

Provisional text

JUDGMENT OF THE COURT (Tenth Chamber)

9 December 2021 (*)

(Reference for a preliminary ruling – Taxation – Value added tax (VAT) – Directive 2006/112/EC – Article 168 – Right to deduct input tax – Material conditions governing the right of deduction – Supplier's status as taxable person – Burden of proof – Refusal of the right of deduction where the true supplier has not been identified – Conditions)

In Case C-154/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Nejvyšší správní soud (Supreme Administrative Court, Czech Republic), made by decision of 11 March 2020, received at the Court on 31 March 2020, in the proceedings

Kemwater ProChemie s. r. o.

v

Odvolací finanční ředitelství,

THE COURT (Tenth Chamber),

composed of C. Lycourgos, President of the Fourth Chamber, acting as President of the Tenth Chamber, I. Jarukaitis (Rapporteur) and M. Ilešič, Judges,

Advocate General: P. Pikamäe,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- the Odvolací finanční ředitelství, by T. Rozehnal,
- the Czech Government, by M. Smolek, O. Serdula and J. Vlášil, acting as Agents,
- the Spanish Government, by S. Jiménez García, acting as Agent,
- the Hungarian Government, by M.Z. Fehér and R. Kissné Berta, acting as Agents,
- the European Commission, by A. Armenia and M. Salyková, 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 Kemwater ProChemie s. r. o. and the Odvolací finanční ředitelství (Appellate Tax Directorate, Czech Republic) ('the Tax Directorate') concerning the refusal of the right to deduct input value added tax (VAT) paid in respect of the supply of advertising services carried out in 2010 and 2011.

Legal context

EU law

3 Article 9(1) of Directive 2006/112 provides as follows:

"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.'

4 Article 168 of that directive provides 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 Under Article 178 of that directive:

'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;

...'

6 The first paragraph of Article 273 of Directive 2006/112 provides 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.'

7 Article 287 of that directive provides as follows:

Member States which acceded after 1 January 1978 may exempt taxable persons whose annual turnover is no higher than the equivalent in national currency of the following amounts at the conversion rate on the day of their accession:

...

(7) Czech Republic: EUR 35 000;

...

Czech law

8 Under Paragraph 6(1) of zákon ?. 235/2004 Sb., o dani z p?ídané hodnoty (Law No 235/2004 on value added tax) a taxable person established in the Czech Republic becomes liable for VAT when his or her turnover for a maximum of 12 immediately preceding consecutive calendar months exceeds 1 000 000 Czech koruny (CZK) (approximately EUR 39 250), with the exception of a person who carries out only tax-exempt transactions without deductibility of VAT.

9 Paragraph 29 of that law contains the provisions transposing Article 178(a) of Directive 2006/112.

10 Paragraphs 72 and 73 of that law set out the conditions governing the right to deduct VAT. Under those paragraphs, the taxable person liable for VAT has a right to deduct input VAT, which must correspond to the output tax declared by a taxable person, so that it is not possible to exercise a right of deduction if there is no obligation to apply output tax.

11 Under Paragraph 94a(1) of that law, a taxable person with its head office or an establishment within the territory of the Czech Republic who carries out or will carry out transactions in respect of which VAT is deductible may submit an application for registration.

12 Under Paragraph 92(3) of zákon ?. 280/2009 Sb., da?ový ?ád (Law No 280/2009, the Tax Code), the taxable person is to furnish proof of all the facts which he or she is obliged to provide in a standard tax return, a supplementary tax return or other documents.

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

13 Following a tax inspection initiated on 25 April 2012 and relating to the tax periods from August to October 2010, April to June 2011 and August 2011, the Czech tax authority refused Kemwater ProChemie, a commercial company established in the Czech Republic, the right to deduct the VAT paid by Kemwater ProChemie in respect of advertising services provided during a golf tournament which had taken place in 2010 and 2011. According to the tax documents, those services were supplied by Viasat Service s. r. o., for CZK 120 000 (approximately EUR 4 708) in respect of each of those tax periods, including 20% VAT.

14 Without calling into question that the services in question had been provided, the Czech tax authority found that the managing director of Viasat Service had stated that he had no knowledge of the fact that those services had been provided by that company and that Kemwater ProChemie, for its part, was not able to demonstrate that that company was indeed the supplier of those services. Taking the view, first, that the identity of the supplier or suppliers and their status as a taxable person for VAT purposes were not established and, secondly, that the scope of the supplies at issue was partially disputed, the tax authority, on 20 December 2013, issued assessment notices setting the VAT due in respect of each tax period at CZK 20 000 (approximately EUR 784) and imposed a penalty payment of CZK 4 000 (approximately EUR 156)

on Kemwater ProChemie in respect of each of those periods.

15 After the Tax Directorate had dismissed the action brought by Kemwater ProChemie against those tax assessments, Kemwater ProChemie brought an action before the Krajský soud v Praze (Regional Court, Prague, Czech Republic), which upheld its action. That court found, relying on the case-law of the Court of Justice and on a judgment of the Nejvyšší správní soud (Supreme Administrative Court, Czech Republic), that the right of deduction is not conditional on proving that the taxable person has received the taxable supply from the supplier mentioned on the invoice relating to that supply and that the lack of evidence as to the identity of its actual supplier is decisive only if the tax authorities prove that that transaction is connected with tax fraud of which the taxable person exercising the right of deduction knew or ought to have known.

16 The Tax Directorate then brought an appeal on a point of law before the referring court, the Nejvyšší správní soud (Supreme Administrative Court).

17 The referring court states that it is faced with the question whether it is possible to refuse the right to deduct VAT on the ground that the actual supplier of the services in respect of which their recipient is exercising that right has not been identified.

18 The referring court notes that it is apparent from the case-law of the Court that, first, the right to deduct VAT is subject to the condition that the recipient of the taxable transaction is a taxable person who has used the goods or services supplied for the purposes of taxable output transactions and that those goods or services have been supplied by another taxable person, and that that right cannot, in principle, be refused where those conditions are satisfied. Secondly, the tax authorities should refuse the taxable person the right of deduction if they show, without requiring the taxable person to prove other circumstances which are not its responsibility, that that taxable person knew or could have known that, by acquiring the goods or services in question, he or she was participating in tax fraud.

19 The referring court states that, under Czech law, the burden of proving that the material conditions for the right to deduct VAT have been met lies with the taxable person. It considers that the same requirement follows from the Court's case-law, while pointing out that doubt as to the identity of the supplier should not in itself allow the tax authorities to refuse the right of deduction, since Directive 2006/112 gives a broad definition of the concept of 'taxable person'. However, it observes that, since the Czech Republic applies the exception provided for in Article 287 of that directive, it cannot be clearly established that the material condition for the right of deduction relating to the supplier's status as a taxable person is satisfied where the true supplier is not identified.

20 Furthermore, the referring court considers that there is a contradiction between, on one hand, the Court's case-law according to which it is for the person exercising the right of deduction to prove that the material conditions for that right have been met, including the fact that the goods or services were actually supplied by a taxable person, and, on the other hand, the judgment of 13 February 2014, *Maks Pen* (C-18/13, EU:C:2014:69), and the order of 10 November 2016, *Signum Alfa Sped* (C-446/15, not published, EU:C:2016:869), in which it was held that that right had to be granted in so far as participation in tax fraud had not been proven, even though, in the cases which gave rise to those decisions, the supplier's status as a taxable person was not established.

21 Finally, the referring court considers that it is necessary to require the taxable person to prove that the material conditions for the right of deduction are met not only where it has not been established that the supplier is a taxable person, but also where, although it is certain that the supplier has that status, it is not possible to identify that person. In its view, if it were otherwise, the material condition for the right of deduction relating to the supplier's status as a taxable person

could not be established with certainty where the Member State has applied the exception provided for in Article 287 of Directive 2006/112. A contrary interpretation would not be consistent with the principle of fiscal neutrality and the case-law of the Court in relation to the fact that the onus is on the taxable person to prove that the material conditions for the right of deduction are satisfied, and would open the way to significant tax fraud, whereas the fight against tax fraud is an objective recognised by that directive.

22 In those circumstances, the Nejvyšší správní soud (Supreme Administrative Court) decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Is it compatible with Directive [2006/112] for exercise of the right to deduct input [VAT] to be conditional on the taxable person fulfilling the obligation to prove that the taxable supply received was made by another specific taxable person?’

(2) If the first question is answered in the affirmative and the taxable person fails to fulfil that evidentiary obligation, can the right to deduct input tax be refused without it being established that that taxable person knew or could have known that, by acquiring the goods or services in question, he [or she] was participating in tax fraud?’

Consideration of the questions referred

23 By its two questions, which it is appropriate to examine together, the referring court asks, in essence, whether Directive 2006/112 must be interpreted as meaning that the right to deduct input VAT must be refused, without the tax authorities having to prove that the taxable person committed VAT fraud or that he or she knew, or ought to have known, that the transaction relied on to establish the right of deduction was connected with such fraud where, the true supplier of the goods or services concerned not having been identified, that taxable person fails to adduce proof that that supplier had the status of taxable person.

24 It should be recalled that the right to deduct VAT is subject to compliance with material as well as formal conditions. As regards the material conditions, it is apparent from Article 168(a) of Directive 2006/112 that, in order for that right to be available, first, the person concerned must be a ‘taxable person’ within the meaning of that directive. Secondly, the goods or services relied on as the basis for claiming the right of deduction must be supplied by another taxable person as inputs and those goods or services must be used by the taxable person for the purposes of his or her own taxed output transactions. As to the detailed rules governing the exercise of the right to deduct VAT, which may be considered formal conditions, Article 178(a) of Directive 2006/112 provides that the taxable person must hold an invoice drawn up in accordance with Articles 220 to 236 and Articles 238 to 240 of that directive (judgment of 11 November 2021, *Ferimet*, C?281/20, EU:C:2021:910, paragraph 26 and the case-law cited).

25 It follows that the naming of the supplier, on the invoice relating to the goods or services on the basis of which the right to deduct VAT is exercised, is a formal condition for the exercise of that right. By contrast, the status of the supplier of the goods or services as a taxable person is, as the referring court and the Czech, Spanish and Hungarian Governments observe, among the material conditions for the exercise of that right (see, to that effect, judgment of 11 November 2021, *Ferimet*, C?281/20, EU:C:2021:910, paragraph 27).

26 As regards the consequences of the fact that the true supplier of the goods or services concerned was not identified, it must be borne in mind that 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 or her 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 in principle to VAT (see, to that effect, judgment of 11 November 2021, *Ferimet*, C-281/20, EU:C:2021:910, paragraph 30 and the case-law cited).

27 In accordance with the settled case-law of the Court, 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. As the Court has repeatedly held, 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 if the material and formal requirements or conditions to which this right is subject are respected by taxable persons wishing to exercise it (judgment of 11 November 2021, *Ferimet*, C-281/20, EU:C:2021:910, paragraph 31 and the case-law cited).

28 While, in accordance with the first paragraph of Article 273 of Directive 2006/112, Member States may impose obligations, other than those provided for by that directive, if they consider such obligations necessary to ensure the correct collection of VAT and to prevent evasion, the measures adopted by the Member States must not go beyond what is necessary to achieve the objectives pursued. Therefore, they cannot be used in such a way that they would have the effect of systematically undermining the right to deduct VAT and, consequently, the neutrality of VAT (judgment of 11 November 2021, *Ferimet*, C-281/20, EU:C:2021:910, paragraph 32 and the case-law cited).

29 Thus the Court has held that the fundamental principle of VAT neutrality requires deduction of input VAT to be allowed if the material conditions are satisfied, even if the taxable person has failed to comply with some of the formal conditions (judgment of 11 November 2021, *Ferimet*, C-281/20, EU:C:2021:910, paragraph 33 and the case-law cited).

30 Consequently, where the tax authorities have the information necessary to establish that the material conditions have been satisfied, they cannot, in relation to the right of the taxable person to deduct that tax, impose additional conditions which may have the effect of rendering that right ineffective for practical purposes (judgment of 11 November 2021, *Ferimet*, C-281/20, EU:C:2021:910, paragraph 34 and the case-law cited).

31 The position may, however, be different if non-compliance with formal requirements effectively prevents the production of conclusive evidence that the substantive requirements have been satisfied (judgment of 11 November 2021, *Ferimet*, C-281/20, EU:C:2021:910, paragraph 36 and the case-law cited).

32 That may be the case where the identity of the true supplier is not mentioned on the invoice relating to the goods or services on the basis of which the right of deduction is exercised, if that prevents the supplier from being identified and, therefore, the supplier's status as a taxable person from being established, since, as has been noted in paragraph 25 above, that status is one of the material conditions of the right to deduct VAT (judgment of 11 November 2021, *Ferimet*, C-281/20, EU:C:2021:910, paragraph 37).

33 In that context, it should be pointed out that, first, the tax authorities cannot restrict themselves to examining the invoice itself. They must also take account of the additional information provided by the taxable person. Secondly, it is for the taxable person seeking deduction of VAT to establish that he or she meets the conditions for eligibility. The tax authorities may thus require the taxable person himself or herself to produce the evidence they consider necessary for determining whether or not the deduction requested should be granted (judgment of 11 November 2021, *Ferimet*, C-281/20, EU:C:2021:910, paragraph 38 and the case-law cited).

34 It follows that it is for the taxable person exercising the right to deduct VAT, in principle, to establish that the supplier of the goods or services on the basis of which that right is exercised had the status of taxable person. Accordingly, the taxable person is required to provide objective evidence that goods or services were actually supplied as inputs by taxable persons for the purposes of his or her own transactions subject to VAT, in respect of which he or she has actually paid VAT. That evidence may include, inter alia, documents held by the suppliers or service providers from whom the taxable person has acquired the goods or services in respect of which he or she has paid VAT (judgment of 11 November 2021, *Ferimet*, C-281/20, EU:C:2021:910, paragraph 39 and the case-law cited).

35 However, as regards the fight against VAT fraud, the tax authorities cannot, as a general rule, require the taxable person wishing to exercise the right to deduct VAT to check, in particular, that the supplier of the goods or services on the basis of which the right is exercised has the status of taxable person (judgment of 11 November 2021, *Ferimet*, C-281/20, EU:C:2021:910, paragraph 40 and the case-law cited).

36 So far as concerns the burden of proof as to whether the supplier is a taxable person, a distinction must be made between, on the one hand, establishing a material condition governing the right to deduct VAT and, on the other, determining the existence of VAT fraud (judgment of 11 November 2021, *Ferimet*, C-281/20, EU:C:2021:910, paragraph 41).

37 Thus, although, in the context of fighting VAT fraud, a taxable person wishing to exercise the right to deduct VAT cannot, as a general rule, be required to check that the supplier of the goods or services concerned has ‘taxable person’ status, the position is otherwise if establishing that status is necessary for the purpose of verifying that that material condition governing the right of deduction is satisfied (judgment of 11 November 2021, *Ferimet*, C-281/20, EU:C:2021:910, paragraph 42).

38 In the latter situation, it is for the taxable person to establish, on the basis of objective evidence, that the supplier has the status of taxable person, unless the tax authorities have the information necessary to check that that material condition governing the right to deduct VAT is satisfied. In that regard, it follows from the wording of Article 9(1) of Directive 2006/112 that the concept of ‘taxable person’ is defined widely, on the basis of the factual circumstances, and therefore that the supplier’s status as a taxable person may be apparent from the circumstances of the case (judgment of 11 November 2021, *Ferimet*, C-281/20, EU:C:2021:910, paragraph 43).

39 That is so in particular, even though the Member State has made use of the option in Article 287 of Directive 2006/112 to exempt taxable persons whose annual turnover is no higher than a certain amount, where it can be inferred with certainty from the factual circumstances, such as the volume and price of the goods or services purchased, that the supplier’s annual turnover exceeds that amount, with the result that that supplier cannot benefit from the exemption provided for in that article, and that supplier necessarily has the status of taxable person.

40 To deny a taxable person the right to deduct VAT on the ground that the true supplier of the goods or services concerned has not been identified and that that taxable person has not proved that that supplier was a taxable person, when it clearly follows from the factual circumstances that that supplier necessarily had that status, would be contrary to the principle of fiscal neutrality and to the case-law cited in paragraphs 26 to 30 above. Consequently, contrary to the referring court’s submissions, in order to be able to exercise that right the taxable person cannot be required, in every case, to prove, where the true supplier of the goods or services concerned has not been identified, that that supplier has the status of taxable person.

41 It follows that, where the true supplier of the goods or services concerned has not been identified, the taxable person must be refused the right to deduct VAT if, taking into account the factual circumstances and notwithstanding the evidence provided by that taxable person, the information needed to verify that that supplier had the status of taxable person is lacking (see, to that effect, judgment of 11 November 2021, *Ferimet*, C-281/20, EU:C:2021:910, paragraph 44).

42 In the light of all the foregoing considerations, the answer to the questions referred is that Directive 2006/112 must be interpreted as meaning that the right to deduct input VAT must be refused, without the tax authorities having to prove that the taxable person committed VAT fraud or that he or she knew, or ought to have known, that the transaction relied on to establish the right of deduction was connected with such fraud where, the true supplier of the goods or services concerned not having been identified, that taxable person fails to adduce proof that that supplier had the status of taxable person, provided that, taking into account the factual circumstances and the evidence produced by that taxable person, the information needed to verify that the true supplier had that status is lacking.

Costs

43 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 meaning that the right to deduct input value added tax (VAT) must be refused, without the tax authorities having to prove that the taxable person committed VAT fraud or that he or she knew, or ought to have known, that the transaction relied on to establish the right of deduction was connected with such fraud, where, the true supplier of the goods or services concerned not having been identified, that taxable person fails to adduce proof that that supplier had the status of taxable person, provided that, taking into account the factual circumstances and the evidence produced by that taxable person, the information needed to verify that the true supplier had that status is lacking.

[Signatures]

* Language of the case: Czech.