JUDGMENT OF THE COURT (Third Chamber)

6 December 2012 (*)

(VAT – Directive 2006/112/EC – Right of deduction – Refusal)

In Case C-285/11,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Administrativen sad – Varna (Bulgaria), made by decision of 16 May 2011, received at the Court on 8 June 2011, in the proceedings

Bonik EOOD

v

Direktor na Direktsia 'Obzhalvane i upravlenie na izpalnenieto' – Varna pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite,

THE COURT (Third Chamber),

composed of R. Silva de Lapuerta (Rapporteur), acting as President of the Third Chamber, K. Lenaerts, E. Juhász, T. von Danwitz and D. Šváby, Judges,

Advocate General: J. Kokott,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 19 September 2012,

after considering the observations submitted on behalf of:

– Bonik EOOD, by O. Minchev, advokat, and M. Patchett-Joyce, Barrister,

– the Bulgarian Government, by E. Petranova, acting as Agent,

– the Italian Government, by G. Palmieri, acting as Agent, and by A. De Stefano, avvocato dello Stato,

– the United Kingdom Government, by L. Seeboruth and L. Christie, acting as Agents, and by P. Moser, Barrister,

– the European Commission, by L. Lozano Palacios and D. Roussanov, acting as Agents,

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

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 2, 9, 14, 62, 63, 167, 168 and 178 of Council Directive 2006/112/EC of 28 November 2006 on the common system

of value added tax (OJ 2006 L 347, p. 1).

2 The reference has been made in proceedings between, on the one hand, Bonik EOOD (‘Bonik’) and, on the other, the Direktor na Direktsia ‘Obzhalvane i upravlenie na izpalnenieto’ – Varna pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite (Director of the ‘Appeal and Enforcement Administration’ Directorate, Varna, at the Central Administration of the National Revenue Agency), concerning the right to make a deduction, in the form of a ‘tax credit’, of value added tax (‘VAT’) in relation to purchases of wheat made by Bonik.

Legal context

3 Article 2(1)(a) of Directive 2006/112 provides that the supply of goods for consideration within the territory of a Member State by a taxable person acting as such is to be subject to VAT.

4 Under Article 9(1) of that directive:

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

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

5 Article 62 of Directive 2006/112 provides:

‘For the purposes of this Directive:

(1) “chargeable event” shall mean the occurrence by virtue of which the legal conditions necessary for VAT to become chargeable are fulfilled;

(2) VAT shall become “chargeable” when the tax authority becomes entitled under the law, at a given moment, to claim the tax from the person liable to pay, even though the time of payment may be deferred.’

6 Under Article 63 of that directive:

‘The chargeable event shall occur and VAT shall become chargeable when the goods or the services are supplied.’

7 Article 167 of Directive 2006/112 states:

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

8 Article 168 of the 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;

...’

9 Article 178 of that 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 Articles 220 to 236 and Articles 238, 239 and 240;

...’

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

10 Bonik is a company which was the subject of a tax investigation relating to the months of February and March 2009.

11 Following that investigation, the Bulgarian tax authorities found that there was no evidence of the intra-Community supplies of wheat and sunflower declared by Bonik as having been carried out for Agrisco Srl, a company governed by Romanian law, and that, in view of the fact that, according to Bonik’s accounts, the quantities of wheat and sunflower quoted on the invoices issued by Bonik had been taken out of its stock and were not there at the time of the investigation, taxable supplies of those quantities of wheat and sunflower had been made on Bulgarian territory.

12 The tax authorities also carried out checks in connection with wheat purchases which, according to Bonik’s tax return, it had made from Favorit stroy Varna EOOD (‘Favorit stroy’) and Agro treyd BG Varna EOOD (‘Agro treyd’), in relation to which VAT had been deducted.

13 Bonik had in its possession invoices relating to those purchases, issued by Favorit stroy and by Agro treyd.

14 However, in order to check that those purchases had been genuine, the Bulgarian tax authorities carried out additional checks with Bonik’s suppliers (Favorit stroy and Agro treyd) and with their suppliers (Lyusi treyd EOOD, Eksim plyus EOOD and Riva agro stil EOOD).

15 As it was not possible through those checks to establish that Lyusi treyd EOOD, Eksim plyus EOOD and Riva agro stil EOOD had actually supplied goods to Favorit stroy and to Agro treyd, the Bulgarian tax authorities concluded that Favorit stroy and Agro treyd did not have a sufficient quantity of goods to make the supplies to Bonik and that no actual supplies had been made from those companies to Bonik.

16 By tax adjustment notice of 10 March 2010, the Bulgarian tax authorities accordingly refused Bonik the right to deduct, in the form of a ‘tax credit’, the VAT relating to the supplies of wheat carried out by Favorit stroy and Agro treyd.

17 Bonik brought an administrative appeal against that tax assessment before the Direktor na Direktsia ‘Obzhalvane i upravlenie na izpalnenieto’ – Varna pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite, which, by decision of 21 June 2010, confirmed the assessment.

18 Bonik contested the tax assessment before the Administrativen sad – Varna (Varna Administrative Court).

19 In the order for reference, the Administrativen sad – Varna states that the Bulgarian tax authorities do not dispute that Bonik subsequently carried out supplies of goods of the same type

and in the same quantity; nor do they maintain that Bonik acquired those goods from suppliers other than Favorit stroy and Agro treyd.

20 The referring court adds that there is some evidence that direct supplies were carried out and states that the lack of evidence of the preceding supplies cannot support the conclusion that those direct supplies were not carried out.

21 In that regard, the referring court specifies that the national legislation does not make the right of deduction of VAT, in the form of a tax credit, conditional upon proof of the origin of the goods.

22 The referring court relates that certain Bulgarian courts – and the tax authorities, through their practice – require proof that the preceding supplies have been carried out before they will recognise that a taxable person has a right of deduction in respect of VAT.

23 It was against that background that the Administrativen sad – Varna decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Can the concept “absence of actual supply” be inferred by interpretation from the provisions of Articles 178(a) and (b), 14, 62, 63, 167 and 168 of Directive 2006/112 and, if so, is “absence of actual supply” coextensive, as regards its definition, with the concept “tax evasion” or is it included in that concept? What does the concept “tax evasion” cover within the meaning of Directive 2006/112?

(2) In the light of the definition of “tax evasion”, and of recitals 26 and 59 in the preamble to Directive 2006/112, read in conjunction with Article 178(b) thereof, does Directive 2006/112 require that the formalities be expressly laid down by means of legislation in the form of an act of the Member State’s highest legislative body or does it allow those formalities not to be laid down by means of legislation, but to constitute an administrative (and tax investigation) practice and case-law? May formalities be introduced by legislative acts of the administrative authorities and/or by instructions of the administration?

(3) If it is a concept which differs from “tax evasion” and is not covered by the definition of the latter, does “absence of actual supply” constitute a formality as referred to in Article 178(b) of Directive 2006/112 or a measure as referred to in recital 59 thereto, the introduction of which results in refusal of the right of deduction and jeopardises the neutrality of VAT, a fundamental principle of the common system of VAT which was introduced by the relevant Community legislation?

(4) Is it permissible to lay down formalities for taxable persons according to which they must provide evidence of supplies which preceded the supply between them (that is, the final customer and his supplier) in order for the supply to be deemed to have been actually carried out, if the authority does not dispute that the persons concerned (the final suppliers) have carried out downstream supplies of the same goods in the same quantities to downstream customers?

(5) Under the common system of VAT and the provisions of Articles 168 and 178 of Directive 2006/112, is the right of the trader to recognition of VAT payments in respect of a given transaction:

(a) to be assessed solely in relation to the specific transaction to which the trader is party, having regard to the trader’s intention to be a party to the transaction, and/or

(b) to be assessed taking account of all transactions, including upstream and downstream

transactions, which form a supply chain of which the transaction in question is part, having regard to the intentions of the other parties in the chain, which the trader does not know and/or about which he cannot find out, or to the acts and/or omissions of the issuer of the invoice and of the other parties in the chain, namely his upstream suppliers, whom the person to whom the supply is made cannot control and of whom he cannot demand particular conduct, and/or

(c) to be assessed taking account of fraudulent acts and intentions of other parties in the chain, of whose participation the trader did not know and about whose acts or intentions it cannot be established whether he was able to find out, regardless of whether those acts or intentions date from before or after a given transaction?

(6) Depending on the answer to Question 5: Are transactions such as those at issue in the main proceedings to be regarded as supplies for consideration as referred to in Article 2 of Directive 2006/112 or as part of the taxable person's economic activity within the meaning of Article 9(1) of the Directive?

(7) Is it permissible for transactions such as those at issue in the main proceedings, which were properly documented and declared for VAT purposes by the supplier, in respect of which the customer has in fact acquired the right of ownership of the goods invoiced and there are no indications as to whether he actually received the goods from a person who was not the issuer of the invoice, not to be regarded as supplies for consideration as referred to in Article 2 of Directive 2006/112 merely because the supplier was not found at the address indicated and did not produce the documents requested during the tax investigation or did not provide evidence to the tax authorities for all the circumstances under which the supplies were carried out, including the origin of the goods sold?

(8) Does it constitute a permissible measure for the purposes of ensuring the collection of tax and preventing tax evasion that the right of deduction is made dependent on the conduct of the supplier and/or his upstream suppliers?

(9) Depending on the answers to Questions 2, 3 and [4]: Do measures of the tax authorities such as those at issue in the main proceedings, which lead to exclusion of the VAT arrangements in relation to the transactions concluded by a bona fide trader, infringe the principles of Community law of proportionality, equal treatment and legal certainty?

(10) Depending on the answers to the above questions: In circumstances such as those of the main proceedings, does the person to whom the supplies are made have a right to deduct the tax invoiced to him by the suppliers?'

The questions referred for a preliminary ruling

24 By its questions, which should be examined together, the referring court asks, in essence, whether Directive 2006/112 and the principles of proportionality, equal treatment and legal certainty must be interpreted as meaning that, in circumstances such as those of the case before the referring court, a taxable person may not be refused the right to deduct VAT in relation to a supply of goods on the ground that, in view of factors relating to transactions upstream of that supply, the supply is considered not to have actually taken place.

25 It should be borne in mind that, according to settled case-law, the right of taxable persons to deduct VAT due or already paid on goods purchased and services received as inputs from the VAT which they are liable to pay is a fundamental principle of the common system of VAT established by the relevant EU legislation (see Joined Cases C-80/11 and C-142/11 *Mahagében and Dávid* [2012] ECR, paragraph 37 and the case-law cited).

26 In that regard, the Court has consistently held that the right of deduction provided for in Article 167 et seq. of Directive 2006/112 is an integral part of the VAT scheme and in principle may not be limited. In particular, the right of deduction is exercisable immediately in respect of all the taxes charged on transactions relating to inputs (see Joined Cases C-110/98 to C-147/98 *Gabalfrisa and Others* [2000] ECR I-1577, paragraph 43; Case C-63/04 *Centralan Property* [2005] ECR I-11087, paragraph 50; Joined Cases C-439/04 and C-440/04 *Kittel and Recolta Recycling* [2006] ECR I-6161, paragraph 47; and *Mahagében and Dávid*, paragraph 38).

27 The deduction system is intended to relieve the trader entirely of the burden of the VAT payable or paid in the course of all his economic activities. The common system of VAT consequently ensures neutrality of taxation of all economic activities, whatever the purpose or results of those activities, provided that they are themselves subject to VAT (see Case 268/83 *Rompelman* [1985] ECR 655, paragraph 19; Case C-37/95 *Ghent Coal Terminal* [1998] ECR I-1, paragraph 15; *Gabalfrisa and Others*, paragraph 44; Case C-32/03 *Fini H* [2005] ECR I-1599, paragraph 25; Case C-255/02 *Halifax and Others* [2006] ECR I-1609, paragraph 78; *Kittel and Recolta Recycling*, paragraph 48; Case C-438/09 *Dankowski* [2010] ECR I-14009, paragraph 24; and *Mahagében and Dávid*, paragraph 39).

28 The question whether the VAT payable on the prior or subsequent sales of the goods concerned has or has not been paid to the public purse is irrelevant to the right of the taxable person to deduct input VAT. VAT applies to each transaction by way of production or distribution after deduction of the VAT directly borne by the various cost components (see Joined Cases C-354/03, C-355/03 and C-484/03 *Optigen and Others* [2006] ECR I-483, paragraph 54; *Kittel and Recolta Recycling*, paragraph 49; and *Mahagében and Dávid*, paragraph 40).

29 In addition, it is apparent from the wording of Article 168(a) of Directive 2006/112 that, in order to have a right of deduction, it is necessary, first, that the interested party be a taxable person within the meaning of that directive and, second, that the goods or services relied on to give entitlement to that right be used by the taxable person for the purposes of his own taxed output transactions, and that, as inputs, those goods or services must be supplied by another taxable person (see *Centralan Property*, paragraph 52, and Case C-324/11 *Tóth* [2012] ECR, paragraph 26).

30 In the present case, it appears from the order for reference that the parties concerned by the supplies of goods at issue in the main proceedings – namely, Bonik and its suppliers – are taxable persons within the meaning of Directive 2006/112.

31 In order to be able to conclude that there is a right of deduction, as relied upon by Bonik on the basis of those supplies of goods, it is necessary to check whether those supplies have actually been carried out and whether the goods in question were used by Bonik for the purposes of its taxed transactions.

32 However, it should be borne in mind that, in proceedings brought under Article 267 TFEU, the Court has no jurisdiction to check or to assess the factual circumstances of the case before the referring court. It is therefore for the national court, in accordance with the rules of evidence of national law, to carry out an overall assessment of all the facts and circumstances of the case in

order to establish whether Bonik may exercise a right of deduction on the basis of those supplies of goods (see, to that effect, Case C-273/11 *Mecsek-Gabona* [2012] ECR, paragraph 53).

33 If that assessment discloses that the supplies of goods at issue in the main proceedings have actually been carried out and that those goods were used by Bonik for the purposes of its own taxed output transactions, Bonik cannot, in principle, be refused the right of deduction.

34 In that regard, the referring court states that the Bulgarian tax authorities do not claim that Bonik acquired the goods in question from suppliers other than Favorit stroy and Agro treyd, and that there is some evidence that direct supplies were carried out. It also notes that the tax authorities do not dispute that Bonik carried out subsequent supplies of goods of the same type as those in question and in the same quantity.

35 That being so, it must also be borne in mind that the prevention of tax evasion, avoidance and abuse is an objective recognised and encouraged by Directive 2006/112 (see, inter alia, *Halifax and Others*, paragraph 71; *Kittel and Recolta Recycling*, paragraph 54; Case C-285/09 *R* [2010] ECR I-12605, paragraph 36; Case C-504/10 *Tanoarch* [2011] ECR I-10853, paragraph 50; and *Mahagében and Dávid*, paragraph 41).

36 In that connection, the Court has held that EU law cannot be relied on for abusive or fraudulent ends (see, inter alia, *Fini H*, paragraph 32; *Halifax and Others*, paragraph 68; *Kittel and Recolta Recycling*, paragraph 54; and *Mahagében and Dávid*, paragraph 41).

37 It is therefore for the national courts and judicial authorities to refuse the right of deduction, if it is shown, in the light of objective factors, that that right is being relied on for fraudulent or abusive ends (see *Fini H*, paragraph 34; *Kittel and Recolta Recycling*, paragraph 55; and *Mahagében and Dávid*, paragraph 42).

38 That is the position where a tax fraud is committed by the taxable person himself. In such a case, the objective criteria which form the basis of the concepts of ‘supply of goods or services effected by a taxable person acting as such’ and ‘economic activity’ are not met (see *Halifax and Others*, paragraphs 58 and 59, and *Kittel and Recolta Recycling*, paragraph 53).

39 By the same token, a taxable person who knew, or should have known, that, by his purchase, he was taking part in a transaction connected with VAT fraud must, for the purposes of Directive 2006/112, be regarded as a participant in that fraud, whether or not he profits from the resale of the goods or the use of the services in the context of the taxable transactions subsequently carried out by him (see, to that effect, *Kittel and Recolta Recycling*, paragraph 56, and *Mahagében and Dávid*, paragraph 46).

40 It follows that a taxable person cannot be refused the right of deduction unless it is established on the basis of objective factors 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 VAT fraud committed by the supplier or by another trader acting upstream or downstream in the chain of supply of those goods or services (see, to that effect, *Kittel and Recolta Recycling*, paragraphs 56 to 61, and *Mahagében and Dávid*, paragraph 45).

41 On the other hand, it is incompatible with the rules governing the right of deduction under Directive 2006/112 to impose a penalty, in the form of refusal of that right, on a taxable person who did not know, and could not have known, that the transaction concerned was connected with fraud committed by the supplier or that another transaction forming part of the chain of supply, downstream or upstream of the transaction carried out by the taxable person, was vitiated by VAT

fraud (see, to that effect, *Optigen and Others*, paragraphs 52 and 55; *Kittel and Recolta Recycling*, paragraphs 45, 46 and 60; and *Mahagében and Dávid*, paragraph 47).

42 The establishment of a system of strict liability would go beyond what is necessary to preserve the public exchequer's rights (see *Mahagében and Dávid*, paragraph 48).

43 Consequently, since the refusal of the right of deduction is an exception to the application of the fundamental principle constituted by that right, it is incumbent upon the competent tax authorities to establish, to the requisite legal standard, the objective evidence needed to substantiate the conclusion that the taxable person knew, or should have known, that the transaction relied on as a basis for the right of deduction was connected with fraud committed by the supplier or by another trader acting upstream or downstream in the chain of supply (see *Mahagében and Dávid*, paragraph 49).

44 It follows that, if the referring court were to find that the supplies of goods at issue in the case before it had actually been carried out and that Bonik had subsequently used those goods for the purposes of its taxed transactions, it would be for that court subsequently to determine whether the tax authorities concerned had established the existence of objective evidence to the effect described above.

45 In those circumstances, the answer to the questions referred is that Articles 2, 9, 14, 62, 63, 167, 168 and 178 of Directive 2006/112 must be interpreted as meaning that, in circumstances such as those of the case before the referring court, a taxable person may not be refused the right to deduct VAT in relation to a supply of goods on the ground that, in view of fraud or irregularities committed upstream or downstream of that supply, the supply is considered not to have actually taken place, where it has not been established on the basis of objective evidence that the taxable person knew, or should have known, that the transaction relied on as a basis for the right of deduction was connected with VAT fraud committed upstream or downstream in the chain of supply – a matter which it is for the referring court to determine.

Costs

46 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national 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 (Third Chamber) hereby rules:

Articles 2, 9, 14, 62, 63, 167, 168 and 178 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning that, in circumstances such as those of the case before the referring court, a taxable person may not be refused the right to deduct VAT in relation to a supply of goods on the ground that, in view of fraud or irregularities committed upstream or downstream of that supply, the supply is considered not to have actually taken place, where it has not been established on the basis of objective evidence that the taxable person knew, or should have known, that the transaction relied on as a basis for the right of deduction was connected with VAT fraud committed upstream or downstream in the chain of supply – a matter which it is for the referring court to determine.

[Signatures]

* Language of the case: Bulgarian.