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Request for a preliminary ruling from the Tribunalul Bucureşti (Romania) lodged on 4 October 2019 — ITH Comercial Timişoara SRL v Agenţia Naţională de Administrare Fiscală — Direcţia Generală Regională a Finanţelor Publice Bucureşti — Agenţia Naţională de Administrare Fiscală — Direcţia Generală Regională a Finanţelor Publice Bucureşti — Administraţia Sector 1 a Finanţelor Publice

(Case C-734/19)

(2020/C 54/18)

Language of the case: Romanian

Referring court

Tribunalul Bucureşti

Parties to the main proceedings

Applicant: ITH Comercial Timişoara SRL

Defendants: Agenţia Naţională de Administrare Fiscală — Direcţia Generală Regională a Finanţelor Publice Bucureşti, Agenţia Naţională de Administrare Fiscală — Direcţia Generală Regională a Finanţelor Publice Bucureşti — Administraţia Sector 1 a Finanţelor Publice

Questions referred

1.1.

Do the provisions of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, (1) in particular Articles 167 and 168 thereof, and the principles of legal certainty, the protection of legitimate expectations, non-discrimination and tax neutrality permit or preclude that the right of a taxable person to deduct VAT in relation to certain investment expenditure which the taxable person incurs with the intention of allocating it for the purpose of carrying out of a taxable transaction should be forfeited in the event that the planned investment is subsequently abandoned?

1.2.

Do those same provisions and principles permit or preclude that the right of deduction should, in the event that the investment is abandoned, be called into question even in circumstances other than those where the taxable person is guilty of abuse or fraud?

1.3.

Do those same provisions and principles permit or preclude an interpretation to the effect that the circumstances in which the right of deduction may be called into question in the event that the investment is abandoned include:

1.3.1.

the subsequent materialisation of a risk that the investment project will not be completed, which the taxable person was aware when incurring the investment expenditure, such as the fact that a public authority has not approved an urban development plan necessary for the completion of the investment project;

1.3.2.

a change in economic circumstances over time, such that the planned investment is no longer viable as it was when the project was commenced?

1.4.

Are the provisions of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax and the general principles of EU law to be interpreted as meaning that, in the event that the investment is abandoned:

1.4.1.

there is a presumption of abuse or fraud justifying the calling into question of the right of deduction, or must the tax authorities demonstrate such abuse or fraud, and

1.4.2.

such abuse or fraud may be demonstrated by simple presumption, or is objective evidence required?

1.5.

Do the provisions of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax and the general principles of EU law permit or preclude that, in the event that the investment is abandoned, abuse or fraud justifying the calling into question of the right of deduction should be taken into consideration in circumstances where the taxable person is unable to make any use whatsoever, not even private use, of the goods or services in respect of which it has deducted VAT?

1.6.

Are the provisions of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax and the general principles of EU law to be interpreted as meaning that, in the event that the investment is abandoned, circumstances arising subsequent to the taxable person's incurring expenditure, such as (i) an economic crisis (ii) the materialisation of a risk that the investment project will not be completed that was present at the time the investment expenditure was incurred (for example, the fact that a public authority has not approved an urban development plan necessary for the completion of the investment project) or (iii) a change in the viability projections for the investment, are circumstances beyond the control of the taxable person which

may be taken into consideration in determining whether the taxable person acted in good faith?

1.7.

Are the provisions of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, in particular Articles 184 and 185, and the principles of legal certainty, the protection of legitimate expectations, non-discrimination and tax neutrality to be interpreted as meaning that the abandonment of the investment project constitutes a case requiring the adjustment of VAT?

In other words, where the right to deduct VAT relating to certain investment expenditure which the taxable person has incurred with the intention of allocating it to the carrying out of a taxable transaction is called into question, in the event that the investment is subsequently abandoned, should the VAT adjustment mechanism be applied?

1.8.

Do the provisions of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax permit or preclude national legislation which provides that the right to deduct VAT relating to investments that are abandoned is retained in two cases only, those cases being identified by summary reference to two judgments of the Court of Justice: (i) where, because of circumstances beyond the control of the taxable person, the taxable person never uses the goods or services for the purposes of its economic activity, as the Court ruled in its judgment in Case C-37/95, *Belgian State v Ghent Coal Terminal NV*, and (ii) in other cases in which purchased goods or services in respect of which the right of deduction has been exercised are not used for the purposes of the taxable person's economic activities for objective reasons beyond the taxable person's control, as the Court ruled in Case C-110/94, *Intercommunale voor zeewaterontziltling (INZO) v Belgian State*?

1.9.

Do the provisions of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, the principle of legal certainty and the principle of the protection of legitimate expectations permit or preclude that tax authorities may withdraw approvals, contained in previous tax inspection reports or in previous decisions on administrative tax appeals, recognising that:

1.9.1.

an individual has purchased goods or services with the intention of using them for the purposes of a taxable transaction;

1.9.2.

the suspension or abandonment of an investment project was brought about by a particular set of circumstances beyond the control of the taxable person?

2.1.

Do the provisions of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, in particular Article 28 thereof, permit or preclude the application of the mechanism imposing the rules governing commissioning other than in the case of an agency agreement without representation?

2.2.

Are the provisions of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, in particular Article 28 thereof, to be interpreted as meaning that the mechanism imposing the rules governing commissioning is applicable where a taxable person constructs a building in accordance with the specifications and business requirements of another legal person, with the intention of retaining ownership of the building and merely letting it once it is finished to the other legal person?

2.3.

Are the same provisions to be interpreted as meaning that, in the situation described above, the builder must invoice the investment expenditure relating to the construction of the building to the legal person to which it is to let the building once it is finished and must collect the corresponding VAT from that legal person?

2.4.

Are the same provisions to be interpreted as meaning that, in the situation described above, the builder is under an obligation to invoice the investment expenditure and collect the corresponding VAT even if it stops the construction work definitively because of a drastic reduction in the economic activity of the person to which the building was to have been let, resulting from the latter's imminent insolvency?

2.5.

Are the provisions of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax and the general principles of EU law to be interpreted as meaning that tax authorities may reclassify transactions carried out by a taxable person without having regard to the terms of the contracts which it has concluded, even if the contracts in question are not colourable?

2.6.

Do the provisions of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax and, in particular, the principle of legal certainty and the principle of the protection of legitimate expectations, permit tax authorities to withdraw approvals, contained in previous tax inspection reports or in previous decisions on administrative tax appeals, of a taxable person's right to deduct VAT, or do they preclude them from doing so?

(1) Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1).