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Provisional text

JUDGMENT OF THE COURT (Fifth Chamber)

24 November 2022 (*)

(Reference for a preliminary ruling – Taxation – Value added tax (VAT) – Directive 2006/112/EC – Articles 167 and 168 – Right to deduct input VAT – Principle of prohibition of fraud – Chain of supply – Refusal of the right to deduct in the case of fraud – Taxable person – Second purchaser of goods – Fraud affecting part of the VAT due in respect of the first purchase – Scope of the refusal of the right to deduction)

In Case C?596/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Finanzgericht Nürnberg (Finance Court, Nuremberg, Germany), made by decision of 21 September 2021, received at the Court on 28 September 2021, in the proceedings

A

v

Finanzamt M,

THE COURT (Fifth Chamber)

composed of E. Regan, President of the Chamber, D. Gratsias (Rapporteur), M. Ileši?, I. Jarukaitis and Z. Csehi, Judges,

Advocate General: P. Pikamäe,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the German Government, by J. Möller and R. Kanitz, acting as Agents,

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

– the European Commission, by R. Pethke and V. Uher, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 167, 168 and 178 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1), as amended by Council Directive 2010/45/EU of 13 July 2010 (OJ 2010

L 189, p. 1) (‘Directive 2006/112’).

2 The reference has been made in proceedings between A and the Finanzamt M (Tax Office M, Germany) (‘the tax authority’) concerning a refusal of the right to deduct input value added tax (VAT) on the acquisition of a vehicle in the financial year 2011.

Legal context

European Union law

3 Under Article 14(2)(c) of Directive 2006/112, which is included under Chapter 1, entitled ‘Supply of goods’, of Title IV, itself entitled ‘Taxable transactions’, the transfer of goods pursuant to a contract under which commission is payable on purchase or sale is to be regarded as constituting a supply of goods.

4 Article 167 of Directive 2006/112, which is included under Chapter 1, entitled ‘Origin and scope of the right of deduction’, of Title X, entitled ‘Deductions’, provides:

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

5 Article 168 of that directive, which is included under Chapter 1, 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 carried out these transactions, to deduct the following from the VAT 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;

…’

6 Under Article 178 of that directive, which is included under Chapter 4, entitled ‘Rules governing exercise of the right of deduction’, of Title X:

‘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 Sections 3 to 6 of Chapter 3 of Title XI;

…’

7 Article 203 of Directive 2006/112, which is included under Chapter 1, entitled ‘Obligation to pay’, of Title XI of that directive, itself entitled ‘Obligation of taxable persons and certain non-taxable persons’, states:

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

8 Article 273 of that directive, which is included under Chapter 7, entitled ‘Miscellaneous provisions’, of Title XI of that directive, is worded as follows:

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

formalities connected with the crossing of frontiers.

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

German law

9 Paragraph 3(3) of the Umsatzsteuergesetz (Law on turnover tax) ('the UStG') provides:

'In the case of a transaction under a commission contract (Paragraph 383 of the Handelsgesetzbuch (Commercial Code)), delivery takes place between the principal and the agent. In the case of a sales commission, it is the agent who is regarded as the recipient, and in the case of a buying commission, it is the principal.'

10 Paragraph 15(1) of the UStG, in the version applicable at the time of the facts at issue in the main proceedings, provides:

'A trader may deduct the following as input tax:

(1) the tax lawfully payable on goods and services provided to his or her business by another trader. Deduction of the input tax presupposes that the trader holds an invoice drawn up in accordance with Paragraphs 14 and 14a. …'

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

11 In 2011, A, a trader and the applicant in the main proceedings, purchased from C, who claimed to be W, a used car for the purposes of his business ('the car at issue'). W knew that C was pretending to be him and consented to this. C issued W with an invoice in the sum of EUR 52 100.84 plus VAT of EUR 9 899.16 for the supply of the car at issue, while W subsequently sent the applicant an invoice in the sum of EUR 64 705.88 plus VAT of EUR 12 294.12. W issued that invoice to C, who in turn forwarded it to the applicant in the main proceedings.

12 A paid C a total of EUR 77 000, made up of EUR 64 705.88 in respect of the value of the car and EUR 12 294.12 in respect of the corresponding VAT. C retained all those sums for himself. In his accounts and tax returns, C entered a sale price in the sum of EUR 52 100.84 plus EUR 9 899.16 in VAT, as shown on the invoice issued by him to W. C consequently only repaid the tax collected relating to that amount, that is to say EUR 9 899.16. W, for his part, did not enter the transaction either in his accounts or in his tax returns and therefore did not pay tax in that respect.

13 For the purchase of the car at issue, A claimed the sum of EUR 12 294.12 in respect of the input VAT which he had paid. For their part, the tax authority considers that A cannot exercise the right of deduction for any input VAT because he could not have been unaware of the tax evasion committed by C.

14 The referring court considers that, in view of the occurrence of a number of events which it describes as 'abnormal', A ought to have checked the identity of the other contracting party. That check would have enabled it to find, first, that C had deliberately concealed his identity, which could have had no purpose other than to evade VAT due in respect of the sale of the car at issue, and, second, that W did not intend to discharge his tax obligations.

15 According to the referring court, the conditions laid down in point 1 of the first sentence of Paragraph 15(1) of the UStG, relating to the deduction of input VAT, are satisfied in respect of the sum of EUR 12 294.12 mentioned, in relation to VAT, on W's invoice sent to A. W's consent to C's actions means that both those operators are connected by an atypical sales commission, in the

sense that the principal, namely C, is also the agent of W, who is the commission agent. It must therefore be held that C initially delivered the vehicle at issue to W and that W then delivered that vehicle to A.

16 The referring court notes that, according to the case-law of the Bundesfinanzhof (Federal Finance Court, Germany), A could be refused the deduction of the sum of EUR 12 294.12, even though, first, the amount of the VAT fraud committed by C was only EUR 2 394.96 and, second, the difference between the tax actually paid and the tax due if the transactions had been carried out legitimately amounts precisely to that sum.

17 The referring court considers, however, that deduction of input VAT should be refused only in so far as it proves necessary to compensate for the loss of tax revenue caused by fraudulent conduct. That being so, the referring court also observes that, according to the order of 14 April 2021, *Finanzamt Wilmersdorf* (C?108/20, EU:C:2021:266, paragraph 35), the refusal of the right to deduct input VAT does not depend on whether the person involved in tax evasion derived a tax or economic advantage from it, but seeks to impede fraudulent transactions by depriving the outlet of the goods and services which were the subject of a transaction connected to fraud.

18 In those circumstances, the referring court is inclined to favour a limitation of the refusal of the right to deduct input VAT to the tax loss suffered by the State. That loss should be calculated by comparing the amount of the tax legally due in respect of all the services with the amount of tax actually paid. According to that approach, A is entitled to deduct the sum of EUR 9 899.16 by way of input tax. Only the deduction for the remainder, that is to say the sum of EUR 2 394.96 corresponding to the fiscal loss suffered by the State, should be refused.

19 In those circumstances, the Finanzgericht Nürnberg (Finance Court, Nuremberg, Germany) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Can the second purchaser of a good be refused the right of deduction in respect of the purchase because he or she should have known that the original seller had evaded value added tax (VAT) in the first sale, even though the first purchaser had known that the original seller had evaded VAT in the first sale?

(2) If Question 1 is answered in the affirmative, is the refusal of the right of deduction in the case of the second purchaser limited in terms of amount to the shortfall in tax revenue caused by the evasion?

(3) If Question 2 is answered in the affirmative, is the shortfall in tax revenue calculated

(a) by comparing the tax lawfully payable in the supply chain with the tax actually assessed,

(b) by comparing the tax lawfully payable in the supply chain with the tax actually paid, or

(c) in another way, and, if so, what way?’

Consideration of the questions referred

Preliminary observations

20 Although, in the formulation of its three questions, the referring court has not referred to any specific provision of Directive 2006/112 or any general principle of law, it is nevertheless apparent from its request that its questions concern the interpretation of Articles 167 and 168 of that directive, read in the light of the principle of the prohibition of fraud, which is a general principle of

EU law (see, to that effect, judgment of 29 April 2021, *Granarolo*, C?617/19, EU:C:2021:338, paragraph 63).

21 In that regard, it should be noted at the outset that the right of taxable persons to deduct the VAT due or already paid on goods purchased and services received as inputs and used for the purposes of a taxable activity from the VAT which they are liable to pay is a fundamental principle of the common system of VAT. The right to deduct provided for in Article 167 et seq. of Directive 2006/112 is therefore 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, *Ferimet*, C?610/20, EU:C:2021:910, paragraph 31).

22 In particular, the deduction system is intended to relieve the trader entirely of the burden of VAT due 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 21 June 2012, *Mahagében and Dávid*, C?610/11, EU:C:2012:373, paragraph 39).

23 In addition, the question whether the VAT payable on the prior or subsequent sales of the goods concerned has or has not been paid to the public purse is irrelevant to the right of the taxable person to deduct input VAT. VAT applies to each transaction by way of production or distribution after deduction of the VAT directly borne by the various cost components (judgment of 21 June 2012, *Mahagében and Dávid*, C?80/11 and C?142/11, EU:C:2012:373, paragraph 40).

24 That being so, the prevention of possible tax evasion, tax avoidance and abuse is an objective recognised and encouraged by Directive 2006/112, with the result that individuals cannot fraudulently or improperly avail themselves of the rules of EU law. It is therefore 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 order of 14 April 2021, *Finanzamt Wilmersdorf*, C?108/20, EU:C:2021:266, paragraph 21, and judgment of 11 November 2021, *Ferimet*, *C?*281/20, EU:C:2021:910, paragraph 45 and the case-law cited).

25 A taxable person is to be refused the right to deduct not only where fraud is committed by the taxable person him or herself, but also where it is established that that taxable person, to whom goods or services which served as the basis on which to substantiate the right to deduct were supplied, knew or ought to have known that, through the purchase of those goods or services, he or she was taking part in, or at least facilitated, a transaction connected with VAT fraud. Such a taxable person must, for the purposes of Directive 2006/112, be regarded as participating in or facilitating fraud, whether or not he or she profits from the resale of goods or the use of services in the context of taxable transactions subsequently carried out by him or her (see, to that effect, order of 14 April 2021, *Finanzamt Wilmersdorf*, C?108/20, EU:C:2021:266, paragraphs 22 and 23, and judgment of 11 November 2021, *Ferimet*, C?281/20, EU:C:2021:910, paragraphs 46 and 47 and the case-law cited).

26 On the other hand, it is incompatible with the rules governing the right of deduction under Directive 2006/112 to refuse that right to 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 (order of 14 April 2021, *Finanzamt Wilmersdorf*, C?108/20, EU:C:2021:266, paragraph 25, and judgment of 11 November 2021, *Ferimet*, C?281/20, EU:C:2021:910, paragraph 49).

27 Under Article 273 of Directive 2006/112, the Member States may adopt measures to ensure the correct collection of VAT and to prevent fraud. In particular, in the absence of provisions of EU law on that matter, the Member States have the power to choose the penalties which seem to them to be appropriate in the event that conditions laid down by EU legislation for the exercise of the right to deduct VAT are not observed (judgment of 15 April 2021, *Grupa Warzywna*, C?935/19, EU:C:2021:287, paragraph 25 and the case-law cited).

28 It is in the light of those considerations that the various questions referred by the national court must be examined.

The first question

29 By its first question, the referring court asks, in essence, whether Articles 167 and 168 of Directive 2006/112, read in the light of the principle of the prohibition of fraud, must be interpreted as meaning that the second purchaser of goods may be refused the benefit of deducting input VAT where he or she knew or ought to have known that that purchase was linked to VAT fraud committed by the original seller at the time of the first sale, even if the first purchaser was also aware of that fraud.

30 As is apparent from paragraph 26 above, the mere fact that a taxable person has purchased goods or services when he or she knew or ought to have known that, by that purchase, he or she was participating in a transaction connected with VAT fraud, committed upstream in the chain of supply or services, is considered, for the purposes of Directive 2006/112, to be a participation in that fraud. 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. That acquisition facilitates the fraud by enabling the disposal of the goods concerned, which is sufficient to deny the right to deduct the VAT paid (see, to that effect, order of 14 April 2021, *Finanzamt Wilmersdorf*, C?108/20, EU:C:2021:266, paragraphs 26 and 34).

31 It follows that, where it is duly established that the second purchaser knew or ought to have been aware of the existence of VAT fraud committed by the original vendor, which it is for the referring court to ascertain in the case in the main proceedings, the fact that the first purchaser of goods is also aware and facilitates the fraud committed by the original vendor does not preclude that second purchaser from being refused the benefit of the deduction of VAT paid at the time a transaction affected by that fraud takes place, or subsequently.

32 The answer to the first question is therefore that Articles 167 and 168 of Directive 2006/112, read in the light of the principle of the prohibition of fraud, must be interpreted as meaning that the second purchaser of goods may be refused the benefit of deducting input VAT on the ground that he or she knew or ought to have been aware of the existence of VAT fraud committed by the original seller at the time of the first sale, even if the first purchaser was also aware of that fraud.

The second question

33 By its second question, the referring court asks, in essence, whether Articles 167 and 168 of Directive 2006/112, read in the light of the principle of the prohibition of fraud, must be interpreted as meaning that the second purchaser of goods which, at a stage prior to that purchase, were the subject of a fraudulent transaction relating to only part of the VAT which the State is entitled to collect may have the right to deduct the VAT paid in respect of that transaction refused in its entirety or only up to the amount covered by the fraud committed and which led to the tax loss, where that second purchaser knew or ought to have known that that purchase was linked to fraud.

34 In that regard, it must be borne in mind, first, that the prevention of possible tax evasion, tax avoidance and abuse is an objective recognised and encouraged by Directive 2006/112, with the result that individuals cannot fraudulently or improperly avail themselves of the rules of EU law. It is therefore 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 order of 14 April 2021, *Finanzamt Wilmersdorf*, C?108/20, EU:C:2021:266, paragraph 21, and judgment of 11 November 2021, *Ferimet*, C?281/20, EU:C:2021:910, paragraph 45 and the case-law cited).

35 As regards fraud, according to settled case-law, a taxable person is to be refused the right to deduct not only where fraud is committed by the taxable person him or herself, but also where it is established that that taxable person, to whom goods or services which served as the basis on which to substantiate the right to deduct were supplied, knew or ought to have known that, through the purchase of those goods or services, he or she was participating in a transaction connected to VAT fraud. Indeed 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 or her, since that taxable person, in such a situation, aids the perpetrators of that fraud and becomes their accomplice (see order of 14 April 2021, *Finanzamt Wilmersdorf*, C?108/20, EU:C:2021:266, paragraphs 22 and 23, and judgment of 11 November 2021, *Ferimet*, C?281/20, EU:C:2021:910, paragraphs 46 and 47 and the case-law cited).

36 Second, it should be noted that the refusal of the right to deduct input VAT paid by the applicant in the main proceedings must be dissociated from the penalties which the Member State may impose under Article 273 of Directive 2006/112. It is true that it is in the context of the application of the penalties laid down by the Member States in order to deter unlawful tax conduct that fraud must be punished (see, to that effect, judgment of 1 July 2021, *Tribunal Económico Administrativo Regional de Galicia*, C?521/19, EU:C:2021:527, paragraphs 26 and 38).

37 However, in accordance with the harmonised VAT system, it is for the national authorities and courts to refuse the right to deduct if it is established, in the light of objective factors, that that right is being relied on for fraudulent ends or that the taxable person, to whom goods or services which served as the basis on which to substantiate the right to deduct were supplied, knew or ought to have known, if he or she had undertaken the checks that might reasonably be required of any economic operator, that the transaction in which that person was taking part was linked to fraud (see, to that effect, inter alia, judgment of 21 June 2012, *Mahagében and Dávid*, C?80/11 and C?142/11, EU:C:2012:373, paragraphs 53, 54 and 59).

38 Since ignorance of a fraud vitiating the taxed transaction giving rise to the right to deduct, even though the checks which could reasonably be required of any economic operator were carried out, constitutes an implied material condition of the right to deduct, a taxable person who does not satisfy that condition must therefore be refused the possibility of exercising the right to deduct in its entirety (see, to that effect, order of 14 April 2021, *Finanzamt Wilmersdorf*, C?108/20, EU:C:2021:266, paragraphs 24, 31 and 33).

39 That conclusion is confirmed by the objectives pursued by the obligation on the national authorities and courts to refuse the right to deduct where a taxable person knew or ought to have known that the transaction was connected with fraud. As is apparent from the case-law of the Court, that requirement is intended in particular to require taxable persons to carry out the steps which could reasonably be asked of them in any economic transaction in order to satisfy themselves that the transactions which they carry out do not result in their participation in tax evasion (see, to that effect, order of 14 April 2021, *Finanzamt Wilmersdorf*, C?108/20,

EU:C:2021:266, paragraph 28 and the case-law cited).

40 Such an objective could not be effectively achieved if the refusal of the right to deduct were limited solely to the proportion of the sums paid by way of VAT due corresponding to the amount of the fraud, since, in doing so, taxable persons would only be encouraged to take appropriate measures to limit the consequences of possible fraud, but not necessarily those which make it possible to ensure that the transactions which they carry out do not result in their participation in tax evasion.

41 Moreover, the Court has already had occasion to hold that the fact that a taxable person has acquired goods or services when he or she knew or ought to have known that, through the purchase of those goods or services, he or she was participating in a transaction connected with fraud committed at a preceding stage is sufficient for that taxable person to be regarded as having participated in that fraud and to deprive him or her of the benefit of the right to deduct, without it even being necessary to establish the existence of a risk of loss of tax revenue (judgment of 11 November 2021, *Ferimet*, C?281/20, EU:C:2021:910, paragraph 56).

42 Therefore, the answer to the second question is that Articles 167 and 168 of Directive 2006/112, read in the light of the principle of the prohibition of fraud, must be interpreted as meaning that the second purchaser of goods which, at a stage prior to that purchase, were the subject of a fraudulent transaction relating to only part of the VAT which the State is entitled to collect must have the right to deduct the input VAT refused in its entirety where that second purchaser knew or ought to have known that that purchase was linked to fraud.

The third question

43 In light of the answer given to the first question, there is no need to answer the third question.

Costs

44 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 (Fifth Chamber) hereby rules:

1. **Articles 167 and 168 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, as amended by Council Directive 2010/45/EU of 13 July 2010, read in the light of the principle of the prohibition of fraud,**

must be interpreted as meaning that the second purchaser of goods may be refused the benefit of deducting input value added tax (VAT) on the ground that he or she knew or ought to have been aware of the existence of VAT fraud committed by the original seller at the time of the first sale, even if the first purchaser was also aware of that fraud.

2. **Articles 167 and 168 of Directive 2006/112/EC, as amended by Directive 2010/45/EU, read in the light of the principle of the prohibition of fraud,**

must be interpreted as meaning that the second purchaser of goods which, at a stage prior to that purchase, were the subject of a fraudulent transaction relating to only part of the value added tax (VAT) which the State is entitled to collect must have the right to deduct the input VAT refused in its entirety where that second purchaser knew or ought to have known that that purchase was linked to fraud.

[Signatures]

* Language of the case: German.