Reports of Cases

JUDGMENT OF THE COURT (Sixth Chamber)

13 March 2025*

(Reference for a preliminary ruling – Common system of value added tax – Directive 2006/112/EC – Right to deduct value added tax (VAT) – Sales transaction reclassified by the tax authorities as a transfer of an undertaking falling outside the scope of VAT – Failure to correct the invoice within the limitation period – Impossibility of recovering the VAT paid in respect of that transaction – Principles of effectiveness and fiscal neutrality – Reimbursement of the tax)

In Case C-640/23,

REQUEST for a preliminary ruling under Article 267 TFEU from the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice, Romania), made by decision of 26 June 2023, received at the Court on 25 October 2023, in the proceedings

Direcția Generală Regională a Finanțelor Publice Galați – Administrația Județeană a Finanțelor Publice Vrancea,

Direcția Generală de Administrare a Marilor Contribuabili

v

Greentech SA,

THE COURT (Sixth Chamber),

composed of A. Kumin, President of the Chamber, F. Biltgen (Rapporteur), President of the First Chamber, and S. Gervasoni, Judge,

Advocate General: R. Norkus,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Greentech SA, by D.-D. Dascălu and A.M. Iordache, avocați,

– the Romanian Government, by M. Chicu, E. Gane and A. Wellman, acting as Agents,

* Language of the case: Romanian.

– the European Commission, by M. Herold and T. Isacu de Groot, 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 the principles of the neutrality of value added tax (VAT), legal certainty and the protection of legitimate expectations, as well as Articles 2, 19, 168 and 203 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1; 'the VAT Directive').

2 The request has been made in proceedings between the Direcția Generală Regională a Finanțelor Publice Galați – Administrația Județeană a Finanțelor Publice Vrancea (Regional Directorate-General for Public Finances of Galați – District Administration of Public Finances of Vrancea, Romania) and the Direcția Generală de Administrare a Marilor Contribuabili (Directorate-General for the Administration of Large-Scale Taxpayers, Romania), on the one hand, and Greentech SA, on the other, concerning additional VAT liabilities and related charges which have been imposed on Greentech.

Legal context

European Union law

3 Article 2(1) of the VAT Directive provides:

'The following transactions shall be subject to VAT:

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

…'

4 Article 19 of that directive provides:

'In the event of a transfer, whether for consideration or not or as a contribution to a company, of a totality of assets or part thereof, Member States may consider that no supply of goods has taken place and that the person to whom the goods are transferred is to be treated as the successor to the transferor.

Member States may, in cases where the recipient is not wholly liable to tax, take the measures necessary to prevent distortion of competition. They may also adopt any measures needed to prevent tax evasion or avoidance through the use of this Article.'

5 Article 29 of that directive is worded as follows:

'Article 19 shall apply in like manner to the supply of services.'

6 Under Article 167 of that directive:

‘A right of deduction shall arise at the time the deductible tax becomes chargeable.’

7 Article 168 of the VAT Directive provides:

‘In so far as the goods and services are used for the purposes of the taxed transactions of a taxable person, the taxable person shall be entitled, in the Member State in which he carries out these transactions, to deduct the following from the VAT which he is liable to pay:

(a) the VAT due or paid in that Member State in respect of supplies to him of goods or services, carried out or to be carried out by another taxable person;

(b) the VAT due in respect of transactions treated as supplies of goods or services pursuant to Article 18(a) and Article 27;

(c) the VAT due in respect of intra-Community acquisitions of goods pursuant to Article 2(1)(b)(i);

(d) the VAT due on transactions treated as intra-Community acquisitions in accordance with Articles 21 and 22;

(e) the VAT due or paid in respect of the importation of goods into that Member State.’

8 Under Article 179 of that directive:

‘The taxable person shall make the deduction by subtracting from the total amount of VAT due for a given tax period the total amount of VAT in respect of which, during the same period, the right of deduction has arisen and is exercised in accordance with Article 178.

However, Member States may require that taxable persons who carry out occasional transactions, as defined in Article 12, exercise their right of deduction only at the time of supply.’

9 Article 203 of that directive provides:

‘VAT shall be payable by any person who enters the VAT on an invoice.’

Romanian law

The Tax Code

10 Under Article 3(a) of Legea nr. 571/2003 privind Codul fiscal (Law No 571/2003 establishing the Tax Code) of 22 December 2003 (*Monitorul Oficial al României*, Part I, No 927 of 23 December 2003; ‘the Tax Code’):

‘The taxes and duties governed by this Code are based on the following principles:

(a) the neutrality of fiscal measures as regards the various categories of investors and capital, as well as forms of ownership, by ensuring equal conditions for investors and for Romanian and foreign capital’.

11 Article 126(1) of the Tax Code provides:

‘For the purposes of VAT, taxable transactions in Romania are those which satisfy the following cumulative conditions:

(a) any transaction which, for the purposes of Articles 128 to 130, constitutes or is treated as a supply of goods or services made for consideration and subject to VAT’.

12 Article 128(7) of the Tax Code provides:

‘The transfer of a totality of assets or part thereof, made during the transfer of assets or, as the case may be, of liabilities, regardless of whether the transfer is made following a sale or following transactions such as a division or merger or as a contribution in kind to the capital of a company, does not constitute a supply of goods if the person to whom the assets have been transferred is a taxable person. The person to whom the assets have been transferred is considered to be the successor to the transferor with regard to the adjustment of the right of deduction provided by law.’

13 Article 145(2) of the Tax Code is worded as follows:

‘Every taxable person is entitled to deduct the tax related to purchases where these are intended for use for the following transactions:

(a) taxable transactions;

(b) transactions resulting from economic activities for which the place of supply is considered to be abroad, if the tax would have been deductible if those transactions had been carried out in Romania;

(c) transactions which are exempted under Articles 143, 144 and 144[1];

(d) transactions which are exempted under points 1 to 5 of Article 141(2)(a) and under Article 141(2)(b) if the customer or the recipient is established outside the [European] Community or if those transactions are in direct connection with goods which are to be exported outside the Community, as well as in the case of transactions carried out by intermediaries acting in the name and on behalf of another person, when those intermediaries take part in the performance of such transactions;

(e) the transactions referred to in Article 128(7) and Article 129(7), if the tax would apply to the transfer.’

The Code of Tax Procedure

14 Article 84 of Ordonanța Guvernului nr. 92/2003 privind Codul de procedură fiscală (Government Order No 92/2003 establishing the Code of Tax Procedure) (‘the Code of Tax Procedure’) provides:

‘(1) Tax returns may be corrected by the taxpayer, on his own initiative, within the limitation period laid down in respect of the right to establish tax liabilities.

(2) Tax returns may be corrected where the taxpayer becomes aware of errors in the initial return, through the filing of a corrected return.

(3) In the case of [VAT], errors that appear in VAT returns shall be corrected on the basis of the provisions of the Tax Code. Clerical errors in a [VAT] return shall be corrected on the basis of the procedure approved by order of the President of the Agenția Națională de Administrare Fiscală (National Agency for Fiscal Administration) (ANAF).

(4) Tax returns cannot be filed or corrected after the withdrawal of any reservation expressed in the subsequent review, with the exception of situations where the correction is necessary as a result of the fulfilment or non-fulfilment of a condition laid down by law, which requires correction of the taxable amount and/or of the related tax.

(5) For the purposes of this Article, "errors" shall mean errors relating to the amount of taxes, charges and contributions, taxable goods and income, or any other aspect of the taxable amount.

(6) In the event that, during a tax audit, the taxpayer files or corrects tax returns relating to the periods and taxes, charges, contributions and other income that are the subject of that tax audit, those tax returns shall not be taken into consideration by the tax authorities.'

15 Article 90 of the Code of Tax Procedure provides:

'(1) The amount of tax liabilities shall be determined subject to a subsequent review.

(2) The tax notice issued subject to a subsequent review may be cancelled or amended, on the initiative of the tax authorities or at the request of the taxpayer, on the basis of the findings of the competent tax authorities.

(3) Any reservation expressed in the subsequent review shall be withdrawn only upon expiry of the limitation period or following the tax audit carried out within the limitation period.

(4) If the taxpayer corrects tax returns under Article 84(4), any reservation expressed in the subsequent review shall take effect again.'

16 Article 91 of the Code of Tax Procedure provides:

'(1) The right of the tax authorities to establish tax liabilities shall be limited to a period of five years, unless otherwise provided by law.

(2) The limitation period laid down in respect of the right provided for in paragraph 1 shall begin to run from 1 January of the year following that in which the tax claim arose under Article 23, unless otherwise provided by law.

(3) The right to establish tax liabilities shall be limited to a period of ten years when those liabilities are the result of the commission of an act covered by criminal law.

(4) The period provided for in paragraph 3 shall run from the date of the commission of the act constituting an offence punishable as such by a final judicial decision.'

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

17 Between 23 November 2015 and 15 July 2016, Greentech was subject to a tax audit which resulted in the issuing of a tax notice imposing additional liabilities on that company in the amount of 4 388 720 Romanian lei (RON) (approximately EUR 882 352) for VAT and related charges. The imposition of those additional liabilities was the result of the reclassification, by the Romanian tax authorities, of the sale of equipment by Greenfiber International SA ('Greenfiber') to Greentech – a transaction initially regarded as a supply of goods subject to VAT giving Greentech the right to deduct the input VAT – as a transfer of a partial totality of assets between two related companies, a transaction not subject to VAT under Article 128(7) of the Tax Code.

18 Furthermore, between 28 May 2015 and 17 November 2015, Greenfiber was also subject to a tax audit which resulted in the issuing of a tax notice on 26 November 2015. As part of that audit, those authorities found that the tax treatment applied by Greenfiber and Greentech to the transfer of assets, namely that that transaction was subject to VAT, was correct and that Greenfiber had therefore correctly collected and paid the VAT relating to that transaction to the State budget.

19 As the complaint brought by Greentech against the tax notice concerning the additional VAT liabilities claimed from it was partially rejected, Greentech brought an appeal before the Curtea de Apel Ploiești (Court of Appeal, Ploiești, Romania).

20 On 26 November 2018, that court upheld Greentech's appeal, partially annulling the decision to reject that complaint ('the judgment of 26 November 2018').

21 On 12 March 2019, the Curtea de Apel Ploiești (Court of Appeal, Ploiești) also partially annulled the tax notice and the tax audit report concerning the audit carried out at Greentech.

22 The Romanian tax authorities filed an appeal against the judgment of 26 November 2018, as supplemented by the judgment of 12 March 2019, before the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice, Romania), which is the referring court.

23 On 23 November 2021, that court found that appeal to be admissible, partially quashed the judgment of 26 November 2018 and, ruling again, partially upheld Greentech's appeal, inasmuch as it annulled the contested administrative and tax measures solely with regard to the additional liabilities established for 2009 ('the judgment of 23 November 2021'). Greentech's appeal was dismissed as unfounded as to the remainder and the amount previously awarded to it in respect of costs was reduced.

24 Greentech submitted an application for revision of that judgment to the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice), arguing that it was in breach of the case-law of the Court of Justice, in particular, the judgments of 26 April 2017, *Farkas* (C-564/15, EU:C:2017:302), and of 11 April 2019, *PORR Építési Kft.* (C-691/17, EU:C:2019:327), under which the right to deduct VAT must also be recognised in cases where the transactions at issue do not fall within the scope of VAT, where it is apparent from the specific circumstances of the case that it would be impossible or extremely difficult for the person who paid the VAT to recover it without acting in breach of the principles of the neutrality of VAT and effectiveness.

25 On 31 January 2023, the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice) granted the application for revision and partially set aside the judgment of 23 November 2021 as regards the ground of appeal relating to the reclassification of the transaction concerning the sale of equipment as a transfer of assets. That court ordered that a new ruling be given in respect of that ground of appeal and heard the parties at the hearing on 9 May 2023.

26 The referring court notes, in particular, that, as the judgment of 26 November 2018 confirmed that the tax treatment reserved by Greenfiber and Greentech for the transaction at issue was correct, those companies had no valid reason to correct the invoice recording that transaction before the judgment of 23 November 2021 was delivered. Furthermore, Greenfiber could not correct that invoice until after the delivery of the latter judgment. However, on the date of that judgment, the right to correct that invoice was already time-barred, because the limitation period had expired in May 2021.

27 That court considers that the situation before it can be likened to that which gave rise to the case leading to the judgment of 26 April 2017, *Farkas* (C-564/15, EU:C:2017:302), having regard to the fact that, at least ostensibly, it is objectively impossible to recover the VAT, because Greenfiber is prevented from correcting the invoice and the VAT statement following the expiry of the limitation period provided for in that regard. That situation should also be likened to that which gave rise to the case leading to the judgment of 11 April 2019, *PORR Építési Kft.* (C-691/17, EU:C:2019:327), given that the recovery of VAT from the issuer of the invoice appears to be impossible or excessively difficult. First, the limitation period in tax matters has expired, with the result that Greenfiber cannot correct the invoices, and, secondly, the Romanian tax authorities confirmed, following the tax audit carried out at Greenfiber, that that company had correctly invoiced and paid the VAT at issue.

28 The referring court also questions whether, in the light of the interpretation of the VAT Directive, the fact that the Romanian tax authorities treated the same commercial transaction relating to equipment whose transfer gave rise to the collection of VAT in two completely different ways – that is to say, on the one hand, as a transaction subject to VAT for Greenfiber, with that equipment being bought from that company and Greentech paying the VAT to that company, and, on the other, as a transaction not subject to VAT for Greentech – is relevant.

29 In those circumstances the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Do the principles of neutrality, legal certainty and the protection of legitimate expectations, governed by the provisions of Articles 2, 19 and 168 of [the VAT Directive], read in conjunction with Article 203 thereof, preclude a refusal to recognise the right to deduct the VAT paid in respect of a sales transaction, which has subsequently been reclassified by the tax authorities as a transfer of an undertaking falling outside the scope of VAT, where the VAT has already been collected by the State budget and cannot be refunded under national legislation?’

Consideration of the question referred

30 As a preliminary point, it should be borne in mind that, in the procedure laid down by Article 267 TFEU providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to

decide the case before it. To that end, the Court should, where necessary, reformulate the questions referred to it. The Court may also find it necessary to consider provisions and principles of EU law which the national court has not referred to in its questions (see, to that effect, judgment of 7 September 2023, *Groenland Poultry*, C-169/22, EU:C:2023:638, paragraph 47 and the case-law cited).

31 In the present case, it is apparent from the request for a preliminary ruling that an essential element characterising the situation at issue in the main proceedings lies in the fact that, according to the referring court, it is now practically impossible for Greentech to obtain reimbursement of the VAT which the seller, namely Greenfiber, unduly invoiced to it and paid to the State budget. In such a situation, the principle which should be taken into particular account is the principle of effectiveness and not the principle of legal certainty or the principle of the protection of legitimate expectations.

32 Therefore, and in order to provide the referring court with an answer which will be of use to it, it should be understood that, by the question referred, that court is asking, in essence, whether Articles 168 and 203 of the VAT Directive, as well as the principles of the neutrality of VAT and effectiveness, are to be interpreted as precluding a piece of national legislation or a national administrative practice which does not allow a taxable person to obtain the deduction of the input VAT on a transaction which, following a tax audit, has been reclassified by the tax authorities as a transaction not subject to VAT, even though it appears impossible or excessively difficult for that taxable person to obtain, from the seller, reimbursement of the VAT thus unduly paid.

33 In that regard, it should be borne in mind that the right of deduction forms an integral part of the VAT scheme and, in principle, may not be limited (judgments of 15 July 2010, *Pannon Gép Centrum*, C-368/09, EU:C:2010:441, paragraph 37, and of 26 April 2017, *Farkas*, C-564/15, EU:C:2017:302, paragraph 42). The deduction rules thus established are intended to free the taxable person completely of the burden of the VAT accruing or paid in all its economic activities. The common system of VAT therefore ensures that all economic activities, whatever their purpose or results, provided that they are, in principle, themselves subject to VAT, are taxed in a neutral way (judgments of 22 February 2001, *Abbey National*, C-408/98, EU:C:2001:110, paragraph 24, and of 26 April 2017, *Farkas*, C-564/15, EU:C:2017:302, paragraph 43).

34 In the present case, it is apparent from the request for a preliminary ruling that the transaction which took place between Greenfiber and Greentech was, as regards the latter of those taxable persons, definitively classified by the Romanian tax authorities as a transaction not subject to VAT and that Greenfiber is prevented from correcting the invoice relating to that transaction and the VAT statement following the expiry of the limitation period provided for doing so.

35 In that regard, according to the case-law of the Court, in a situation such as that at issue in the main proceedings, in which a taxable person has paid an amount of VAT that was unduly invoiced, it is, in principle, for the issuer of the invoice to put that invoice in order, it being understood that, in the absence of any provision in the VAT Directive on the adjustment by the issuer of the invoice of VAT improperly charged, it is, in principle, for the Member States to lay down the conditions in which that VAT may be adjusted (judgment of 13 October 2022, *HUMDA*, C-397/21, EU:C:2022:790, paragraph 19 and the case-law cited).

36 In order to ensure neutrality of VAT, it is for the Member States to provide, in their domestic legal systems, for the possibility of adjusting any tax improperly invoiced where the person who issued the invoice shows that he or she acted in good faith (judgment of 13 October 2022, *HUMDA*, C-397/21, EU:C:2022:790, paragraph 20 and the case-law cited).

37 It is also apparent from the case-law of the Court that national legislation under which, first, the supplier who has paid the VAT to the tax authorities in error may seek to be reimbursed and, secondly, the recipient of the services may bring a civil law action against that supplier for recovery of the sums paid but not due observes the principles of the neutrality of VAT and effectiveness. Such a system enables the recipient who bore the VAT invoiced in error to obtain reimbursement of the sums unduly paid (judgment of 13 October 2022, *HUMDA*, C-397/21, EU:C:2022:790, paragraph 21 and the case-law cited).

38 If, as in the present case, reimbursement of the VAT has become impossible or excessively difficult, the principles of the neutrality of VAT and effectiveness require the Member States to provide for the instruments necessary to enable the recipient to recover the VAT which has been unduly invoiced and paid, in particular by addressing its application for reimbursement to the tax authorities directly (judgment of 13 October 2022, *HUMDA*, C-397/21, EU:C:2022:790, paragraph 22 and the case-law cited). Thus, where the seller can no longer correct the invoice relating to the transaction concerned and it is therefore impossible for the buyer to obtain reimbursement from the seller of the VAT unduly invoiced, the buyer must, according to the case-law recalled above, be able to apply directly to the tax authorities for reimbursement.

39 It must be stated, however, that, as can be seen from paragraph 45 of the judgment of 11 April 2019, *PORR Építési Kft.* (C-691/17, EU:C:2019:327), such an application for reimbursement must be distinguished from a claim for deduction of VAT, such as that at issue in the main proceedings.

40 The deduction rules are intended to free the taxable person completely of the burden of the VAT accruing or paid in all its economic activities, and the right of deduction can be exercised only in respect of taxes actually due, that is to say, the taxes corresponding to a transaction subject to VAT or paid in so far as they were due (judgment of 11 April 2019, *PORR Építési Kft.*, C-691/17, EU:C:2019:327, paragraph 36 and the case-law cited). Therefore, in the absence of a transaction subject to VAT, a taxable person cannot claim a right to deduct VAT in relation to that transaction (see, to that effect, judgment of 11 April 2019, *PORR Építési Kft.*, C-691/17, EU:C:2019:327, paragraph 37). That finding is not called into question by the fact that, in a situation such as that at issue in the main proceedings, there is no risk of loss of tax revenue.

41 As the transaction at issue in the main proceedings was definitively classified as a transaction not subject to VAT, the VAT paid by Greentech to the issuer of the invoice – Greenfiber – was not ‘due’ within the meaning of the case-law of the Court.

42 In the light of the foregoing considerations, the answer to the question referred is that Articles 168 and 203 of the VAT Directive, as well as the principles of the neutrality of VAT and effectiveness, must be interpreted as not precluding a piece of national legislation or a national administrative practice which does not allow a taxable person to obtain the deduction of the input VAT on a transaction which, following a tax audit, has been reclassified by the tax authorities as a transaction not subject to VAT, even though it appears impossible or excessively difficult for that

taxable person to obtain, from the seller, reimbursement of the VAT thus unduly paid. However, those principles require that, in such a situation, that taxable person be able to apply directly to the tax authorities for reimbursement.

Costs

43 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:

Articles 168 and 203 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, as well as the principles of the neutrality of value added tax (VAT) and effectiveness,

must be interpreted as not precluding a piece of national legislation or a national administrative practice which does not allow a taxable person to obtain the deduction of the input VAT on a transaction which, following a tax audit, has been reclassified by the tax authorities as a transaction not subject to VAT, even though it appears impossible or excessively difficult for that taxable person to obtain, from the seller, reimbursement of the VAT thus unduly paid. However, those principles require that, in such a situation, that taxable person be able to apply directly to the tax authorities for reimbursement.

[Signatures]