

Provisional text

JUDGMENT OF THE COURT (Tenth Chamber)

7 March 2018 (*)

(Reference for a preliminary ruling — Common system of value added tax (VAT) — Directive 2006/112/EC — Revocation of identification for VAT purposes — Obligation to pay VAT collected in the period during which the VAT identification number is revoked — Non-recognition of the right to deduct VAT relating to purchases made during that period)

In Case C-159/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Curtea de Apel Constanța (Court of Appeal, Constanța, Romania), made by decision of 10 March 2017, received at the Court on 29 March 2017, in the proceedings

Întreprinderea Individuală Dobre M. Marius

v

Ministerul Finanțelor Publice — A.N.A.F. — D.G.R.F.P. Galați — Serviciul Soluționare Contestații,

A.N.A.F — D.G.R.F.P. Galați — A.J.F.P. Constanța — Serviciul Inspecție Fiscală Persoane Fizice 2 Constanța,

THE COURT (Tenth Chamber),

composed of E. Levits (Rapporteur), President, A. Borg Barthet and F. Biltgen, Judges,

Advocate General: H. Saugmandsgaard Øe,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- the Romanian Government, by R.-H. Radu, C.-M. Florescu and E. Gane, acting as Agents,
- the European Commission, by R. Lyal and G.-D. Balan, 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 Articles 167 to 169 and 179, Article 213(1), Article 214(1)(a) and Article 273 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1), as amended, as

regards the rules on invoicing, by Council Directive 2010/45/EU of 13 July 2010 (OJ 2010 L 189, p. 1), ('Directive 2006/112').

2 The request has been made in proceedings between the Întreprinderea Individuală Dobre M. Marius (sole trader M. Marius Dobre, 'Dobre') and the Ministerul Finanțelor Publice — Agenția Națională de Administrare Fiscală — Direcția Generală Regională a Finanțelor Publice Galați — Serviciul Soluționare Contestații (Ministry of Public Finances — National Agency for Tax Administration — Directorate-General of Public Finance of Galați — Complaints Office) and the Agenția Națională de Administrare Fiscală — Direcția Generală Regională a Finanțelor Publice Galați — Administrația Județeană a Finanțelor Publice Constanța — Serviciul Inspecție Fiscală Persoane Fizice 2 Constanța (National Agency for Tax Administration — Directorate-General of Public Finance of Galați – Regional Public Finance Administration of Constanța — Department No 2 of the Constanța Tax Office for Natural Persons) (together 'the tax authorities'), concerning the right to deduct value added tax (VAT) relating to purchases made by Dobre during the period in which his identification for VAT purposes had been revoked.

Legal context

Directive 2006/112

3 Article 167 of Directive 2006/112 provides as follows:

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

4 Article 168 of that directive, set out in Title X thereof, entitled 'Deductions', is worded as follows:

'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;

...'

5 In accordance with Article 178(a) of that directive, in order to exercise the right of deduction, in respect of the supply of goods or services, a taxable person must meet, inter alia, the following condition:

'... he must hold an invoice drawn up in accordance with Sections 3 to 6 of Chapter 3 of Title XI'.

6 The first paragraph of Article 179 of that directive provides as follows:

'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.'

7 Article 213(1) of Directive 2006/112 states:

'Every taxable person shall state when his activity as a taxable person commences, changes or ceases.

...'

8 Article 214 of that directive states that:

‘1. Member States shall take the measures necessary to ensure that the following persons are identified by means of an individual number:

(a) every taxable person, with the exception of those referred to in Article 9(2), who within their respective territory carries out supplies of goods or services in respect of which VAT is deductible, other than supplies of goods or services in respect of which VAT is payable solely by the customer or the person for whom the goods or services are intended, in accordance with Articles 194 to 197 and Article 199;

...’

9 Under Article 250(1) of that directive:

‘Every taxable person shall submit a VAT return setting out all the information needed to calculate the tax that has become chargeable and the deductions to be made including, in so far as is necessary for the establishment of the basis of assessment, the total value of the transactions relating to such tax and deductions and the value of any exempt transactions.

...’

10 Article 252 of that directive provides as follows:

‘1. The VAT return shall be submitted by a deadline to be determined by Member States. That deadline may not be more than two months later than the end of each tax period.

2. The tax period shall be set by each Member State at one month, two months or three months.

Member States may, however, set different tax periods provided that those periods do not exceed one year.’

11 Article 273 of Directive 2006/112 is worded as follows:

‘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.

...’

Romanian Law

12 According to Article 11(1 *quater*) of the Legea nr. 571/2003 privind Codul fiscal (Law No 571/2003 establishing the Tax Code (*Monitorul Oficial al României*, No 927 of 23 December 2003):

‘Taxable persons established in Romania, whose identification for VAT purposes has been revoked in accordance with Article 153(9)(b) to (e) and (h) shall not, for the period in question, enjoy the right to deduct VAT on purchases made, but shall be liable to pay VAT collected, in accordance with the provisions of Title VI, in respect of taxable transactions carried out during that period. As regards purchases of goods and/or services made during the period in which the relevant person has no valid VAT number, which are intended for transactions to be made after the VAT identification date and which give rise to the right to deduct under Title VI, adjustments

shall be made in favour of the taxable person, by means of inclusion in the first tax return provided for in Article 156 *ter* submitted by the taxable person following the identification for VAT purposes or, as the case may be, in a subsequent return, in respect of tax relating to the following:

- (a) goods stored and services not used at the time of the identification, as certified on the basis of an inventory;
- (b) tangible fixed assets, including capital assets for which the adjustment period for the deduction has not expired, and tangible fixed assets in the process of implementation, as certified on the basis of inventory, which are owned by the relevant party at the time of identification. In the case of fixed tangible assets other than capital assets, the tax relating to as yet undepreciated values at the time of identification shall be adjusted. Article 149 applies in relation to capital assets;
- (c) purchases of goods and services to be obtained, that is to say, those for which the tax became chargeable, in accordance with Article 134 *bis*(2)(a) and (b), before the date of identification and for which the chargeable event of the tax, that is to say, delivery or supply, takes place after that date.'

13 Article 153(9)(d) of that law provides as follows:

'The competent tax authorities shall revoke the identification for VAT purposes of a person in accordance with the present article:

...

- (d) if, in the course of a calendar half-year, that person has not filed any VAT return as provided for in Article 156 *ter*, but is not in the situation referred to in paragraph (a) or (b), as from the first day of the second month following the current calendar half-year. Those provisions shall apply only to persons whose tax period is a month or quarter. From the date of the return relating to July 2012, in the case of persons whose tax period is a calendar month, or the return relating to the third quarter of 2012, in the case of taxable persons whose tax period is a calendar quarter, the competent tax authorities shall revoke the identification for VAT purposes of a person if he has not filed a tax return provided for in Article 156 *ter* for six consecutive months, in the case of persons whose tax period is a calendar month, and for two consecutive calendar quarters, in the case of taxable persons whose tax period is a calendar quarter, but who are not in the situation referred to in paragraph (a) or (b), as from the first day of the month following that in which the time limit for filing the sixth return expired, in the first case, and as from the first day of the month following that in which the time limit for filing the second return expired, in the second case'.

14 Article 153(9 *bis*) of that law provides as follows:

'The procedure for revoking identification for VAT purposes shall be defined by the procedural rules in force. Following revocation of the identification for VAT purposes issued in accordance with paragraph 9(a) to (e) and (h), the competent tax authorities shall identify taxable persons subject to VAT by applying paragraph 7 *bis* as follows:

...

- (c) at the request of the taxable person, in the situation referred to in paragraph 9(d), as from the date of notification of the decision concerning identification for VAT purposes on the basis of the following information or documents provided by the taxable person:

1. submission of the VAT returns not filed within the time limits;

2. submission of a reasoned request indicating that the taxable person undertakes to submit the VAT returns within the legally prescribed time limits;

...'

15 Under Article 156 *quater*(10) of that law:

'Taxable persons whose VAT identification number has been revoked under Article 153(9)(a) to (e) must file a return concerning the tax collected due, in accordance with Article 11(1 *bis*) and (1 *quater*), up to and including the 25th day of the month following that during which tax became chargeable for the supply of goods or provision of services or purchase of goods or services in respect of which those persons are liable to pay VAT, which took place during the period in which the taxable person has no valid VAT identification number

...'

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

16 Dobre was identified for VAT purposes in Romania for the period between 13 July 2011 and 31 July 2012.

17 Dobre failed to submit to the tax authorities VAT returns relating to the fourth quarter of 2011 and the first quarter of 2012, which led to the revocation of his identification for VAT purposes as from 1 August 2012.

18 From 1 August 2012 to 31 July 2013, Dobre continued to issue invoices including VAT without submitting the relevant VAT returns.

19 On 30 January 2014, Dobre submitted VAT returns for the fourth quarter of 2011 and for the first and second quarters of 2012.

20 Following a tax inspection carried out between 1 July and 4 August 2015, the tax authorities issued a tax demand requiring Dobre to pay, *inter alia*, the sum of 183 301 Romanian lei (RON) (approximately EUR 39 982) corresponding to the VAT he had collected for the period during which he was not registered for VAT purposes ('the tax demand').

21 Dobre filed a claim for deduction of RON 123 266 (approximately EUR 26 887) from the sum claimed in respect of the VAT paid for the goods and services used by him for the purpose of supplying legal persons with services corresponding to his business objective for the period in which he was not identified for VAT purposes; the tax authorities rejected that claim.

22 Dobre lodged an administrative appeal against the tax demand and the rejection of his claim for deduction, which was dismissed.

23 Dobre brought an action before the Tribunalul Constanța (Constanța Regional Court, Romania) against, *inter alia*, the tax demand, which was also dismissed.

24 Dobre lodged an appeal against the judgment of the Tribunalul Constanța (Constanța Regional Court) before the referring court, the Curtea de Apel Constanța (Court of Appeal, Constanța, Romania).

25 The referring court observes that refusal to allow a taxable person to deduct input VAT for the purpose of carrying out his activities and, in parallel, his obligation to pay the VAT collected in

connection with the services provided by him, even though he was not identified for VAT purposes, are intended, in accordance with Article 273 of Directive 2006/112, to combat tax avoidance. However, it entertains doubts as to whether such a rule is compatible with the fundamental principle of the right of deduction.

26 In those circumstances, the Curtea de Apel Constanța (Court of Appeal, Constanța) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Must Articles 167, 168, 169 and 179, Article 213(1), Article 214(1)(a) and Article 273 of Directive [2006/112] be interpreted as precluding national legislation which, in circumstances such as those of the main proceedings, requires a taxpayer, whose identification for VAT purposes has been revoked, to pay to the State the VAT collected during the period in which the VAT reference number was revoked, without, however, recognising his right to deduct the VAT relating to purchases made during that period?’

Consideration of the question referred

27 By its question, the referring court asks, in essence, whether Directive 2006/112 must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which allows tax authorities to refuse a taxable person the right to deduct VAT when his identification for VAT purposes has been revoked on the ground that he failed to submit VAT returns within the statutory time limit for a given period.

28 At the outset, it should be recalled that the right of taxable persons to deduct the 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 EU legislation (judgment of 19 October 2017, *Paper Consult*, C-101/16, EU:C:2017:775, paragraph 35 and the case-law cited).

29 As the Court has repeatedly held, the right to deduct provided for in Article 167 et seq. of Directive 2006/112 is an integral part of the VAT scheme and may not, in principle, be limited. In particular, that right is exercisable immediately in respect of all the taxes charged on transactions relating to inputs (judgment of 19 October 2017, *Paper Consult*, C-101/16, EU:C:2017:775, paragraph 36 and the case-law cited).

30 The deduction system is meant 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 the neutrality of taxation of all economic activities, whatever the purpose or results of those activities, provided that they are themselves subject in principle to VAT (judgment of 19 October 2017, *Paper Consult*, C-101/16, EU:C:2017:775, paragraph 37 and the case-law cited).

31 Consequently, according to settled case-law, the fundamental principle of VAT neutrality requires deduction of input tax to be allowed if the substantive requirements are satisfied, even if the taxable person has failed to comply with some of the formal requirements (judgment of 28 July 2016, *Astone*, C-332/15, EU:C:2016:614, paragraph 45).

32 In particular, identification for VAT purposes, provided for in Article 214 of Directive 2006/112, and the obligation of the taxable person to state when his activity as a taxable person commences, changes or ceases, provided for in Article 213 of that directive, are only formal requirements for the purposes of control, and they cannot compromise, inter alia, the right to deduct VAT, in so far as the substantive conditions which give rise to that right have been satisfied

(judgment of 9 July 2015, *Salomie and Oltean*, C?183/14, EU:C:2015:454, paragraph 60).

33 Accordingly, a person taxable for VAT purposes may not be prevented from exercising his right of deduction on the ground that he had not been identified as a taxable person for those purposes before using the goods purchased in the context of his taxed activity (judgment of 21 October 2010, *Nidera Handelscompagnie*, C?385/09, EU:C:2010:627, paragraph 51).

34 Furthermore, the Court has held that penalising the failure on the part of the taxable person to comply with the obligations relating to accounts and tax returns by denial of the right to deduct clearly goes further than is necessary to attain the objective of ensuring the correct application of those obligations, since EU law does not prevent Member States from imposing, where necessary, a fine or a financial penalty proportionate to the seriousness of the offence (judgment of 9 July 2015, *Salomie and Oltean*, C?183/14, EU:C:2015:454, paragraph 63).

35 The position could be different if the effect of breach of failure to satisfy formal requirements is to prevent the production of conclusive evidence that the substantive requirements have been satisfied (judgment of 28 July 2016, *Astone*, C?332/15, EU:C:2016:614, paragraph 46 and the case-law cited). Refusal of the right to deduct depends more on the lack of information necessary to establish that the substantive requirements have been satisfied than it does on failure to comply with a formal requirement (see, to that effect, judgment of 11 December 2014, *Idexx Laboratories Italia*, C?590/13, EU:C:2014:2429, paragraphs 44 and 45).

36 Similarly, the right to deduct may be refused, if it has been established, in the light of objective evidence, that that right is being invoked fraudulently or abusively (judgment of 19 October 2017, *Paper Consult*, C?101/16, EU:C:2017:775, paragraph 43).

37 In the present case, it is apparent from the order for reference, first, that Dobre's identification for VAT purposes was revoked, in accordance with Article 153(9)(d) of Law No 571/2003, on the ground that that taxable person failed to submit, within the period prescribed by statute, his tax returns relating to the fourth quarter of 2011 and the first and second quarters of 2012. Second, that taxable person did not provide any such returns between the month of August 2012 and the month of July 2013, even though he continued to issue invoices including VAT, with the result that the tax authorities did not recognise his right to deduct VAT for that period.

38 Having regard to the considerations set out in paragraph 35 of the present judgment, it is for the referring court to ascertain whether the tax authorities had the information necessary to establish that the substantive requirements giving rise to the right to deduct input VAT paid by Dobre had been satisfied, notwithstanding the alleged failure to satisfy formal conditions.

39 In that regard, it must be noted that, under Article 168(a) of Directive 2006/112, in order to have a right to deduct, first, the interested party must be a 'taxable person' within the meaning of that directive and, second, the goods or services relied on to give entitlement to that right must 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, to that effect, inter alia, judgments of 22 October 2015, *PPUH Stehcemp*, C?277/14, EU:C:2015:719, paragraph 28, and of 19 October 2017, *Paper Consult*, C?101/16, EU:C:2017:775, paragraph 39).

40 In any event, the Court has held that, even if infringements of those formal obligations do not prevent the production of conclusive evidence that the substantive requirements giving rise to the right to deduct input VAT have been satisfied, such circumstances may establish the simplest case of tax evasion, in which the taxable person deliberately fails to fulfil the formal obligations incumbent upon him with the aim of evading payment of the tax (judgment of 28 July 2016, *Astone*, C?332/15, EU:C:2016:614, paragraph 55).

41 In particular, failure to file a VAT return that would allow VAT to be applied and monitored by the tax authorities is liable to prevent the correct collection of the tax and, therefore, to compromise the proper functioning of the common system of VAT. Therefore, EU law does not prevent such infringements from being considered to amount to tax fraud and the right to deduct being refused in such a case (judgment of 28 July 2016, *Astone*, C-332/15, EU:C:2016:614, paragraph 56).

42 Having regard to those considerations, Articles 167 to 169 and 179, Articles 213(1) and 214(1), and Article 273 of Directive 2006/112 must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which allows tax authorities to refuse a taxable person the right to deduct VAT when it is established that, on account of the alleged infringements committed by that person, the tax authorities could not have access to the information necessary to establish that the substantive requirements giving rise to the right to deduct input VAT paid by that taxable person have been satisfied or that that person acted fraudulently in order to enjoy that right, a matter which it is for the referring court to ascertain.

Costs

43 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 (Tenth Chamber) hereby rules:

Articles 167 to 169 and 179, Articles 213(1) and 214(1), and Article 273 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which allows tax authorities to refuse a taxable person the right to deduct value added tax when it is established that, on account of the alleged infringements committed by that person, the tax authorities could not have access to the information necessary to establish that the substantive requirements giving rise to the right to deduct input value added tax paid by that taxable person have been satisfied or that that person acted fraudulently in order to enjoy that right, a matter which it is for the referring court to ascertain.

[Signatures]

* Language of the case: Romanian.