essentially asks whether, in the event that a national tax authority merely has uncorroborated doubts about whether the economic operations giving rise to the issue of a tax invoice were actually carried out, the principles governing the application by the Member States of the common system of VAT, in particular the principles of fiscal neutrality and legal certainty, must be interpreted as precluding the taxable person to which the invoice is addressed from being refused the right to deduct VAT where he is unable to produce, in addition to the invoice, other evidence that the economic operations were actually carried out.

39 As a preliminary point, it should be stated that it is for the referring court alone to assess the effect of the interpretation provided by the Court in response to these question on the aspect of the case in the main proceedings that relates to corporation tax.

40 According to the settled case-law of the Court, the right of taxable persons to deduct the VAT due or already paid on goods purchased and services received as inputs and used for the purposes of their taxed transactions from the VAT which they are liable to pay is a fundamental principle of the common system of VAT established by EU legislation. As the Court has repeatedly held, the right to deduct provided for in Article 167 et seq. of the VAT Directive is an integral part of the VAT scheme and in principle may not be limited (judgment of 16 October 2019, *Glencore Agriculture Hungary*, C-189/18, EU:C:2019:861, paragraph 33 and the case-law cited).

41 The common system of VAT thus ensures the absolute neutrality of taxation of all economic activities, whatever their purpose or results, provided that they are themselves subject, in principle, to VAT (judgment of 3 July 2019, *The Chancellor, Masters and Scholars of the University of Cambridge*, C-316/18, EU:C:2019:559, paragraph 22 and the case-law cited).

42 However, the prevention of tax evasion, avoidance and abuse is an objective recognised and encouraged by the VAT Directive and the Court has repeatedly held that EU law cannot be relied on for abusive or fraudulent ends. It is, therefore, for the national courts and authorities to refuse the right of deduction, if it is shown, in the light of objective evidence, that that right is being relied on for fraudulent or abusive ends (judgment of 16 October 2019, *Glencore Agriculture Hungary*, C-189/18, EU:C:2019:861, paragraph 34).

43 While that is the position where tax evasion is committed by the taxable person himself, the same is also true where a taxable person knew, or should have known, that, by his acquisition, he was taking part in a transaction connected with the evasion of VAT. Accordingly, a taxable person cannot be refused the right of deduction unless it is established on the basis of objective evidence that that taxable person — to whom the supply of goods or services, on the basis of which the right of deduction is claimed, was made — knew or should have known that, through the acquisition of those goods or services, he was participating in a transaction connected with the evasion of VAT committed

by the supplier or by another trader acting upstream or downstream in the chain of supply of those goods or services (judgment of 16 October 2019, *Glencore Agriculture Hungary*, C-189/18, EU:C:2019:861, paragraph 35).

44 It is for the competent national tax authorities to establish, on the basis of objective factors and without requiring the recipient of the invoice to carry out checks which are not his responsibility, that that recipient knew, or should have known, that the transaction on which the right to deduct is based was connected with VAT fraud, this being a matter for the referring court to determine (see, to that effect, judgment of 22 October 2015, *PPUH Stehcemp*, C-277/14, EU:C:2015:719, paragraph 50).

45 In the absence of EU rules regarding the taking of evidence in cases of VAT fraud, those objective factors must be proven by the competent national tax authority in accordance with the rules of evidence under national law. However, those rules must not undermine the effectiveness of EU law and must be consistent with the rights guaranteed by EU law, in particular by the Charter of Fundamental Rights of the European Union (judgment of 16 October 2019, *Glencore Agriculture Hungary*, C-189/18, EU:C:2019:861, paragraph 37 and the case-law cited).

46 It must be pointed out in this connection that the determination of the measures which may, in a particular case, reasonably be required of a taxable person wishing to exercise the right to deduct VAT in order to satisfy himself that his transactions are not connected with fraud committed by a trader at an earlier stage of a transaction depends essentially on the circumstances of that particular case (judgment of 22 October 2015, *PPUH Stehcemp*, C-277/14, EU:C:2015:719, paragraph 51).

47 Although such a taxable person could be obliged, when there are indications pointing to an infringement or fraud, to make inquiries about the trader from whom he intends to purchase goods or services, in order to ascertain the latter's trustworthiness, the competent national tax authorities cannot, however, as a general rule, require that taxable person, first, to ensure that the issuer of the invoice relating to the goods and services in respect of which the exercise of that right to deduct is sought was in possession of the goods at issue and was in a position to supply them and that he has complied with his obligations as regards the declaration and payment of VAT, in order to be satisfied that there are no irregularities or fraud at the level of the traders operating at an earlier stage of the transaction or, second, to be in possession of documents in that regard (judgment of 22 October 2015, *PPUH Stehcemp*, C-277/14, EU:C:2015:719, paragraph 52).

48 Since the production of such additional documents is not contemplated by Article 178(a) of the VAT Directive and would be liable to have a disproportionate effect on the exercise of the right to deduct, and therefore on the principle of neutrality, the competent national tax authority cannot, as a general rule, require their production.

49 That being so, the answer to the second, third and fourth questions must be that the principles governing the application by the Member States of the common system of VAT, in particular the principles of fiscal neutrality and legal certainty, must be interpreted as precluding, in the event that a national tax authority merely has uncorroborated doubts about whether the economic operations giving rise to the issue of a tax invoice were actually carried out, the taxable person to which that invoice is addressed from being refused the right to deduct VAT where he is unable to produce, in addition to the invoice, other evidence that the economic operations were actually carried out.

Costs

50 Since these proceedings are, for the parties to the main proceedings, a step in the action pending 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. **The general EU law principle of observance of the rights of the defence must be interpreted as meaning that where, in the context of national administrative procedures for inspection and for determining the taxable amount for value added tax purposes, a taxable person has not been allowed access to the information in the administrative file that was taken into consideration when an administrative decision imposing additional tax liabilities on that taxable person was adopted, and where the court hearing the case finds that, in the absence of that irregularity, the outcome of the procedure might have been different, that principle requires that that decision be annulled.**

2. **The principles governing the application by the Member States of the common system of value added tax (VAT), in particular the principles of fiscal neutrality and legal certainty, must be interpreted as precluding, in the event that a national tax authority merely has uncorroborated doubts about whether the economic operations giving rise to the issue of a tax invoice were actually carried out, the taxable person to which that invoice is addressed from being refused the right to deduct VAT where he is unable to produce, in addition to the invoice, other evidence that the economic operations were actually carried out.**

[Signatures]