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Provisional text

JUDGMENT OF THE COURT (Fifth Chamber)

11 November 2021 (*)

(Reference for a preliminary ruling – Taxation – Value added tax (VAT) – Directive 2006/112/EC – Article 168 – Right of deduction – Article 199 – Reverse charge procedure – Principle of fiscal neutrality – Material conditions governing the right to deduct – Supplier's status as taxable person – Burden of proof – Fraud – Abusive practice – Invoice referring to a fictitious supplier)

In Case C?281/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunal Supremo (Supreme Court, Spain), made by decision of 11 February 2020, received at the Court on 26 June 2020, in the proceedings

Ferimet SL

v

Administracíon General del Estado,

THE COURT (Fifth Chamber),

composed of E. Regan, President of the Chamber, K. Lenaerts, President of the Court, acting as Judge of the Fifth Chamber, C. Lycourgos, President of the Fourth Chamber, I. Jarukaitis (Rapporteur) and M. Ileši?, Judges,

Advocate General: P. Pikamäe,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Ferimet SL, by M.A. Montero Reiter, procurador, and F. Juanes Ródenas, abogado,

– the Spanish Government, by S. Jiménez García, acting as Agent,

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

– the European Commission, by L. Lozano Palacios and J. Jokubauskait?, 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 Article 168 of Council

Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1), read in conjunction, where appropriate, with other provisions of that directive, and the principle of fiscal neutrality.

2 The request has been made in proceedings between Ferimet SL and the Administración General del Estado (General Administration of the State, Spain) concerning the right to deduct value added tax (VAT) relating to a supply of recovered materials that was made in 2008.

Legal context

European Union law

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

'"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:

'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;

…

(f) when required to pay VAT as a customer where Articles 194 to 197 or Article 199 apply, he must comply with the formalities as laid down by each Member State.'

6 Article 199(1) of Directive 2006/112 provides:

'Member States may provide that the person liable for payment of VAT is the taxable person to whom any of the following supplies are made:

…

(d) the supply of used material, used material which cannot be re-used in the same state, scrap, industrial and non industrial waste, recyclable waste, part processed waste and certain

goods and services, as listed in Annex VI;

…’

7 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.’

Spanish law

8 Article 84(1)(2)(c) of Ley 37/1992 del Impuesto sobre el Valor Añadido (Law on value added tax) of 28 December 1992 (BOE No 312, of 29 December 1992, p. 44247), in the version applicable to the dispute in the main proceedings (‘the VAT Law’) provides that, in the case of supplies of industrial waste, ferrous waste and scrap, residues and other recyclable materials consisting of ferrous and non-ferrous metals, their alloys, slag, ash and industrial residues containing metals or their alloys, the person liable to pay VAT is the trader or professional for whom the taxable transaction is carried out.

9 Under Article 92(1)(3) of the VAT Law, taxable persons may deduct the tax accruing within the country’s territory in respect of input tax charged to them or paid by them on supplies of goods referred to in Article 84(1)(2) of the VAT Law from the VAT due on the taxed transactions they carry out within the country.

10 Article 97 of that law provides:

‘1. The right of deduction may be exercised only by traders or professionals who have documentary evidence of their right.

For those purposes, the only acceptable documentary evidence of the right of deduction is as follows:

…

4º an invoice issued by the taxable person in accordance with the provisions of Article 165(1) of this law. …

2. Any such documents that do not satisfy all the statutory and regulatory requirements shall not be treated as evidence of the right of deduction …

…’

11 Under Article 165(1) of the VAT Law, ‘where Article 84(1)(2) … of this law applies, an invoice issued by the supplier of the goods or services concerned, or the accounting record of the transaction, must be accompanied by a VAT invoice. That invoice must satisfy the requirements laid down in regulations.’

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

12 Ferimet declared that it had acquired, in 2008, recovered materials (scrap metal) from the company Reciclatges de Terra Alta, stating that the transaction was subject to the reverse charge

procedure for VAT and drawing up the corresponding invoice.

13 During an audit, the Inspección de los Tributos (tax inspectorate, Spain) found in particular that the undertaking named on the invoice as the supplier of those materials did not in fact have the material and human resources required to supply them, and concluded that the invoices issued by Ferimet had to be deemed to be false. In its view, while the materials had undeniably been supplied, the transaction in question was a sham, since the real supplier had deliberately been concealed. The tax inspectorate therefore decided that it was not appropriate for a deduction of VAT to be made in relation to that transaction and issued a tax assessment notice in respect of the financial year 2008 for EUR 140 441.71, together with a penalty of EUR 140 737.68.

14 The Tribunal Económico-Administrativo Regional de Cataluña (Regional Tax Tribunal, Catalonia, Spain) dismissed Ferimet's complaint in respect of that tax assessment notice and the penalty, whereupon Ferimet brought an action against that dismissal in the Tribunal Superior de Justicia de Cataluña (High Court of Justice, Catalonia, Spain). In that court, Ferimet claimed that it was an established fact that the purchase of the recovered materials had taken place, that the naming of a fictitious supplier on an invoice was a purely formal issue given that, in material terms, the acquisition had taken place, that the right to deduct VAT cannot be refused where the transaction is shown to exist, and that the reverse charge procedure applied in the present case ensures not only that the VAT is collected and monitored, but also that there is no possible tax advantage to the taxpayer.

15 By a judgment of 23 November 2017, the Tribunal Superior de Justicia de Cataluña (High Court of Justice, Catalonia) dismissed Ferimet's action on the grounds that the tax inspection had clearly demonstrated that the supplier was a sham, that the naming of that supplier could not be considered a purely formal matter, as it enables the lawfulness of the VAT chain to be checked, and that it therefore has an impact on the principle of tax neutrality. The court also noted that, while it is true that, under the reverse charge procedure, in principle there is no loss of tax revenue, the right to deduct VAT is nevertheless subject to material conditions being met, including a condition that the person mentioned should actually be the supplier.

16 Ferimet then lodged an appeal in the Tribunal Supremo (Supreme Court, Spain), the referring court, before which it argues that national and EU legislation as well as the case-law of the Court of Justice necessarily lead to the conclusion that it was entitled to deduct the VAT relating to the acquisition of the recovered materials concerned. It claims, in that regard, that it was the genuine customer for the supply of those materials, that it did indeed purchase and receive them, and that there had not and could not have been any loss of tax revenue because, being subject to the reverse charge procedure, neither it nor its supplier were liable to pay VAT.

17 The Spanish Government contends before that court that the mention of a fictitious supplier on an invoice demonstrates that the transaction is a sham, that concealment of the true supplier's identity must be considered to be connected both with VAT fraud and with direct tax fraud, and that Ferimet has failed to prove its assertion that there is no tax advantage.

18 The referring court states that the dispute before it concerns the question whether it is possible to deduct the VAT which Ferimet has itself charged and borne by issuing an invoice under the reverse charge procedure in a situation where the transaction in question has actually taken place but the true supplier of those recovered materials has nevertheless been concealed by the reference on that invoice to a fictitious or non-existent supplier.

19 The referring court considers that it is necessary in these proceedings to determine (i) whether mention of the supplier of the goods concerned is a purely formal condition of the right to deduct VAT; (ii) the consequences of stating a false identity in respect of the supplier and of the

fact that the purchaser knows that that reference is false; and (iii) whether the case-law of the Court of Justice necessarily means that deduction of VAT can be refused – even where bad faith is involved – only where there is a risk of loss of tax revenue for the Member State when, under the reverse charge procedure, in principle the taxable person is not liable to pay the Treasury any VAT.

20 According to the referring court, the Court's case-law does not necessarily mean that it is never possible to refuse the right to deduct VAT when the reverse charge procedure is applied and where it is established that the supply of the goods concerned and their acquisition by the taxpayer actually took place. Nor is it apparent from the Court's case-law that the naming of a supplier on the invoice is a purely formal piece of information that is of no significance for the purposes of exercising that right if the transaction concerned is real.

21 Furthermore, as regards the tax advantage, which is considered to be a condition of refusal of the right to deduct VAT, the referring court notes that that case-law does not show that the advantage relates only to the taxpayer applying for the deduction and not to any other parties who may be involved in the transaction giving rise to the deduction. It considers that it is not necessarily the case that the conduct of the supplier must be disregarded when the question arises as to whether a taxpayer could claim to be entitled to the right of deduction under the reverse charge procedure, particularly where direct taxation may be jeopardised.

22 In those circumstances the Tribunal Supremo (Supreme Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must Article 168 and related provisions of [Directive 2006/112], the principle of tax neutrality arising from that directive, and the associated case-law of the Court of Justice be interpreted as not allowing a trader to deduct input VAT where, under the [reverse charge procedure], the documentary evidence (invoice) issued by that trader for the goods he or she has purchased states a fictitious supplier, although it is not disputed that the trader in question did actually make the purchase and used the purchased materials in the course of his or her trade or business?

(2) In the event that a practice such as that described above – of which the interested party must have been aware – can be characterised as abusive or fraudulent for the purposes of refusing the deduction of input VAT, is it necessary, in order for the deduction to be refused, to prove in full the existence of a tax advantage that is incompatible with the guiding objectives of VAT regulation?

(3) Lastly, if such proof is required, must the tax advantage which would be grounds for refusing the deduction and which must be identified in the specific case in question relate exclusively to the taxpayer (who purchased the goods) or could that advantage be one which relates to other parties involved in the transaction?'

Consideration of the questions referred

23 By its three questions, which it is appropriate to examine together, the referring court asks, in essence, whether Directive 2006/112, read in conjunction with the principle of fiscal neutrality, must be interpreted as meaning that a taxable person must be refused the right to deduct VAT relating to the acquisition of goods supplied to that taxable person where he or she has knowingly mentioned a fictitious supplier on the invoice which that taxable person him- or herself has issued in respect of that transaction under the reverse charge procedure.

24 The referring court queries, first of all, whether the mention of the supplier on the invoice relating to the goods on the basis of which the right to deduct VAT is exercised is a purely formal

requirement. It goes on to question the consequences, for the exercise of that right, of the taxable person's concealment of the true supplier of those goods where it is undisputed that those goods have actually been supplied and that they have been used by that taxable person for the purposes of that person's own taxed output transactions. Lastly, it queries whether a taxable person acting in bad faith can be refused the right of deduction only where there is a risk of loss of tax revenue for the Member State concerned and a tax advantage for that taxable person or for other parties involved in the transaction in question.

25 It must be made clear at the outset that the questions raised are exclusively concerned with the exercise of the right of deduction and not with questions as to whether, in circumstances such as those outlined by the referring court, a pecuniary penalty should be imposed on the taxable person concerned for infringement of certain requirements laid down by Directive 2006/112 or whether such a penalty is consistent with the principle of proportionality.

26 It should therefore be recalled, in the first place, 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 (see, to that effect, judgments of 15 September 2016, *Senatex*, C?518/14, EU:C:2016:691, paragraphs 28 and 29 and the case-law cited; of 21 November 2018, *V?dan*, C?664/16, EU:C:2018:933, paragraphs 39 and 40; and order of 3 September 2020, *Vikingo F?vállalkozó*, C?610/19, EU:C:2020:673, paragraph 43).

27 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 Spanish and Czech Governments observe, among the material conditions for the exercise of that right.

28 As regards specifically the rules governing the exercise of the right to deduct VAT in the reverse charge procedure under Article 199(1) of Directive 2006/112, it must be added that a taxable person who is liable as the purchaser of an item of property for the VAT relating thereto is not required to hold an invoice drawn up in accordance with the formal requirements of that directive in order to be able to exercise his or her right to deduct, and only has to fulfil the formalities laid down by the Member State concerned in the exercise of the option conferred by Article 178(f) of that directive (judgment of 26 April 2017, *Farkas*, C?564/15, EU:C:2017:302, paragraph 44 and the case-law cited).

29 In the present case, it is apparent from the order for reference that the taxable person knowingly mentioned a fictitious supplier on the invoice at issue in the main proceedings, which prevented the Inspección de los Tributos (tax inspectorate) from identifying the true supplier and, therefore, from establishing the true supplier's status as a taxable person, a material condition governing the right to deduct VAT.

30 In the second place, as regards the consequences of concealment of the true supplier by the taxable person, 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 (order of 3 September 2020, *Vikingo F?vállalkozó,* C?610/19, EU:C:2020:673, paragraph 41 and the case-law cited).

31 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 to deduct 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 (order of 3 September 2020, *Vikingo F?vállalkozó,* C?610/19, EU:C:2020:673, paragraph 40 and the case-law cited).

32 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 (order of 3 September 2020, *Vikingo F?vállalkozó,* C?610/19, EU:C:2020:673, paragraph 44 and the case-law cited).

33 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 (see, to that effect, judgments of 15 September 2016, *Senatex*, C?518/14, EU:C:2016:691, paragraph 38, and of 19 October 2017, *Paper Consult*, C?101/16, EU:C:2017:775, paragraph 41).

34 Consequently, where the tax authorities have the information necessary to establish that the substantive requirements 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 15 September 2016, *Barlis 06 – Investimentos Imobiliários e Turísticos*, C?516/14, EU:C:2016:690, paragraph 42).

35 Those considerations apply, in particular, in the context of the application of the reverse charge procedure (see, to that effect, judgments of 1 April 2004, *Bockemühl*, C?90/02, EU:C:2004:206, paragraphs 50 and 51; of 8 May 2008, *Ecotrade*, C?95/07 and C?96/07, EU:C:2008:267, paragraphs 62 to 64; and of 6 February 2014, *Fatorie*, C?424/12, EU:C:2014:50, paragraphs 34 and 35).

36 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 19 October 2017, *Paper Consult*, C?101/16, EU:C:2017:775, paragraph 42 and the case-law cited).

37 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 to deduct 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 27 of the present judgment, that status is one of the material conditions of the right to deduct VAT.

38 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 (judgment of 15 September 2016, *Barlis 06 – Investimentos Imobiliários e Turísticos*, C?516/14, EU:C:2016:690, paragraph 44). Secondly, it is for the taxable person seeking deduction of VAT to establish that he or she meets the conditions for eligibility (see, to that effect, judgment of 21 November 2018, *V?dan*, C?664/16, EU:C:2018:933, paragraph 43). The tax authorities may thus require the taxable person him- or herself to produce the evidence they consider necessary for determining whether or not the deduction requested should be granted (judgment of 15 September 2016, *Barlis 06 – Investimentos Imobiliários e Turísticos*, C?516/14, EU:C:2016:690, paragraph 46 and the case-law cited).

39 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 (see, to that effect, judgment of 21 November 2018, *V?dan*, C?664/16, EU:C:2018:933, paragraphs 44 and 45).

40 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 (see, to that effect, judgment of 21 June 2012, *Mahagében and Dávid*, C?80/11 and C?142/11, EU:C:2012:373, paragraph 61, and order of 3 September 2020, *Vikingo F?vállalkozó*, C?610/19, EU:C:2020:673, paragraph 56).

41 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.

42 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.

43 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 should be recalled that 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 (judgments of 6 September 2012, *Tóth*, C?324/11, EU:C:2012:549, paragraph 30, and of 22 October 2015, *PPUH Stehcemp*, C?277/14, EU:C:2015:719, paragraph 34), and therefore that the supplier’s status as a taxable person may be apparent from the circumstances of the case.

44 It follows that, as regards establishing the material conditions governing the right to deduct VAT, 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 to deduct VAT is exercised, a taxable person must be refused that right if, taking into account the factual circumstances and notwithstanding the evidence provided by that taxable person, the information necessary to verify that that supplier had the status of taxable person is lacking.

45 Furthermore, as the Court has repeatedly pointed out, the prevention of tax evasion, tax avoidance and abuse is an objective recognised and encouraged by Directive 2006/112. In this respect, the Court has 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 of deduction if it is established, on the basis of objective evidence, 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; of 16 October 2019, *Glencore Agriculture Hungary*, C?189/18, EU:C:2019:861, paragraph 34 and the case-law cited; and order of 14 April 2021, *Finanzamt Wilmersdorf*, C?108/20, EU:C:2021:266, paragraph 21).

46 In the case of fraud, according to settled case-law, a taxable person is to be refused the right of deduction not only where a fraud 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 of deduction is claimed, was made – knew or ought to have known that, through the acquisition of those goods or services, he or she was participating in a transaction connected with 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; of 16 October 2019, *Glencore Agriculture Hungary*, C?189/18, EU:C:2019:861, paragraph 35 and the case-law cited; and order of 14 April 2021, *Finanzamt Wilmersdorf*, C?108/20, EU:C:2021:266, paragraph 22).

47 It has been considered, in that regard, that a taxable person who knew or ought to have known that, through his or her acquisition, he or she was participating in a transaction connected with the evasion of VAT must, for the purposes of Directive 2006/112, be regarded as a participant in that 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 that person, since, in such a situation, the taxable person aids the perpetrators of that fraud and becomes their accomplice (order of 14 April 2021, *Finanzamt Wilmersdorf*, C?108/20, EU:C:2021:266, paragraph 23 and the case-law cited).

48 The Court has repeatedly clarified, in situations where the material conditions of the right to deduct are met, that the taxable person cannot be refused the 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 the 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 (order of 14 April 2021, *Finanzamt Wilmersdorf*, C?108/20, EU:C:2021:266, paragraph 24 and the case-law cited).

49 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 going beyond what is necessary to preserve the Treasury's rights (order of 14 April 2021, *Finanzamt Wilmersdorf*, C?108/20, EU:C:2021:266, paragraph 25 and the case-law cited).

50 In addition, according to the settled case-law of the Court, since the refusal of the right of deduction is an exception to the application of the fundamental principle constituted by that right, it is incumbent on the tax authorities to establish, to the requisite legal standard, the objective evidence from which it may be concluded that the taxable person committed VAT fraud or knew or should have known that the transaction relied on as a basis for the right of deduction was connected with such a fraud. It is for the national courts subsequently to determine whether the tax authorities concerned have established the existence of such objective evidence (order of 3 September 2020, *Vikingo F?vállalkozó* C?610/19, EU:C:2020:673, paragraph 57 and the case-law cited).

51 Since EU law lays down no rules relating to the procedures for taking evidence in connection with VAT fraud, that objective evidence must be established by the tax authorities in accordance with the rules of evidence laid down in national law. However, those rules must not undermine the effectiveness of EU law (order of 3 September 2020, *Vikingo F?vállalkozó*, C?610/19, EU:C:2020:673, paragraph 59 and the case-law cited).

52 It follows from the case-law referred to in paragraphs 46 and 51 of the present judgment that that taxable person may be refused the right of deduction only if, after an overall assessment of all the evidence and all the factual circumstances of the case, carried out in accordance with the rules of evidence laid down under national law, it is established that that taxable person has committed VAT fraud or knew, or ought to have known, that the transaction relied on as a basis for that right was connected with such a fraud (see, to that effect, judgment of 13 February 2014, *Maks Pen*, C?18/13, EU:C:2014:69, paragraph 30, and order of 10 November 2016, *Signum Alfa Sped,* C?446/15, not published, EU:C:2016:869, paragraph 36). Entitlement to the right of deduction can be refused only if those facts have been established to the requisite legal standard, otherwise than by assumptions (see, to that effect, order of 3 September 2020, *Crewprint*, C?611/19, not published, EU:C:2020:674, paragraph 45).

53 In the present case, in the context of that overall assessment, the fact that the taxable person who claims to be entitled to the right of deduction and who issued the invoice, knowingly mentioned a fictitious supplier on that invoice is relevant information which may indicate that that taxable person was aware that it was participating in a supply of goods connected with VAT fraud. It is, however, for the referring court to assess, taking into account all the evidence and factual circumstances of the case, whether that is indeed so in the context of the case in the main proceedings.

54 As regards any abusive practice, it should be noted that such a practice can exist only if two conditions are satisfied, namely, first, that the transactions concerned, while fulfilling the conditions laid down by the relevant provisions of that directive and the national legislation transposing it, result in the accrual of a tax advantage the grant of which would be contrary to the purpose of those provisions and, secondly, that it is apparent from a number of objective factors that the essential aim of the transactions concerned is solely to obtain that tax advantage (see, in particular, judgments of 17 December 2015, *WebMindLicenses*, C?419/14, EU:C:2015:832, paragraph 36; of 10 July 2019, *Kuršu zeme*, C?273/18, EU:C:2019:588, paragraph 35; and of 18 June 2020, *KrakVet Marek Batko*, C?276/18, EU:C:2020:485, paragraph 85).

55 Consequently, such a practice does not cover the mention of a fictitious supplier on an invoice relating to the goods or services on the basis of which the right to deduct VAT is exercised, since, as has been noted in paragraph 27 of the present judgment, 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 of that right and does not therefore result in the material conditions laid down by the provisions relating to the right of deduction being met.

56 In the third place, as regards the question whether a taxable person acting in bad faith can be refused the right of deduction only where there is a risk of loss of tax revenue for the Member State and a tax advantage for the taxable person or other parties involved in the transaction concerned, it must be observed that, under the reverse charge procedure, no payment is due, in principle, to the Treasury (see, in particular, judgments of 6 February 2014, *Fatorie*, C?424/12, EU:C:2014:50, paragraph 29, and of 26 April 2017, *Farkas*, C?564/15, EU:C:2017:302, paragraph 41). Moreover, the question whether the VAT payable on the prior or subsequent sales of the goods concerned has or has not been paid to the Treasury is irrelevant to the right of the taxable person to deduct VAT (see, to that effect, order of 3 September 2020, *Vikingo F?vállalkozó*, C?610/19, EU:C:2020:673, paragraph 42 and the case-law cited). However, as is apparent from paragraphs 44 and 46 to 52 of the present judgment, the taxable person must be refused the right of deduction where the information necessary to verify that the supplier of the goods or services concerned had the status of taxable person is lacking or it is established to the requisite legal standard that that taxable person has committed VAT fraud or knew or ought to have known that the transaction relied on as a basis for that right was connected with such a fraud. A finding of a risk of loss of tax revenue is not, therefore, necessary in order to justify such a refusal.

57 Likewise, it is immaterial for that purpose whether or not the transaction in question conferred a tax advantage on the taxable person or on others involved in the supply chain. First, the existence of such an advantage has no bearing on whether the material conditions to which the right of deduction is subject, such as the status of the supplier of the goods or services concerned as a taxable person, are satisfied. Secondly, unlike rulings issued in relation to abusive practices, a finding that the taxable person participated in VAT fraud is not subject to the condition that that transaction has conferred on that person a tax advantage the grant of which is contrary to the objective pursued by Directive 2006/112 (order of 14 April 2021, *Finanzamt Wilmersdorf*, C?108/20, EU:C:2021:266, paragraph 35).

58 Since the referring court has mentioned the possibility that the taxable person may be acting in bad faith if he or she conceals the identity of the true supplier, it must be added that, while it is not contrary to EU law to require a trader to act in good faith, it is not necessary for the taxable person’s bad faith to be established in order for that person to be refused the right of deduction (see, to that effect, order of 14 April 2021, *Finanzamt Wilmersdorf*, C?108/20, EU:C:2021:266, paragraphs 30 and 31).

59 Lastly, in so far as the referring court also refers to the fact that concealing the true supplier’s identity may jeopardise direct taxation by depriving the tax authorities of means of control, it must be noted that it follows from the case-law referred to in paragraphs 30 and 31 of the present judgment that the right of deduction cannot be refused on that ground. Such a refusal would be contrary to the fundamental principle constituted by that right and, accordingly, to the principle of fiscal neutrality.

60 Having regard to all of the above, the answer to the questions referred is that Directive 2006/112, read in conjunction with the principle of fiscal neutrality, must be interpreted as meaning that a taxable person must be refused the right to deduct VAT relating to the acquisition of goods supplied to that taxable person where he or she has knowingly mentioned a fictitious supplier on the invoice which that taxable person him- or herself has issued in respect of that transaction under the reverse charge procedure, if, taking into account the factual circumstances and the evidence provided by that taxable person, the information necessary to verify that the true supplier

had the status of taxable person is lacking, or if it is established to the requisite legal standard that the taxable person has committed VAT fraud or knew or ought to have known that the transaction relied on as a basis for the right of deduction was connected with such a fraud.

Costs

61 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 (Fifth Chamber) hereby rules:

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, read in conjunction with the principle of fiscal neutrality, must be interpreted as meaning that a taxable person must be refused the right to deduct value added tax (VAT) relating to the acquisition of goods supplied to that taxable person where he or she has knowingly mentioned a fictitious supplier on the invoice which that taxable person him- or herself has issued in respect of that transaction under the reverse charge procedure, if, taking into account the factual circumstances and the evidence provided by that taxable person, the information necessary to verify that the true supplier had the status of taxable person is lacking, or if it is established to the requisite legal standard that the taxable person has committed VAT fraud or knew or ought to have known that the transaction relied on as a basis for the right of deduction was connected with such a fraud.

[Signatures]

* Language of the case: Spanish.