Provisional text

ORDER OF THE COURT (Tenth Chamber)

14 April 2021 (1)

(Reference for a preliminary ruling – Article 99 of the Rules of Procedure of the Court of Justice – Taxation – Value added tax (VAT) – Directive 2006/112/EC – Articles 167 and 168 – Right to deduct input VAT – Refusal – Fraud – Supply chain – Refusal of the right to deduct where the taxable person knew or should have known that, by his or her purchase, he or she was participating in a transaction connected to VAT fraud)

In Case C?108/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Finanzgericht Berlin-Brandenburg (Finance Court, Berlin-Brandenburg, Germany), made by decision of 5 February 2020, received at the Court on 27 February 2020, in the proceedings

HR

v

Finanzamt Wilmersdorf,

THE COURT (Tenth Chamber),

composed of M. Ileši?, President of the Chamber, E. Juhász and I. Jarukaitis (Rapporteur), Judges,

Advocate General: E. Tanchev,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– HR, by M. Wulf, Rechtsanwalt,

– the German Government, by J. Möller and S. Eisenberg, acting as Agents,

– the Czech Government, by M. Smolek, J. Vlá?il and O. Serdula, acting as Agents,

– the European Commission, by J. Jokubauskait? and L. Mantl, acting as Agents,

having decided, after hearing the Advocate General, to give a decision by reasoned order, pursuant to Article 99 of the Rules of Procedure of the Court of Justice,

makes the following

Order

1 This request for a preliminary ruling concerns the interpretation of Article 167 and Article

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

2 The reference has been made in proceedings between HR and the Finanzamt Wilmersdorf (Wilmersdorf Tax Office, Germany; 'the tax authority') concerning a refusal of the right to deduct input value added tax (VAT) paid on the acquisition of drinks in the financial years 2009 and 2010.

Legal context

European Union law

3 Article 167 of Directive 2006/112, which forms part of Chapter I, entitled 'Origin and scope of the right to deduct', of Title X thereof, entitled 'Deductions', provides:

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

4 In the same chapter, Article 168 of that 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;

…'

5 Under the first paragraph of Article 273 of that directive:

'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.'

German law

6 Paragraph 15 of the Umsatzsteuergesetz (Law on VAT, BGBI. 2005 I, p. 386, in the version applicable to the facts of the dispute in the main proceedings ('the UStG'), provides in paragraph 1:

'The trader may deduct the following as input tax:

1. the tax lawfully payable on goods and services provided to his business by another trader. 2. Deduction of the input tax is subject to the condition that the trader holds an invoice drawn up in accordance with Paragraphs 14 and 14a of the present Law. …

…'

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

7 In 2009 and 2010, HR operated, together with her spouse, a wholesale drinks business. In her VAT returns for those years, she deducted the input VAT paid in respect of the invoices issued by P GmbH, amounting to EUR 993 164 for 2009 and EUR 108 417.87 for 2010 relating to supplies of drinks which had actually been made.

8 It is apparent from two judgments delivered by a criminal court, which have become final, that P acquired the drinks supplied to HR, committing several counts of VAT fraud. According to the findings of that court, HR's husband provided P with significant quantities of spirit drinks, coffee and Red Bull, with a turnover of approximately EUR 80 million, without issuing invoices for those supplies. An employee of P issued sham invoices relating to the purchase of those goods on the basis of which P improperly asserted the right to deduct input VAT. HR's husband also made price lists and potential customers for those goods available to P. Those goods were resold to various buyers, including HR.

9 After the discovery of those facts, the tax authorities refused P the right to deduct VAT and did the same with regard to HR, taking the view, in essence, that HR, together with her business, formed part of the supply chain in which the counts of fraud had been committed.

10 HR brought an action before the referring court, the Finanzgericht Berlin-Brandenburg (Finance Court, Berlin-Brandenburg, Germany), before which she claimed that she satisfied the statutory conditions for entitlement to a deduction of input VAT.

11 The tax authorities take the view, on the contrary, that, because of the involvement of HR's spouse and the unusual nature of that commercial practice, HR should have realised that, together with her business, she was part of a supply chain in which VAT fraud had been committed.

12 The referring court harbours doubts as to how to interpret the concept of a 'supply chain' in the light of EU law and whether the business relations at issue in the case before it may fall within that concept, observing that neither HR, in asserting her right to deduct the input VAT paid on supplies of beverages made by P, nor the latter, as supplier of the goods, committed VAT fraud in connection with the transactions at issue.

13 In its view, it could be considered that the mere fact that a taxable person was, or should have been aware, of tax fraud committed at an earlier stage of the transaction at issue deprives him or her of the right to deduct input VAT. The concept of 'supply chain' is thus understood as meaning that it is sufficient for the goods supplied to be the subject of several successive transactions and connection to the fraud committed upstream would exist merely because the fraud relates to the same goods, without it being necessary for the taxable person to have facilitated or encouraged the fraud by the transaction at issue.

14 However, the referring court is of the view that such an interpretation of the concept of 'supply chain' is too broad, having regard to the principles of fiscal neutrality and proportionality. In its view, it follows from the case-law of the Court that to refuse the right to deduct in the event of fraud can be envisaged only where it is the specific combination of the transactions carried out successively that gives rise to the fraudulent nature of those transactions taken as a whole, as in the case, for example, where the successive supplies form part of an overall plan designed to make the traceability of the goods supplied more difficult and, therefore, the detection of fraud committed in the supply chain. Such an analysis is supported in the case-law making the refusal of the right to deduct subject to 'participation' or 'involvement' on the part of the taxable person. In its view, the mere fact that the taxable person knew or should have known of the fraud is not sufficient to establish participation in or connection to the fraud, participation or involvement presupposes personal contribution to fraud, at least in the form of encouragement or facilitation. Bad faith, as a purely subjective circumstance, cannot replace the active participation which is necessary in order to establish participation or connection.

15 Thus, in its view, in a case such as that in the case before it, where there has been no concealment of the supply relationship or of the suppliers, where the upstream fraud is fully

completed and can no longer be facilitated or encouraged and where there is no overall plan providing for supplies to be part of fraud extending to several transactions, the right to deduct should not be refused. The transaction linking P and HR could, in such circumstances, be regarded as the continuation of the supply relationship, independent of the transaction involved in the fraud upstream, with the result that the supply chain concluded with P. The question of whether or not HR's husband provided the customer list and the list of the goods at issue to P is irrelevant, since that fact does not call into question the fact that the supplies made by P to HR had no effect on the fraud previously committed by that company. Furthermore, the transactions at issue did not cause any loss in relation to VAT, since P was liable to pay the VAT invoiced, and did not give rise to a tax advantage liable to run counter to the objectives of Directive 2006/112.

16 The referring court is of the view that, in such circumstances, maintaining the effects of a fraud committed at an earlier stage on all subsequent transactions where the taxable person merely knew or should have known of the fraud constitutes a disproportionate restriction on the principle of fiscal neutrality, bearing in mind that the refusal of the right to deduct cannot have the nature of a penalty. That legal view could be supported, in its view, by the fact that, according to the case-law of the Court, the question of whether the VAT payable on previous or subsequent transactions concerning the goods concerned has or has not been paid to the public exchequer has no bearing on the taxable person's right to deduct input VAT. In that context, the Court has always stated that the measures which the Member States may adopt under Article 273 of Directive 2006/112, in order to ensure the correct levying and collection of the tax and to prevent evasion, must not go further than is necessary to attain such objectives. It does not appear that a broad interpretation of the concept of 'supply chain' is capable of attaining those objectives. Finally, the erroneous nature of a refusal to grant the benefit of the right to deduct in those circumstances could also follow from the case-law of the Court according to which there is no need to draw a distinction, from the point of view of VAT, between lawful and unlawful transactions.

17 In those circumstances, the Finanzgericht Berlin-Brandenburg (Finance Court, Berlin-Brandenburg) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Are Articles 167 and 168(a) of Directive 2006/112 … to be interpreted as precluding the application of national law under which [VAT] deductions are not to be allowed where, when [VAT] tax fraud about which a taxable person knew or should have known was committed at a preceding stage, the taxable person, through the transaction carried out with him or her, did not participate in and was not connected to the tax fraud and did not encourage or facilitate the tax fraud committed?'

Consideration of the question referred

18 Under Article 99 of its Rules of Procedure, the Court may, in particular, where the reply to a question referred for a preliminary ruling may be clearly deduced from existing case-law or where the answer to the question referred for a preliminary ruling admits of no reasonable doubt, decide at any time, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, to rule by reasoned order.

19 It is appropriate to apply that provision in the present case.

20 By its question, the referring court asks, in essence, whether Directive 2006/112 must be interpreted as precluding a national practice according to which the right to deduct input VAT paid is refused to a taxable person who has acquired goods having been the subject of input VAT fraud committed upstream in the supply chain and who knew or should have known of it, even though he or she did not actively participate in that fraud.

21 The Court has repeatedly held that the prevention of tax evasion, tax avoidance and abuse is an objective recognised and encouraged by Directive 2006/112. In this respect, the Court held that individuals cannot fraudulently or improperly avail themselves of the rules of EU law and that, therefore, it is for national authorities and courts to refuse the right to deduct if it is established, on the basis of objective elements, that this right is being relied on for fraudulent or abusive ends (see, to that effect, judgments of 6 July 2006, *Kittel and Recolta Recycling*, C?439/04 and C?440/04, EU:C:2006:446, paragraphs 54 and 55, and of 16 October 2019, *Glencore Agriculture Hungary*, C?189/18, EU:C:2019:861, paragraph 34 and the case-law cited).

22 The Court has also reiterated numerous times that a taxable person is to be refused the right to deduct not only where tax evasion is committed by the taxable person him or herself, but also where it is established that that taxable person – to whom the supply of goods or services, on the basis of which the right to deduct is claimed, was made – knew or should have known that, through the acquisition of those goods or services, he or she was participating in a transaction connected to the evasion of VAT (see, to that effect, judgments of 6 July 2006, *Kittel and Recolta Recycling*, C?439/04 and C?440/04, EU:C:2006:446, paragraph 59; of 21 June 2012, *Mahagében and Dávid*, C?80/11 and C?142/11, EU:C:2012:373, paragraph 45; and of 16 October 2019, *Glencore Agriculture Hungary*, C?189/18, EU:C:2019:861, paragraph 35 and the case-law cited).

23 It has been considered, in that regard, that such a taxable person must, for the purposes of Directive 2006/112, be regarded as a participant in such fraud, whether or not he or she 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, that taxable person, in such a situation, aids the perpetrators of that fraud and becomes their accomplice (see, to that effect, judgments of 6 July 2006, *Kittel and Recolta Recycling*, C?439/04 and C?440/04, EU:C:2006:446, paragraphs 56 and 57; of 21 June 2012, *Mahagében and Dávid*, C?80/11 and C?142/11, EU:C:2012:373, paragraph 46; of 6 December 2012, *Bonik*, C?285/11, EU:C:2012:774, paragraph 39; of 13 February 2014, *Maks Pen* , C?18/13, EU:C:2014:69, paragraph 27; and of 22 October 2015, *PPUH Stehcemp*, C?277/14, EU:C:2015:719, paragraph 48).

24 The Court has repeatedly clarified, in situations where the material conditions of the right to deduct are met, the taxable person cannot be refused right to deduct unless it is established on the basis of objective factors that he or she knew or should have known that, through the purchase of those goods or services, on the basis of which the right to deduct is claimed, he or she was participating in a transaction connected to such a VAT fraud committed by the supplier or by another trader acting upstream or downstream in the supply chain of those goods or services (see, to that effect, judgments of 6 December 2012, *Bonik*, C?285/11, EU:C:2012:774, paragraph 40; and of 13 February 2014, *Maks Pen*, C?18/13, EU:C:2014:69, paragraph 28; and of order of 3 September 2020, *Vikingo F?vállalkozó*, C?610/19, EU:C:2020:673, paragraph 53).

25 The Court has in fact held, in that regard, that 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 to fraud committed by the supplier or that another transaction forming part of the supply chain, downstream or upstream of the transaction carried out by the taxable person, was vitiated by VAT fraud, the establishment of a system of strict liability would go beyond what is necessary to preserve the public exchequer’s rights (see, to that effect, judgments of 21 June 2012, *Mahagében and Dávid*, C?80/11 and C?142/11, EU:C:2012:373, paragraphs 47 and 48, and of 6 December 2012, *Bonik*, C?285/11, EU:C:2012:774, paragraphs 41 and 42; and of order of 3 September 2020, *Vikingo F?vállalkozó*, C?610/19, EU:C:2020:673, paragraph 52).

26 Contrary to the referring court’s interpretation of the case-law of the Court, it is clear from

the case-law set out in paragraphs 21 to 25 of the present order, in the first place, that the mere fact that the taxable person has acquired goods or services even though he or she knew, in any way whatsoever, that, by that purchase, he or she was participating in a transaction connected to fraud of input VAT committed in the chain of supply or services is considered, for the purposes of Directive 2006/112, to be a participation in that fraud. As the German Government submits, the only positive act which determines the basis for a refusal of the right to deduct in such a situation is the acquisition of those goods or services. There is therefore no need, in order to justify such a refusal, to establish that that taxable person actively participated in that fraud, in one way or another, even if only by actively encouraging or facilitating it. It is also of little importance that he or she did not conceal his or her supply relationships and suppliers.

27 That is all the more true given that, according to that case-law, a taxable person who should have known that, by his or her purchase, he or she was participating in a transaction connected to input VAT fraud in the chain of supply or services is also deprived of the right to deduct. In such a situation, it is the failure to take certain steps which leads to a refusal of the right to deduct.

28 In that regard, it should be recalled that the Court has already held on several occasions that it is not contrary to EU law to require that a trader take every step which could reasonably be asked of him or her to satisfy himself or herself that the transaction which he or she is carrying out does not result in his or her participation in tax evasion, the determination of the measures which may, in a particular case, reasonably be required of a taxable person wishing to exercise the right to deduct VAT in order to satisfy himself or herself that his or her transactions are not connected to fraud committed by a trader at an earlier stage of a transaction depends essentially on the circumstances of that particular case (see, to that effect, judgments of 21 June 2012, *Mahagében and Dávid*, C?80/11 and C?142/11, EU:C:2012:373, paragraphs 54 and 59, and of 19 October 2017, *Paper Consult*, C?101/16, EU:C:2017:775, paragraph 52).

29 The Court has stated that, when there are indications pointing to an infringement or fraud, a reasonable trader could, depending on the circumstances of the case, be obliged to make enquiries about another trader from whom he or she intends to purchase goods or services in order to ascertain the latter’s trustworthiness (judgment of 21 June 2012, *Mahagében and Dávid*, C?80/11 and C?142/11, EU:C:2012:373, paragraph 60; orders of 16 May 2013, *Hardimpex*, C?444/12, not published, EU:C:2013:318, paragraph 25, and of 3 September 2020, *Vikingo F?vállalkozó*, C?610/19, not published, EU:C:2020:673, paragraph 55).

30 Furthermore, since the referring court claims, in essence, that the bad faith of the taxable person cannot constitute a criterion capable of being substituted for that of the active participation of that taxable person, it must be observed that it is not contrary to EU law to require a trader to act in good faith (see, to that effect, judgments of 28 March 2019, *Vinš*, C?275/18, EU:C:2019:265, paragraph 33, and of 17 October 2019, *Unitel*, C?653/18, EU:C:2019:876, paragraph 33).

31 However, it is not necessary for the taxable person’s bad faith to be established in order for him or her to be refused the right to deduct, since it follows from the case-law set out in paragraphs 21 to 25 of the present order and from the grounds set out above that the fact that the taxable person acquired goods or services even though he or she knew or should have known, by taking the measures which could reasonably be required of him or her to satisfy himself or herself that that transaction did not lead to his or her participation in a fraud, that, by that acquisition, he or she was participating in a transaction connected to fraud, is sufficient for it be considered, for the purposes of Directive 2006/112, that that taxable person participated in that fraud and to deprive him or her of the benefit of the right to deduct.

32 In the second place, the interpretation that, first, the concept of a ‘supply chain’ should be understood as covering only cases where the fraud results from a specific combination of

successive transactions or an overall plan whereby the supplies form part of a fraud extending over several transactions and, second, the transaction carried out by the taxable person and the upstream transaction vitiated by fraud should, apart from those cases, be regarded as independent transactions, in particular where the commission of the fraud had been completed at the time when the first of those transactions occurred, so that that fraud could no longer be facilitated or encouraged.

33 Such an interpretation amounts to adding additional conditions to the refusal of the right to deduct in the case of fraud which do not follow from the case-law set out in paragraphs 21 to 25 of the present order. As has been pointed out in paragraph 31 of the present order, the fact that the taxable person acquired goods or services even though he or she knew or should have known that, by acquiring those goods or services, he or she was participating in a transaction connected to fraud committed upstream is sufficient for that taxable person to be regarded as having participated in that fraud and to deprive him or her of the right to deduct.

34 Furthermore, such an interpretation disregards the fact that fraud committed at a stage in the chain of supply or services is reflected in the following stages of that chain if the amount of VAT collected does not correspond to the amount due on account of the reduction in the price of the goods or services as a result of the input VAT which had not been collected. In all cases, the acquisition by the taxable person of goods which have been the subject of a fraudulent transaction enables them to be disposed of, as is illustrated by the facts of the case in the main proceedings, with the result that, as the Czech Government observes, it facilitates fraud.

35 In the third place, for the purposes of assessing whether or not the taxable person participated in fraud, it is immaterial whether or not the transaction in question conferred a tax advantage on him or her. Unlike what has been held in relation to abusive practices (see judgments of 21 February 2006, *Halifax and Others*, C?255/02, EU:C:2006:121, paragraphs 74 and 75; of 17 December 2015, *WebMindLicenses*, C?419/14, EU:C:2015:832, paragraph 36; and of 10 July 2019, *Kuršu zeme*, C?273/18, EU:C:2019:588, paragraph 35), a finding that the taxable person participated in VAT fraud is not subject to the condition that that transaction has conferred on him a tax advantage the grant of which is contrary to the objective pursued by Directive 2006/112. Similarly, it is irrelevant that the transaction in question did not procure any economic advantage for the taxable person, as pointed out in paragraphs 23 and 34 of the present order.

36 In the last place, it follows from the considerations set out in paragraphs 23 and 25 of the present order, according to which, first, the introduction of a system of strict liability would go beyond what is necessary to preserve the public exchequer’s rights and, second, the taxable person who knew or should have known that, by his or her purchase, he or she was participating in a transaction involving fraud aids the perpetrators of that fraud and becomes an accomplice thereto that such participation constitutes a fault for which that taxable person is liable.

37 Such an interpretation is apt to prevent fraudulent transactions (see, to that effect, judgment of 6 July 2006, *Kittel and Recolta Recycling*, C?439/04 and C?440/04, EU:C:2006:446, paragraph 58), by depriving, inter alia, the outlet of the goods and services which were the subject of a transaction connected to fraud and, therefore, contributes to the prevention of fraud, which is, as has been recalled in paragraph 21 of the present order, an objective recognised and encouraged by Directive 2006/112. By consistently holding that entitlement to the right to deduct must be refused where the taxable person knew or should have known that, by his or her purchase, he or she was participating in a transaction connected to fraud, the Court of Justice has necessarily held that a refusal in those circumstances does not go beyond what is necessary to achieve that objective. Similarly, it necessarily held that such a refusal cannot be regarded as a breach of the principle of fiscal neutrality, which, moreover, cannot be relied upon for the purposes of VAT

deduction by a taxable person who has participated in tax evasion (see, by analogy, judgments of 28 March 2019, *Vinš*, C?275/18, EU:C:2019:265, paragraph 33, and of 17 October 2019, *Unitel*, C?653/18, EU:C:2019:876, paragraph 33).

38 In the light of all the foregoing considerations, the answer to the question referred is that Directive 2006/112 must be interpreted as not precluding a national practice whereby the right to deduct input VAT paid is refused to a taxable person who has acquired goods having been the subject of input VAT fraud committed upstream in the supply chain and who knew or should have known of it, even though he or she did not actively participate in that fraud.

Costs

39 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 (Tenth Chamber) hereby rules:

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as not precluding a national practice whereby the right to deduct input value added tax (VAT) paid is refused to a taxable person who has acquired goods having been the subject of input VAT fraud committed upstream in the supply chain and who knew or should have known of it, even though he or she did not actively participate in that fraud.

[Signatures]

1 Language of the case: German.