JUDGMENT OF THE COURT (Third Chamber)

31 January 2013 (*)

(Taxation – VAT – Directive 2006/112/EC – Principle of fiscal neutrality – Right of deduction – Refusal – Article 203 – Entering of the VAT on the invoice – Chargeability – Existence of a taxable transaction – Identical determination in respect of the issuer of the invoice and its recipient – Necessity)

In Case C-643/11,

REQUEST for a preliminary ruling under Article 267 TFEU from the Administrativen sad Varna (Bulgaria), made by decision of 2 December 2011, received at the Court on 15 December 2011, in the proceedings

LVK – 56 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, acting for the President of the Third Chamber, K. Lenaerts, G. Arestis, J. Malenovský and T. von Danwitz (Rapporteur), Judges,

Advocate General: P. Cruz Villalón,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– LVK – 56 EOOD, by P. Bakalova, advokat,

– Direktor na Direktsia 'Obzhalvane i upravlenie na izpalnenieto' – Varna pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite, by S. Zlateva, acting as Agent,

– the Bulgarian Government, by T. Ivanov and D. Drambozova, acting as Agents,

– 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 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).

2 The request has been made in proceedings between LVK – 56 EOOD (‘LVK’) and the Direktor na Direktsia ‘Obzhalvane i upravlenie na izpalnenieto’ – Varna pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite (Director of the Appeals and Enforcement Management Directorate, Varna, at the Central Administration of the National Revenue Agency) concerning the latter’s refusal to allow the right to deduct value added tax (‘VAT’) on the ground that it was not established that the input transactions actually took place.

Legal context

European Union law

3 According to recital 39 in the preamble to Directive 2006/112, the ‘rules governing deductions should be harmonised to the extent that they affect the actual amounts collected. The deductible proportion should be calculated in a similar manner in all the Member States.’

4 Under Article 2(1)(a) and (c) of that directive, the supply of goods and services for consideration within the territory of a Member State by a taxable person acting as such is to be subject to VAT.

5 Article 62 of the directive 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 Article 63 of Directive 2006/112 provides that ‘[t]he chargeable event shall occur and VAT shall become chargeable when the goods or the services are supplied’.

7 Article 73 of the directive provides that ‘[i]n respect of the supply of goods or services, other than as referred to in Articles 74 to 77, the taxable amount shall include everything which constitutes consideration obtained or to be obtained by the supplier, in return for the supply, from the customer or a third party, including subsidies directly linked to the price of the supply’.

8 Under Article 167 of the directive, ‘[a] right of deduction shall arise at the time the deductible tax becomes chargeable’.

9 Article 168(a) of Directive 2006/112 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’.

10 Article 178 of the 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;

…’

11 Under the first paragraph of Article 179 of the directive, ‘[t]he 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’.

12 In Section 1 (‘Persons liable for payment of VAT to the tax authorities’) of Chapter 1 (‘Obligation to pay’) of Title XI (‘Obligations of taxable persons and certain non-taxable persons’), Article 203 of the directive states:

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

13 Article 273 of the directive, which is in Chapter 7 (‘Miscellaneous provisions’) of Title XI, provides:

‘Member States may impose other obligations which they deem necessary to ensure the correct collection of VAT and to prevent evasion, subject to the requirement of equal treatment as between domestic transactions and transactions carried out between Member States by taxable persons and provided that such obligations do not, in trade between Member States, give rise to formalities connected with the crossing of frontiers.

The option under the first paragraph may not be relied upon in order to impose additional invoicing obligations over and above those laid down in Chapter 3.’

14 Under Article 395(1) to (3) of the directive:

‘1. The Council, acting unanimously on a proposal from the Commission, may authorise any Member State to introduce special measures for derogation from the provisions of this Directive, in order to simplify the procedure for collecting VAT or to prevent certain forms of tax evasion or avoidance.

Measures intended to simplify the procedure for collecting VAT may not, except to a negligible extent, affect the overall amount of the tax revenue of the Member State collected at the stage of final consumption.

2. A Member State wishing to introduce the measure referred to in paragraph 1 shall send an application to the Commission and provide it with all the necessary information. If the Commission considers that it does not have all the necessary information, it shall contact the Member State concerned within two months of receipt of the application and specify what additional information is required.

Once the Commission has all the information it considers necessary for appraisal of the request it shall within one month notify the requesting Member State accordingly and it shall transmit the request, in its original language, to the other Member States.

3. Within three months of giving the notification referred to in the second subparagraph of

paragraph 2, the Commission shall present to the Council either an appropriate proposal or, should it object to the derogation requested, a communication setting out its objections.'

Bulgarian law

15 Under Article 70(5) of the Bulgarian Law on value added tax (Zakon za danak varhu dobavenata stoynost, DV No 63 of 4 August 2006), in the version applicable to the dispute in the main proceedings ('the ZDDS'), '[a] right to deduct input VAT cannot be claimed if that VAT has been improperly invoiced'.

16 According to Article 71(1) of the ZDDS, the taxable person exercises his right to deduct the tax credit when he is in possession of a tax document drawn up in accordance with the requirements of Articles 114 and 115, in which the VAT is entered separately in relation to the goods or services supplied to the taxable person.

17 Article 82(1) of the ZDDS provides that the 'tax shall be payable by a taxable person registered in accordance with this Law who is the supplier of a taxable supply …'.

18 Under Article 85 of the ZDDS, VAT is payable by any person who enters VAT on a tax document referred to in Article 112 of the ZDDS, that is to say, inter alia, on an invoice.

19 Article 113(1) and (2) of the ZDDS states:

'(1) Any taxable supplier who carries out a supply of goods or services or who receives a payment in advance to that end shall issue an invoice corresponding to that transaction, except where the transaction is recorded in the document referred to in Article 117.

(2) The invoice shall be issued at least in duplicate, for the supplier and for the recipient.'

20 According to Article 115(1) of the ZDDS, the supplier is obliged to issue a note in relation to the invoice in the event of amendment of the taxable amount of a transaction or of cancellation of a transaction for which an invoice has been issued.

21 Article 116 of the ZDDS states:

'(1) Corrections and additions in invoices and notes relating thereto are not permitted. Documents containing errors or corrections must be cancelled and new documents must be issued.

…

(3) Invoices issued and notes relating thereto on which tax has been entered, although it should not have been, shall also be considered to be documents containing an error.

(4) If documents containing errors or corrections are included in the accounts of the supplier or the recipient of supplies, a statement regarding its cancellation must also be drawn up for each of the parties, which includes the following:

1. the reason for the cancellation;

2. the number and date of the cancelled document;

3. the number and date of the new document issued;

4. the signatures of the persons who have drawn up the statement for each of the parties.

…’

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

22 LVK, an agricultural producer, deducted in September and October 2007 input VAT resulting from several invoices relating to the supply of goods, issued respectively by REYA – 96 OOD (‘REYA’) and SITI GRUP 76 DZZD (‘SITI GRUP’) which, since that time, have ceased to be registered as taxable persons for VAT. All those invoices were paid in cash and recorded in LVK’s accounts. It is also not disputed that the supplies concerned are entered in the sales ledgers of those suppliers.

23 The tax authorities carried out cross-checks on the two suppliers. During those checks, they required the submission of a number of documents concerning, in particular, the origin of the goods delivered and performance of the delivery. The suppliers did not reply within the prescribed time-limit.

24 Following a request of the tax authorities to provide evidence that the supplies of goods at issue had actually been carried out, LVK submitted delivery notes, weight certificates and consignment notes, which, however, contained mistakes.

25 The tax authorities concluded that it was not established that the invoiced supplies had been carried out, and therefore the VAT had been improperly entered on the invoices at issue. They therefore sent LVK a tax adjustment notice dated 20 December 2010 refusing the deduction of the VAT resulting from those invoices (‘the tax adjustment notice at issue’).

26 Following confirmation of the tax adjustment notice at issue by the Direktor na Direktsia ‘Obzhalvane i upravlenie na izpalnenieto’ – Varna pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite by decision of 18 February 2011, LVK brought an action before the Administrativen sad Varna (Administrative Court, Varna), submitting that the invoices at issue corresponded to actual supplies of goods and that there was thus no basis for refusing the right of deduction.

27 During the main proceedings, two tax adjustment notices addressed to REYA and SITI GRUP respectively were placed in the case file. Those notices were drawn up prior to the tax adjustment notice at issue and relate to the period in question in the main proceedings. It is apparent from those notices that the tax authorities found that there was no need to adjust the basis of assessment and the VAT invoiced for the supplies carried out by REYA and SITI GRUP.

28 The referring court points out that it needs to determine whether the existence of the chargeable event for the input VAT is sufficiently established, given that the tax authorities based the refusal of the right of deduction on the fact that LVK’s suppliers did not submit the documents required and that, in the documents submitted by LVK as recipient of the supplies at issue, certain information was either missing or entered incorrectly. In order to make that determination, the referring court wishes to ascertain, from the point of view of European Union law, what the significance is of the tax adjustment notices addressed to LVK’s suppliers and whether it is possible to infer from them that the tax authorities acknowledged that the invoices at issue corresponded to taxable transactions which were actually carried out.

29 In those circumstances, the Administrativen sad Varna decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Does Article 203 of [Directive 2006/112] cover all cases of incorrectly charged VAT,

including cases in which an invoice showing VAT was issued without a chargeable event having occurred? If the answer to that question is in the affirmative, do Articles 203 and 273 require the Member States to lay down express rules to the effect that VAT shown on an invoice in respect of which no supply has taken place is payable, or is it sufficient for them to transpose the general rule in the directive to the effect that that tax is payable by any person who enters it on an invoice?

(2) In the light of recital 39 in the preamble to Directive 2006/112 and with a view to ensuring the accuracy of deductions of input tax, do Articles 73, 179 and 203 of Directive 2006/112 require that, where VAT is shown on an invoice without a chargeable event having occurred, the revenue authorities must correct the taxable amount and the tax charged?

(3) Can the special measures provided for in Article 395 of Directive 2006/112 consist in a tax practice such as that in the main proceedings, whereby, for the purposes of verifying deductions of input tax, the revenue authorities check only the deduction made, while the tax on the output supplies is regarded as being necessarily payable solely because it was shown on an invoice? If that question is answered in the affirmative, is it permissible under Article 203 of Directive 2006/112 – and, if so, in what circumstances – for VAT on the same transaction to be collected once from the provider of the goods or services, because he entered the tax on an invoice, and a second time from the purchaser of the goods or recipient of the services, inasmuch as he is refused the right of deduction?

(4) Is a tax practice such as that in the main proceedings – whereby the purchaser of taxable goods or the recipient of taxable services is refused the right to deduct input tax on the ground that there is “no evidence that the supply took place”, without any account being taken of findings already made to the effect that a right to claim tax has accrued against the provider of the goods or services and that the tax is payable by him, bearing in mind that, up to the point at which the accrual of the right to deduct input tax was evaluated, the tax adjustment notice in question had not been altered and no reason to alter it in the manner prescribed by the State had emerged or been established – in breach of the non-cumulative nature of VAT and at odds with the principles of legal certainty, equal treatment and fiscal neutrality?

(5) Is it permissible under Articles 167 and 168(a) of Directive 2006/112 for the purchaser of taxable goods or the recipient of taxable services, who fulfils all the conditions laid down in Article 178 of the directive, to be refused the right to deduct input tax after a tax adjustment notice which was issued to the provider of the goods or services and has become final did not correct the VAT charged on that supply because “no chargeable event occurred”, but, rather, the right to claim tax was recognised as having accrued and was taken into consideration in determining the net tax due for the tax period in question? Is it relevant to the answer to that question that the provider of the goods or services did not submit any accounting documents during the tax audit and that the net tax due for that period was determined solely by reference to the information given in the VAT declarations and in the sales and purchase ledgers?

(6) Depending on the answers to the above questions, are Articles 167 and 168(a) of Directive 2006/112 to be interpreted as meaning that, in circumstances such as those in the main proceedings, the neutrality of VAT requires that a taxable person must be able to deduct the tax charged on supplies made to him?’

Consideration of the questions referred

Questions 1 and 2

30 By its first and second questions, the referring court asks, in essence, whether Article 203 of Directive 2006/112 must be interpreted as meaning that the VAT entered by a person on an

invoice is payable by him regardless of whether a taxable transaction actually exists, and whether it can be inferred from the mere fact that the tax authorities did not correct, in a tax adjustment notice addressed to the issuer of that invoice, the VAT declared by the latter that those authorities have acknowledged that the invoice corresponded to an actual taxable transaction.

31 It should be noted first of all that, whilst relating to the existence of a tax debt owed to the tax authorities by the issuer of an invoice, the questions are raised in proceedings between those authorities and the recipient of the contested invoices. Those proceedings relate to the latter's right to deduct the VAT entered on the invoices submitted, which was refused on the ground that the invoices did not correspond to actual taxable transactions, a fact which is disputed by the taxable person.

32 In those proceedings, to which the issuer of the contested invoices is not a party, the obligations owed by the issuer to the tax authorities are relevant only indirectly, in that a tax adjustment notice addressed to it was adduced as evidence that the taxable transactions actually existed.

33 The Court has held in relation to the provision that was the predecessor of Article 203 of Directive 2006/112, namely Article 21(1)(c) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1), as amended by Council Directive 91/680/EEC of 16 December 1991 (OJ 1991 L 376, p. 1), that, according to that provision, any person who mentions VAT on an invoice or other document serving as invoice is liable to pay that tax. In particular, those persons are liable to pay VAT mentioned on an invoice independently of any obligation to pay it on account of there being a transaction subject to VAT (see Case C-566/07 *Stadeco* [2009] ECR I-5295, paragraph 26 and the case-law cited).

34 It is true that, in accordance with Articles 167 and 63 of Directive 2006/112, the right to deduct VAT invoiced is linked, as a general rule, to the actual performance of a taxable transaction (see Case C-536/03 *António Jorge* [2005] ECR I-4463, paragraphs 24 and 25) and the exercise of that right does not extend to VAT which is payable, under Article 203 of the directive, solely because it is entered on the invoice (see, inter alia, Case C-342/87 *Genius* [1989] ECR 4227, paragraphs 13 and 19, and Case C-35/05 *Reemtsma Cigarettenfabriken* [2007] ECR I-2425, paragraph 23).

35 However, the risk of loss of tax revenue is not in principle completely eliminated as long as the recipient of an invoice incorrectly showing VAT could still use it for the purposes of such deduction under Article 178(a) of Directive 2006/112 (see, to that effect, *Stadeco*, paragraph 29).

36 Accordingly, the obligation under Article 203 of that directive seeks to eliminate the risk of loss of tax revenue which the right of deduction provided for in Article 167 et seq. of the directive might entail (see *Stadeco*, paragraph 28).

37 Having regard to that objective, the aforesaid obligation is limited by the possibility, to be provided for by the Member States in their national legal systems, of correcting any tax improperly invoiced where the issuer of the invoice shows that he acted in good faith or where he has, in sufficient time, wholly eliminated the risk of any loss of tax revenue (see, to that effect, *Genius*, paragraph 18; Case C-454/98 *Schmeink & Cofreth and Strobel* [2000] ECR I-6973, paragraphs 56 to 61 and 63; and Joined Cases C-78/02 to C-80/02 *Karageorgou and Others* [2003] ECR I-13295, paragraph 50).

38 In the light, first, of that possibility of correction and, second, of the risk that the invoice incorrectly showing VAT could be used for the purpose of exercising the right of deduction, the

obligation provided for in Article 203 of Directive 2006/112 cannot be regarded as conferring on the payment due the character of a penalty.

39 Moreover, it follows from the foregoing that, to the extent that the issuer of an invoice does not rely on one of the cases in which improperly invoiced VAT can be corrected, referred to in paragraph 37 above, the tax authorities are not obliged, in the context of a tax audit of that person, to determine whether the VAT invoiced and declared corresponds to taxable transactions which were actually carried out by him.

40 In the absence of such an obligation, it cannot be inferred from the mere fact that the tax authorities did not correct the VAT declared by the issuer of the invoice that they have acknowledged that the invoices issued by him corresponded to actual taxable transactions.

41 However, European Union law does not preclude the competent authority from checking the existence of the transactions invoiced by a taxable person and rectifying, where necessary, the tax debt resulting from the declarations made by the taxable person. The outcome of such a check is, like the declaration and the payment, by the issuer of the invoice, of invoiced VAT, one factor to be taken into account by the national court when assessing whether a taxable transaction conferring the right of deduction on the recipient of an invoice in a specific case exists.

42 In the light of the foregoing, the answer to the first and second questions is that Article 203 of Directive 2006/112 must be interpreted as meaning that:

– the VAT entered by a person on an invoice is payable by him regardless of whether a taxable transaction actually exists;

– it cannot be inferred from the mere fact that the tax authorities did not correct, in a tax adjustment notice addressed to the issuer of that invoice, the VAT declared by the latter that those authorities have acknowledged that the invoice corresponded to an actual taxable transaction.

The first part of Question 3

43 In view of the answer given to the first and second questions, there is no need to answer the first part of the third question.

The second part of Question 3 and Questions 4 to 6

44 By the second part of the third question and the fourth, fifth and sixth questions, the referring court asks, in essence, whether European Union law must be interpreted as meaning that Articles 167 and 168(a) of Directive 2006/112 and the principles of fiscal neutrality, legal certainty and equal treatment preclude the recipient of an invoice from being refused the right to deduct input VAT even though, in the tax adjustment notice addressed to the issuer of that invoice, the VAT declared by the latter was not adjusted.

45 This raises the question whether European Union law requires the issue as to whether a supply of goods or services actually exists to be determined identically in respect of the issuer of the invoice and its recipient.

46 So far as concerns the treatment of VAT that has been improperly invoiced because there is no taxable transaction, it follows from Directive 2006/112 that the two traders involved are not necessarily treated identically in so far as the issuer of the invoice has not corrected it, as is apparent from paragraphs 33 to 37 above.

47 On the one hand, the issuer of an invoice is liable to pay the VAT entered on that invoice

even if there is no taxable transaction, in accordance with Article 203 of Directive 2006/112. On the other hand, exercise of the right of deduction by the recipient of an invoice is limited solely to tax corresponding to a transaction subject to VAT, in accordance with Articles 63 and 167 of that directive.

48 In such a situation, compliance with the principle of fiscal neutrality is ensured by the possibility, to be provided for by the Member States and noted in paragraph 37 above, of correcting any tax improperly invoiced where the issuer of the invoice shows that he acted in good faith or where he has, in sufficient time, wholly eliminated the risk of any loss of tax revenue.

49 Having regard to the issues raised in the order for reference, it should be pointed out that recourse to such a possibility must not be rendered unfeasible by the tax authorities systematically arranging their audits in such a way that a tax adjustment notice is first sent to the issuer of an invoice and, in some cases, even becomes final before the recipient of the invoice is audited. Likewise, that possibility cannot be precluded merely because, at the time of the correction, the issuer of the invoice is no longer registered as a taxable person for VAT.

50 It follows that Articles 167 and 168(a) of Directive 2006/112 and the principle of fiscal neutrality do not preclude the recipient of an invoice from being refused deduction of input VAT because there is no taxable transaction, even though, in the tax adjustment notice addressed to the issuer of the invoice, the VAT declared by the latter was not adjusted.

51 As regards the principle of legal certainty, that principle, which is one of the general principles of European Union law, requires that rules of law be clear and precise and predictable in their effect, so that interested parties can ascertain their position in situations and legal relationships governed by European Union law (see Case C-81/10 P *France Télécom* v *Commission* [2011] ECR I-12899, paragraph 100 and the case-law cited).

52 In the case of the tax rules applicable in circumstances such as those of the main proceedings, there is, however, no reason to assume that the interested party was not able to effectively ascertain its position with respect to the application of those rules.

53 Therefore, the principle of legal certainty likewise does not preclude the refusal at issue to deduct input VAT in circumstances such as those referred to in paragraph 50 above.

54 The same applies as regards the principle of equal treatment.

55 The general principle of equal treatment, of which the principle of fiscal neutrality is the reflection in matters relating to VAT (see Case C-309/06 *Marks & Spencer* [2008] ECR I-2283, paragraph 49; Case C-174/08 *NCC Construction Danmark* [2009] ECR I-10567, paragraphs 41 and 44; and Joined Cases C-259/10 and C-260/10 *The Rank Group* [2011] I-10947, paragraph 61), requires similar situations not to be treated differently unless differentiation is objectively justified (see *Marks & Spencer*, paragraph 51; *NCC Construction Danmark*, paragraph 44; and Case C-285/10 *Campsa Estaciones de Servicio* [2011] ECR I-5059, paragraph 29).

56 However, as is pointed out in paragraphs 33 to 37 and 46 and 47 above, it follows from Directive 2006/112 that the issuer and recipient of an invoice relating to a supply which has in actual fact not been carried out are not in a comparable situation.

57 So far as concerns the main proceedings, it is apparent from the order for reference that the tax authorities inferred that there was no taxable supply from, in particular, the fact that the supplier did not submit the documents required during a tax audit. Since that conclusion is contested by the claimant, it is for the national court to verify it, by carrying out, in accordance with

the rules of evidence of national law, an overall assessment of all the facts and circumstances of the case (see, by analogy, Case C-273/11 *Mecsek-Gabona* [2012] ECR, paragraph 53, and Case C-285/11 *Bonik* [2012] ECR, paragraph 32)

58 In this connection, it is true that preventing possible tax evasion, avoidance and abuse is an objective recognised and encouraged by Directive 2006/112 and European Union law cannot be relied on for fraudulent or abusive ends (see, inter alia, Case C-255/02 *Halifax and Others* [2006] ECR I-1609, paragraphs 68 and 71; Joined Cases C-80/11 and C-142/11 *Mahagében and Dávid* [2012] ECR, paragraph 41; and *Bonik*, paragraphs 35 and 36).

59 It is therefore incumbent upon the national authorities and courts to refuse the right of deduction where it is established, on the basis of objective evidence, that that right is being relied on for fraudulent or abusive ends (see, to that effect, Joined Cases C-439/04 and C-440/04 *Kittel and Recolta Recycling* [2006] ECR I-6161, paragraph 55; *Mahagében and Dávid*, paragraph 42; and *Bonik*, paragraph 37).

60 Nevertheless, according to case-law that is also well-established, 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 prior or subsequent to the transaction carried out by the taxable person was vitiated by VAT fraud (see, inter alia, Joined Cases C-354/03, C-355/03 and C-484/03 *Optigen and Others* [2006] ECR I-483, paragraphs 52 and 55; *Kittel and Recolta Recycling*, paragraphs 45, 46 and 60; *Mahagében and Dávid*, paragraph 47; and *Bonik*, paragraph 41).

61 Furthermore, the Court held in *Mahagében and Dávid*, paragraphs 61 to 65, that the tax authorities cannot, as a general rule, require the taxable person wishing to exercise the right to deduct VAT, first, to ensure that the issuer of the invoice relating to the goods and services in respect of which the exercise of that right is sought has the capacity of a taxable person, that he was in possession of the goods at issue and was in a position to supply them and that he has satisfied his obligations as regards declaration and payment of VAT, in order to be satisfied that there are no irregularities or fraud at the level of the traders upstream, or, second, to be in possession of documents in that regard.

62 It follows that a national court which is called upon to decide whether, in a particular case, there was no taxable transaction, and before which the tax authorities have relied in particular on irregularities committed by the issuer of the invoice or one of the issuer’s suppliers, such as omissions in the accounts, must ensure that the assessment of the evidence does not result in the case-law recalled in paragraph 60 above being rendered meaningless and in the recipient of the invoice being indirectly obliged to carry out checks of the other party to the contract which, in principle, are not a matter for him.

63 With regard to the main proceedings, it is necessary, however, to take account of the fact that, according to the order for reference, the documents submitted by the recipient of the invoices at issue also contained irregularities, which are factors to be taken into consideration by the national court when carrying out its overall assessment.

64 In the light of the foregoing, the answer to the second part of the third question and the fourth, fifth and sixth questions is that European Union law must be interpreted as meaning that Articles 167 and 168(a) of Directive 2006/112 and the principles of fiscal neutrality, legal certainty and equal treatment do not preclude the recipient of an invoice from being refused the right to deduct input VAT because there is no actual taxable transaction even though, in the tax

adjustment notice addressed to the issuer of that invoice, the VAT declared by the latter was not adjusted. However, if, in the light of fraud or irregularities, committed by the issuer of the invoice or upstream of the transaction relied upon as the basis for the right of deduction, that transaction is considered not to have been actually carried out, it must be established, on the basis of objective factors and without requiring of the recipient of the invoice checks which are not his responsibility, that he knew or should have known that that transaction was connected with VAT fraud, a matter which it is for the referring court to determine.

Costs

65 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 (Third Chamber) hereby rules:

1. **Article 203 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning that:**

– **the value added tax entered by a person on an invoice is payable by him regardless of whether a taxable transaction actually exists;**

– **it cannot be inferred from the mere fact that the tax authorities did not correct, in a tax adjustment notice addressed to the issuer of that invoice, the value added tax declared by the latter that those authorities have acknowledged that the invoice corresponded to an actual taxable transaction.**

2. **European Union law must be interpreted as meaning that Articles 167 and 168(a) of Directive 2006/112 and the principles of fiscal neutrality, legal certainty and equal treatment do not preclude the recipient of an invoice from being refused the right to deduct input value added tax because there is no actual taxable transaction even though, in the tax adjustment notice addressed to the issuer of that invoice, the value added tax declared by the latter was not adjusted. However, if, in the light of fraud or irregularities, committed by the issuer of the invoice or upstream of the transaction relied upon as the basis for the right of deduction, that transaction is considered not to have been actually carried out, it must be established, on the basis of objective factors and without requiring of the recipient of the invoice checks which are not his responsibility, that he knew or should have known that that transaction was connected with value added tax fraud, a matter which it is for the referring court to determine.**

[Signatures]

* Language of the case: Bulgarian.