Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

4 October 2024*

(Reference for a preliminary ruling – Taxation – Common system of value added tax (VAT) – Directive 2006/112/EC – Point 19 of Article 287 – VAT exemption scheme for small enterprises – Abusive practice by forming a new company)

In Case C-171/23,

REQUEST for a preliminary ruling under Article 267 TFEU from the Upravni sud u Zagrebu (Administrative Court, Zagreb, Croatia), made by decision of 9 March 2023, received at the Court on 20 March 2023, in the proceedings

UP CAFFE d.o.o.

v

Ministarstvo financija Republike Hrvatske,

THE COURT (Fourth Chamber),

composed of C. Lycourgos, President of the Chamber, O. Spineanu-Matei, J.-C. Bonichot (Rapporteur), S. Rodin and L.S. Rossi, Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– UP CAFFE d.o.o., by D. Galić, odvjetnica,

– the Croatian Government, by G. Vidović Mesarek, acting as Agent,

– the European Commission, by J. Jokubauskaitė and M. Mataija, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 16 May 2024,

gives the following

* Language of the case: Croatian.

Judgment

1 This request for a preliminary ruling concerns the interpretation 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 (EU) 2016/856 of 25 May 2016 (OJ 2016 L 142, p. 12) ('the VAT Directive'), and the principle of the prohibition of abusive practices.

2 The request has been made in proceedings between UP CAFFE d.o.o., a Croatian company, and the Ministarstvo financija Republike Hrvatske (Ministry of Finance of the Republic of Croatia) concerning a decision by which the latter seeks the payment of an amount of value added tax (VAT) from UP CAFFE.

Legal context

European Union law

3 Article 285 of the VAT Directive provides in the first subparagraph thereof:

'Member States which have not exercised the option under Article 14 of [the Second Council] Directive 67/228/EEC [of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes – Structure and procedures for application of the common system of value added tax (OJ, English Special Edition, Series I Volume 1967, p. 16.)] may exempt taxable persons whose annual turnover is no higher than EUR 5 000 or the equivalent in national currency.'

4 Under Article 287 of the VAT Directive:

'Member States which acceded after 1 January 1978 may exempt taxable persons whose annual turnover is no higher than the equivalent in national currency of the following amounts at the conversion rate on the day of their accession:

…

(19) Croatia: EUR 35 000.'

5 Article 1 of Council Implementing Decision (EU) 2017/1768 of 25 September 2017 authorising the Republic of Croatia to introduce a special measure derogating from Article 287 of [the VAT Directive] (OJ 2017 L 250, p. 71) provides:

'By way of derogation from point (19) of Article 287 of [the VAT Directive], Croatia is authorised to exempt from VAT taxable persons whose annual turnover is no higher than the equivalent in national currency of EUR 45 000 at the conversion rate on the day of its accession.'

6 The second subparagraph of Article 2 of Implementing Decision 2017/1768 provides that that decision shall apply from 1 January 2018 until 31 December 2020, or until the entry into force of a directive amending Articles 281 to 294 of the VAT Directive, whichever date is the earlier.

Croatian law

7 Article 9 of the Opći porezni zakon (General Tax Law) (*Narodne novine*, br. 115/16 and 106/18), entitled 'Duty of good faith', provides:

'(1) The parties to a relationship governed by tax law are required to act in good faith.

(2) Acting in good faith means acting with integrity and probity, in accordance with the law.

(3) The Minister for Finance shall lay down, by regulation, the detailed rules governing actions in good faith.'

8 Under Article 11 of that law, tax matters 'shall be established on the basis of their economic substance'.

9 Article 90 of the Zakon o porezu na dodanu vrijednost (Law on value added tax) (*Narodne novine*, br. 77/13) is worded as follows:

'(1) For the purposes of this Law, "small enterprise" shall mean a legal person having its registered office or a fixed establishment, or a natural person having his or her domicile or habitual residence, within the national territory, whose supplies of goods or services during the preceding or current calendar year did not exceed 300 000 [Croatian kuna (HRK)] [approximately EUR 39 000].

(2) The taxable person referred to in paragraph 1 of this article shall be exempt from VAT on supplies of goods and services, shall not be entitled to indicate VAT on the invoices issued and shall not be entitled to deduct input tax paid.'

Background to the dispute and the question referred

10 UP CAFFE, established in Croatia, carries on a restaurant business.

11 On 17 October 2018, the Croatian tax authority issued a tax assessment notice against UP CAFFE, in respect of the period from 1 January 2018 to 31 July 2018, concerning an amount of VAT of HRK 138 234,02 (approximately EUR 18 000), together with an amount of HRK 2 425,12 (approximately EUR 320) as interest for late payment ('the contested tax assessment notice').

12 According to the order for reference, the contested tax assessment notice is based on the result of a tax inspection determining that the formation of UP CAFFE constitutes aggressive tax planning, intended to maintain the benefit of the VAT exemption scheme laid down in Article 90 of the Law on Value Added Tax, from which the undertaking SS-UGO d.o.o., also established in Croatia, benefited, for a restaurant business, which, in reality, continues to be carried out by SS-UGO d.o.o.. The tax authority takes the view that there has been de facto no interruption of the activity of the company SS-UGO and that the formation of the new company, namely UP CAFFE, is in actual fact fictitious. The contested tax assessment notice accordingly provides for both the taxation of UP CAFFE in respect of the VAT due for that activity and the recognition of the right to deduct input VAT due or paid relating to that activity.

13 UP CAFFE challenged the legality of the contested tax assessment notice before the Upravni sud u Zagrebu (Administrative Court, Zagreb, Croatia) which is the referring court.

14 The referring court states that the national provisions which justify imposing VAT on UP CAFFE on account of an abuse of rights were not adopted until after the tax period at issue in the main proceedings and that the Ustav Republike Hrvatske (Constitution of the Republic of Croatia) prohibits the retroactive application of those provisions.

15 The referring court is uncertain, however, whether it is possible for the Croatian tax authority to rely directly on the general principle of EU law relating to the prohibition of abusive practices to justify such a charge to VAT, having regard to the principles stemming from the judgment of 18 December 2014, *Schoenimport 'Italmoda' Mariano Previti and Others* (C-131/13, C-163/13 and C-164/13, EU:C:2014:2455). That court notes that the facts of the case before it are, however, different from those which were at issue in the cases which gave rise to that judgment, in so far as the dispute before it does not concern the right of deduction, exemption from or refund of VAT but the benefit of a VAT exemption scheme.

16 In those circumstances, the Upravni sud u Zagrebu (Administrative Court, Zagreb) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Does EU law impose an obligation on the national authorities and courts to determine liability for value added tax (and not to refuse a claim for a refund) where the objective facts of the case indicate that VAT fraud has been committed through the creation of a new company, that is to say, by interrupting the continuity of the previous company's taxable activity, in the case where the taxable person knew, or ought to have known, that it was participating in such an activity, and where, at the time when the chargeable event occurred, national law did not provide for such a determination of liability?'

Consideration of the question referred

17 As a preliminary point, it should be borne in mind that Article 94 of the Rules of Procedure of the Court of Justice requires the referring court, in order to enable an interpretation of EU law that will be of use to the dispute in the main proceedings, to define the factual and legal context of the questions it is asking or, at the very least, to explain the factual circumstances on which those questions are based.

18 In the present case, the question submitted does not specifically refer to the provision of EU law to be interpreted.

19 In addition, Article 285 of the VAT Directive, to which both UP CAFFE and the Croatian Government refer in their written observations, does not appear to be relevant to the case in the main proceedings, taking account of the facts set out in the order for reference.

20 Since the provisions of Croatian law transposing the VAT Directive applied in the case in the main proceedings provide for a ceiling for the application of the VAT exemption in the amount of 300 000 HRK (approximately EUR 39 000), it appears that the relevant provisions of the VAT Directive are not a priori Article 285 of that directive, which provides for an exemption threshold of EUR 5 000, but rather, as the European Commission states, in its written observations, point 19

of Article 287 of that directive, which provides the Republic of Croatia the possibility to apply a ceiling for the VAT exemption equal to EUR 35 000, which was increased to EUR 45 000, during the tax period at issue in the main proceedings, by Implementing Decision 2017/1768.

21 Lastly, it must be stated that, although the wording of the question submitted refers to a case of fraud, it follows from the information provided by the order for reference that the question raised by that case concerns, in reality, the principle of the prohibition of abusive practices.

22 Accordingly, having regard to the presumption of relevance of questions referred for a preliminary ruling relating to EU law and to the fact that the Court has before it the factual or legal material necessary to give a useful answer to the question submitted to it (see, to that effect, judgment of 25 June 2024, *Ilva and Others*, C-626/22, EU:C:2024:542, paragraph 47 and the case-law cited), it must be held that, by its question, the referring court asks, in essence, whether the VAT Directive, read in the light of the principle of the prohibition of abusive practices, must be interpreted as meaning that, where it is established that the formation of a company constitutes an abusive practice intended to maintain the benefit of the VAT exemption scheme, laid down in point 19 of Article 287 of that directive, in respect of an activity previously carried out, under that scheme, by another company, that directive requires that the company thus formed cannot benefit from that scheme, even in the absence of specific provisions laying down the prohibition of such abusive practices in the national legal system.

23 In the first place, it follows from settled case-law of the Court that, in the sphere of VAT, an abusive practice can be found to exist only if, first, the transaction concerned, notwithstanding formal application of the conditions laid down by the relevant provisions of the VAT Directive and the national legislation transposing that directive, result in the accrual of a tax advantage the grant of which would be contrary to the purpose of those provisions and, second, it is apparent from a number of objective factors that the essential aim of that transaction is to obtain that tax advantage. The prohibition of abusive practices is not relevant where the economic activity carried out may have some explanation other than the mere attainment of tax advantages (see by analogy, judgment of 21 February 2006, *Halifax and Others*, C-255/02, EU:C:2006:121, paragraphs 74 and 75).

24 As regards the provisions of the VAT Directive which may be the subject of such abuse, it is necessary, in the present case, to include the right to the benefit of the VAT exemption scheme laid down in point 19 of Article 287 of that directive, since the option of applying that scheme has been implemented by the Republic of Croatia.

25 The Court has already held that, in so far as any refusal of a right under the VAT Directive reflects the general principle that no one may benefit from the rights stemming from the Union's legal system for abusive or fraudulent ends, such a refusal is the responsibility, in general, of the national authorities and courts, irrespective of the VAT right affected by the abuse or the fraud (see, to that effect, judgment of 18 December 2014, *Schoenimport 'Italmoda' Mariano Previti and Others*, C-131/13, C-163/13 and C-164/13, EU:C:2014:2455, paragraph 46).

26 In the present case, it is therefore for the referring court to determine whether the Croatian tax authority was right to find that the formation of UP CAFFE constitutes an abusive practice, within the meaning of the case-law recalled in paragraph 23 above, intended to maintain the benefit of the VAT exemption scheme laid down by the national provisions transposing point 19 of Article 287 of the VAT Directive.

27 It should be stated, in that regard, that, as regards the condition to obtain a tax advantage the grant of which would be contrary to the objectives pursued by the VAT exemption scheme laid down in point 19 of Article 287 of the VAT Directive, that scheme makes it possible, by the administrative simplifications which it entails, to support the creation, activities and competitiveness of small undertakings and to retain a reasonable relationship between the administrative charges connected with fiscal supervision and the small amounts of tax to be reckoned with. Thus, that scheme is aimed at sparing small undertakings and the tax authorities from such an administrative burden (judgment of 9 July 2020, *AJPF Caraş-Severin and DGRFP Timişoara*, C-716/18, EU:C:2020:540, paragraph 40).

28 Consequently, if a company is formed in order to maintain the benefit of the VAT exemption scheme, laid down in point 19 of Article 287 of the VAT Directive, in respect of an activity which appears to have been carried out previously by another company, at a time when that latter company has ceased to satisfy the conditions necessary to benefit from that scheme, which it is for the referring court to ascertain, the grant of such a tax advantage would not meet the objectives pursued by that scheme.

29 In the second place, as to the legal consequences to be inferred in the event of such an abusive practice being found, it is settled case-law that preventing possible tax evasion, avoidance and abuse is an objective recognised and encouraged by the VAT Directive (see, by analogy, judgments of 21 February 2006, *Halifax and Others*, C-255/02, EU:C:2006:121, paragraph 71, and of 18 December 2014, *Schoenimport 'Italmoda' Mariano Previti and Others*, C-131/13, C-163/13 and C-164/13, EU:C:2014:2455, paragraph 42).

30 As is apparent from paragraph 25 above, it is for the national authorities and courts to refuse the benefit of the VAT exemption scheme laid down in point 19 of Article 287 of the VAT Directive if it is established, in the light of objective factors, that the application of that scheme is being relied on for abusive ends.

31 As regards the fact, alluded to by the referring court in its question, that national law does not lay down any specific provisions relating to the prohibition of abuse of rights, it must be recalled, first, that it is for the national court to interpret the national law, so far as possible, in the light of the wording and the purpose of the VAT Directive in order to achieve the result sought by the directive, which requires that national court to do whatever lies within its jurisdiction, taking the whole body of domestic law into consideration and applying the interpretative methods recognised by that law (see, by analogy, judgment of 18 December 2014, *Schoenimport 'Italmoda' Mariano Previti and Others*, C-131/13, C-163/13 and C-164/13, EU:C:2014:2455, paragraph 52).

32 Accordingly, it is for the referring court to ascertain whether there are, in Croatian law, rules of law, whether a provision or a general principle prohibiting abuse of rights, or other provisions relating to fraud or tax avoidance which might be interpreted in accordance with the requirements of EU law in regard to combatting tax fraud (see, to that effect, judgment of 18 December 2014, *Schoenimport 'Italmoda' Mariano Previti and Others*, C-131/13, C-163/13 and C-164/13, EU:C:2014:2455, paragraph 53 and the case-law cited).

33 In the present case, it is for the referring court, therefore, to determine whether, as the Commission suggests, it would not, in any event, be conceivable to base such a refusal on the interpretation in conformity with EU law of Article 9 of the General Tax Law or of Article 11 thereof.

34 Secondly, and in any event, should it transpire that Croatian law contains no such rules which may be interpreted in accordance with the requirements of EU law, it cannot be inferred from this that the national authorities and courts would be prevented from satisfying the requirements of the VAT Directive and, accordingly, refusing a benefit derived from a right laid down by that directive in the event of an abusive practice (see, by analogy, judgment of 18 December 2014, *Schoenimport 'Italmoda' Mariano Previti and Others*, C-131/13, C-163/13 and C-164/13, EU:C:2014:2455, paragraph 54).

35 Although, in accordance with settled case-law, a directive cannot of itself impose obligations on an individual and cannot therefore be relied on as such, by the Member State, against that individual, the refusal of the benefit of a right as a result of an abusive practice is not covered by the situation envisaged by that case-law (see, to that effect, judgment of 18 December 2014, *Schoenimport 'Italmoda' Mariano Previti and Others*, C-131/13, C-163/13 and C-164/13, EU:C:2014:2455, paragraph 55).

36 Such a refusal addresses the principle, recalled in paragraph 25 above, that rules of EU law cannot be relied on for abusive ends as the application of those rules cannot be extended to cover abusive practices (see, to that effect, judgments of 18 December 2014, *Schoenimport 'Italmoda' Mariano Previti and Others*, C-131/13, C-163/13 and C-164/13, EU:C:2014:2455, paragraph 56, and of 22 November 2017, *Cussens and Others*, C-251/16, EU:C:2017:881, paragraph 27 and the case-law cited).

37 Accordingly, in so far as abusive practices cannot form the basis of a right under EU law, the refusal of a benefit under, in this case, the VAT Directive does not amount to imposing an obligation on the individual concerned under that directive, but is merely the consequence of the finding that the objective conditions required for obtaining the advantage sought, under the directive as regards that right, have, in fact, not been satisfied and that, therefore, such a refusal does not require a specific legal basis (see, by analogy, judgments of 18 December 2014, *Schoenimport 'Italmoda' Mariano Previti and Others*, C-131/13, C-163/13 and C-164/13, EU:C:2014:2455, paragraph 57, and of 22 November 2017, *Cussens and Others*, C-251/16, EU:C:2017:881, paragraph 32 and the case-law cited).

38 Consequently, such a case concerns rather the impossibility for the taxable person to claim a right under the VAT Directive, the objective criteria for the granting of which have not been satisfied because of an abusive practice affecting the transaction carried out by the taxable person itself (see, by analogy, judgment of 18 December 2014, *Schoenimport 'Italmoda' Mariano Previti and Others*, C-131/13, C-163/13 and C-164/13, EU:C:2014:2455, paragraph 58). It follows that, in the case of an abusive practice intended to benefit from the VAT exemption scheme laid down in point 19 of Article 287 of the VAT Directive, it is for the national authorities and courts to refuse the benefit thereof, even in the absence of specific national provisions to that effect (see, by analogy, judgments of 18 December 2014, *Schoenimport 'Italmoda' Mariano Previti and Others*, C-131/13, C-163/13 and C-164/13, EU:C:2014:2455, paragraph 62, and of 22 November 2017, *Cussens and Others*, C-251/16, EU:C:2017:881, paragraph 33).

39 In addition, the judgment of 5 July 2007, *Kofoed* (C-321/05, EU:C:2007:408), on which UP CAFFE relies in order to claim, nevertheless, that specific national provisions on the abuse of rights are necessary as a basis for refusing to grant the VAT exemption scheme, does not invalidate that finding. In paragraphs 38 and 48 of that judgment, the Court ruled not on the conditions for application of the principle of the prohibition of abusive practices, but on the conditions for application of a specific provision contained in a directive and enabling the Member States to

refuse the exemption laid down by that directive where the transaction concerned has tax fraud or tax avoidance as its principal objective or as one of its principal objectives. Furthermore, whilst, in paragraph 48 of that judgment, the Court placed emphasis on the existence of national rules relating to abuse of rights, tax fraud or tax avoidance that are capable of being interpreted in accordance with EU law, that case-law concerns that provision of secondary legislation and is therefore not applicable to the general principle of the prohibition of abusive practices (see by analogy, judgment of 22 November 2017, *Cussens and Others* (C-251/16, EU:C:2017:881, paragraph 38).

40 Finally, it should be added that, in the case of abusive practices, the transactions involved must be redefined so as to re-establish the situation that would have prevailed in the absence of the transactions constituting that abusive practice and that that redefinition must, however, go no further than is necessary for the correct charging of the VAT and the prevention of tax fraud (see, to that effect, judgments of 21 February 2006, *Halifax and Others*, C-255/02, EU:C:2006:121, paragraphs 92, 94 and 98; of 22 December 2010, *Weald Leasing*, C-103/09, EU:C:2010:804, paragraphs 48 and 52, and of 22 November 2017, *Cussens and Others*, C-251/16, EU:C:2017:881, paragraph 46).

41 The Court has also stated that application in the sphere of VAT of the principle of the prohibition of abusive practices entails, first, determining the situation that would have prevailed in the absence of the transactions constituting such a practice and then assessing that 'redefined' situation in the light of the relevant provisions of national law and of the VAT Directive (see by analogy, judgment of 22 November 2017, *Cussens and Others*, C-251/16, EU:C:2017:881, paragraph 47).

42 In the present case, those principles entail, at the very least, that the company whose formation constitutes an abusive practice is subject to the VAT which would have been applicable in the absence of such abuse and also benefits, if the conditions are satisfied, from the right to deduct the input VAT due or paid relating to the activity which it carries out, which it is for the referring court to ascertain.

43 In the light of the foregoing, the answer to the question referred is that the VAT Directive, read in the light of the principle of the prohibition of abusive practices, must be interpreted as meaning that, where it is established that the formation of a company constitutes an abusive practice intended to maintain the benefit of the VAT exemption scheme, laid down in point 19 of Article 287 of that directive, in respect of an activity previously carried out, under that scheme, by another company, that directive requires that the company accordingly formed cannot benefit from that scheme, even in the absence of specific provisions laying down the prohibition of such abusive practices in the national legal system.

Costs

44 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 (Fourth Chamber) hereby rules:

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, as amended by Council Directive (EU) 2016/856 of 25 May 2016, read in the light of the principle of the prohibition of abusive practices, must be interpreted as meaning that, where it is established that the formation of a company constitutes an abusive practice intended to maintain the benefit of the value added tax exemption scheme laid down in point 19 of Article 287 of that Directive 2006/112, in respect of an activity previously carried out, under that scheme, by another company, that Directive 2006/112 requires that the company accordingly formed cannot benefit from that scheme, even in the absence of specific provisions laying down the prohibition of such abusive practices in the national legal system.

[Signatures]