Provisional text

JUDGMENT OF THE COURT (Tenth Chamber)

25 May 2023 (*)

(Reference for a preliminary ruling – Taxation – Value added tax (VAT) – Directive 2006/112/EC – Right to deduct VAT – Refusal – Refusal based on the invalidity of the transaction under national civil law)

In Case C?114/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the Naczelny S?d Administracyjny (Supreme Administrative Court, Poland), made by decision of 23 November 2021, received at the Court on 18 February 2022, in the proceedings

Dyrektor Izby Administracji Skarbowej w Warszawie

v

W. sp. z o.o.,

THE COURT (Tenth Chamber),

composed of D. Gratsias, President of the Chamber, I. Jarukaitis (Rapporteur) and Z. Csehi, Judges,

Advocate General: T. ?apeta,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Dyrektor Izby Administracji Skarbowej w Warszawie, by B. Ko?odziej, D. Pach and T. Wojciechowski,

– W. sp. z o.o., by M. Kwietko-B?bnowski, doradca podatkowy,

– the Polish Government, by B. Majczyna, acting as Agent,

– the European Commission, by A. Armenia and I. Barcew, 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 167, Article 168(a), Article 178(a) and Article 273 of Council Directive 2006/112/EC of 28 November 2006 on the

common system of value added tax (OJ 2006 L 347, p. 1), as amended by Council Directive 2010/45/EU of 13 July 2010 (OJ 2010 L 189, p. 1) (‘Directive 2006/112’), read in the light of the principles of fiscal neutrality and proportionality.

2 The request has been made in proceedings between the Dyrektor Izby Administracji Skarbowej w Warszawie (Director of the Tax Authority, Warsaw, Poland; ‘the director of the tax authority’) and W. sp. z o.o. concerning the right to deduct the value added tax (VAT) referred to on an invoice sent to W. dated 27 October 2015.

Legal context

European Union law

3 According to Article 63 of Directive 2006/112:

‘… VAT shall become chargeable when the goods or the services are supplied.’

4 Article 167 of that directive provides:

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

5 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 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 Directive 2006/112:

‘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 273 of that directive provides:

‘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.’

Polish law

8 Article 88(3a)(4)(c) of the ustawa o podatku od towarów i us?ug (Law on the Tax on Goods and Services), of 11 March 2004 (Dz. U. 2011, No. 177, item 1054), in the version applicable to the dispute in the main proceedings (the 'Law on VAT'), provides:

'3a. Invoices and customs documents shall not form the basis for reducing input tax and refunding the tax difference or refunding input tax where these:

…

4. invoices, correcting invoices or customs documents issued:

…

(c) identify transactions to which the provisions of Articles 58 and 83 of the Civil Code apply – for the part relating to those transactions.'

9 Article 58 of the ustawa – Kodeks cywilny (Law on the Civil Code) of 23 April 1964, consolidated text (Dz. U. 2020, item 1740) ('the Civil Code'), provides:

'1. A legal transaction contrary to the law or intended to circumvent the law shall be null and void unless a relevant provision provides otherwise …

2. A legal transaction contrary to the rules of social conduct shall be void.

3. Where only part of the legal transaction is invalid, the other parts of the transaction shall remain in force, unless circumstances show that, without the invalid terms, the transaction would not have been carried out.'

10 Article 83 of the Civil Code provides:

'1. A declaration of intent made under false pretences to another party with that party's consent shall be invalid. Where such a declaration is made to conceal another legal transaction, the validity of the declaration shall be judged by the nature of that legal transaction.

2. Making a declaration of intent under false pretences shall not affect the effectiveness of a legal transaction involving consideration and made on the basis of that declaration, if, as a result of that legal transaction, a third party acquires a right or is released from an obligation, unless that third party has acted in bad faith.'

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

11 On 27 October 2015, M. sp. z o.o. S.K.A. issued an invoice for an assignment of trade marks to W. subject to VAT, which was declared and paid by W.

12 By decision of 20 October 2017, the tax authority called into question the right to deduct the VAT from which W. had benefited, in respect of that invoice, on the basis of Article 88(3a)(4)(c) of the Law on VAT, on the ground that the assignment of trade marks in question was invalid under Article 58(2) of the Civil Code, in that it was contrary to the rules of social conduct, within the meaning of that provision.

13 That decision was confirmed by a decision of 11 October 2018 of the director of the tax authority, who, however, considered that the assignment of trade marks at issue was a fictitious transaction within the meaning of Article 83 of the Civil Code.

14 W. brought an action against the latter decision before the Wojewódzki S?d Administracyjny w Warszawie (Regional Administrative Court, Warsaw, Poland), which annulled that decision by judgment of 29 May 2019, on the ground that the tax authority had not adduced evidence that the transaction at issue was fictitious.

15 The director of the tax authority brought an appeal against that judgment before the Naczelny S?d Administracyjny (Supreme Administrative Court, Poland), the referring court.

16 That court has doubts as to whether Article 88(3a)(4)(c) of the Law on VAT is compatible with Directive 2006/112.

17 That court notes that it is not apparent from that directive that a taxable person may lose his or her right to deduct VAT invoiced to him or her on the ground that the transaction at issue does not comply with the national civil law, since, according to the case-law of the Court, the right of deduction is an integral part of the VAT system and in principle cannot be limited. The referring court considers that the autonomy of VAT in relation to the rules of national civil law and the neutrality of VAT militate in favour of the argument that the invalidity of a legal transaction in the light of that law should not automatically lead to the exclusion of the right of deduction.

18 The referring court notes, in that regard, that it is apparent from the case-law of the Court that derogations from the right to deduct VAT are allowed only in the cases expressly provided for by the provisions of Directive 2006/112, that they are to be interpreted strictly and that that right must be refused where it is established, on the basis of objective evidence, that it is being relied on for fraudulent or abusive ends.

19 The referring court adds that, although, in accordance with Article 273 of Directive 2006/112, the Member States may adopt measures to ensure the correct collection of VAT and to prevent evasion, they must, however, exercise that power in accordance with EU law and its general principles, including the principle of neutrality, and in accordance with the principle of proportionality.

20 In those circumstances, the Naczelny S?d Administracyjny (Supreme Administrative Court) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Must the provisions of Article 167, Article 168(a), Article 178(a) and Article 273 of Directive 2006/112 … and the principles of neutrality and proportionality be interpreted as precluding a national provision, such as Article 88(3a)(4)(c) of the [Law on VAT], which deprives a taxable person of the right to deduct VAT on the acquisition of a right (asset) deemed to have been made under false pretences within the meaning of the provisions of national civil law, irrespective of whether the result sought was a tax advantage, the granting of which would be contrary to one or more of the objectives of [that] directive and whether it constituted the principal aim of the contractual approach adopted?’

Consideration of the question referred

21 As a preliminary point, it must be noted that the director of the tax authority considers that the request for a preliminary ruling must be declared inadmissible, pursuant to Article 94(a) of the Rules of Procedure of the Court of Justice, on the ground that it does not set out the relevant facts of the dispute in the main proceedings or the facts on which the question referred for a preliminary ruling is based, and does not specify the reasons why the transaction at issue was fictitious.

22 In that regard, it must be noted that, according to settled case-law, and in accordance with Article 94 of the Rules of Procedure, the need to provide an interpretation of EU law which will be of use to the national court requires that the national court define the factual and legal context of its questions or, at the very least, that it explain the factual circumstances on which those questions are based. The order for reference must also set out the precise reasons why the national court is unsure as to the interpretation of EU law and considers it necessary to refer a question to the Court for a preliminary ruling (judgment of 24 February 2022, *Suzlon Wind Energy Portugal*, C?605/20, EU:C:2022:116, paragraph 31 and the case-law cited).

23 In the present case, it is true that the referring court has not provided any information as to why the transaction at issue in dispute in the main proceedings was regarded by the director of the tax authority as being fictitious. However, the referring court does, summarily but clearly, indicate the content of the director's decision refusing the right of deduction which is the subject of that dispute, and sets out precisely the reasons why it has doubts as to the compatibility of the provision of national law constituting the legal basis of that decision in the light of Directive 2006/112 and the principles of fiscal neutrality and proportionality.

24 It follows that the request for a preliminary ruling is admissible.

25 By its question, the referring court asks, in essence, whether Article 167, Article 168(a), Article 178(a) and Article 273 of Directive 2006/112, read in conjunction with the principles of fiscal neutrality and proportionality, must be interpreted as precluding national legislation under which a taxable person is deprived of the right to deduct input VAT solely because that transaction is regarded as fictitious and is invalid under the provisions of national civil law, without it being necessary to establish that that transaction is the result of VAT evasion or abuse of rights.

26 As is apparent from the order for reference, that question is raised in the context of a dispute in which the director of the tax authority dismissed the taxable person's appeal against a decision calling into question the right to deduct VAT, on account of the fictitious nature of the transaction for the assignment of trade marks, carried out as an input, on the basis of a provision of the Law on VAT which has the effect of prohibiting such a right where a rule of the Civil Code is applicable to the taxable transaction at issue, according to which a declaration of intent made under false pretences vis-à-vis the other party with his or her consent is invalid.

27 In that regard, it must be borne in mind that, 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. 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 (judgments of 28 July 2011, *Commission* v *Hungary*, C?274/10, EU:C:2011:530, paragraphs 42 and 43, and of 24 November 2022, *Finanzamt M (Scope of the right to deduct VAT)*, C?596/21, EU:C:2022:921, paragraph 21 and the case-law cited).

28 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 (judgments of 14 February 1985, *Rompelman*, 268/83, EU:C:1985:74, paragraph 19; of 21 June 2012, *Mahagében and Dávid* , C?80/11 and C?142/11, EU:C:2012:373, paragraph 39; and of 24 November 2022, *Finanzamt M (Scope of the right to deduct VAT)*, C?596/21, EU:C:2022:921, paragraph 22).

29 The right to deduct VAT is, however, subject to compliance with both substantive and formal requirements or conditions.

30 The substantive requirements or conditions required for that right to arise are listed in Article 168 of Directive 2006/112. Thus, in order to enjoy that right, it is necessary, first, that the interested party be a ‘taxable person’ within the meaning of that directive and, second, that the goods or services relied on to confer entitlement to the right to deduct VAT be used by the taxable person for the purposes of his or her own taxed output transactions, and that, as inputs, as stated in point (a) of that article, those goods or services be supplied by another taxable person.

31 Furthermore, according to Article 167 of Directive 2006/112, the right of deduction arises at the time when the deductible tax becomes chargeable, with the tax becoming chargeable, pursuant to Article 63 of that directive, when the goods are delivered or the services are performed. It follows that the right of deduction is, in principle, subject to proof that the transaction has actually been carried out (see, to that effect, judgments of 26 May 2005, *António Jorge*, C?536/03, EU:C:2005:323, paragraphs 24 and 25; of 27 June 2018, *SGI and Valériane*, C?459/17 and C?460/17, EU:C:2018:501, paragraphs 34 and 35; and of 29 September 2022, *Raiffeisen Leasing*, C?235/21, EU:C:2022:739, paragraph 40). Thus, if the goods are not actually delivered or the services are not actually supplied, no right of deduction can arise.

32 The Court has, moreover, already held that it is inherent in the VAT scheme that a fictitious acquisition transaction cannot give rise to an entitlement to deduct that tax, since such a transaction cannot be connected in any way to the output transactions (judgment of 8 May 2019, EN.SA., C?712/17, EU:C:2019:374, paragraphs 24 and 25 and the case-law cited).

33 Thus, in the first place, the refusal to grant a taxable person the right of deduction in circumstances such as those at issue in the main proceedings may be justified by the finding that proof has not been adduced that the transaction relied on as a basis for the right of deduction has actually been carried out.

34 In order to be able to conclude that there is, in principle, a right of deduction in such circumstances, it is necessary to ascertain whether the assignment of marks relied on as the basis for that right was actually carried out and whether the marks concerned were used by the taxable person for the purposes of his taxed transactions.

35 In that regard, it should be noted that the burden of proof lies with the taxable person, who is required to provide objective evidence that goods and services were actually provided as inputs by another taxable person for the purposes of his or her own transactions subject to VAT, in respect of which he or she has actually paid VAT (judgments of 21 November 2018, *V?dan*, C?664/16, EU:C:2018:933, paragraph 44; of 11 November 2021, *Ferimet*, C?281/20, EU:C:2021:910, paragraph 39; and of 16 February 2023, *DGRFP Cluj*, C?519/21, EU:C:2023:106, paragraph 100).

36 As regards the assessment of the evidence produced in order to establish whether there is a taxable transaction, it must be done by the national court in accordance with the rules of evidence

under national law, carrying out an overall assessment of all the facts and circumstances of the case (judgment of 6 September 2012, *Mecsek-Gabona*, C?273/11, EU:C:2012:547, paragraph 53, and order of 9 January 2023, *A.T.S. 2003*, C?289/22, EU:C:2023:26, paragraph 46 and the case-law cited).

37 If, in the case at issue in the main proceedings, it follows from that assessment, which it is for the referring court to carry out, that the assignment of trade marks relied on did not actually take place, no right of deduction can arise.

38 In that context, as the Polish Government submits in its written observations, the referring court will be able to take into consideration the fact, if established, that, despite the apparent conclusion of an assignment agreement, the parties in fact continued to act as if the assignor were still the proprietor of the trade marks in question, W. being merely the precarious holder of those trade marks.

39 If, however, it is apparent from that overall assessment that that assignment was actually carried out and that the assigned trade marks were used by the taxable person for the purposes of his taxed output transactions, he cannot, in principle, be denied the right of deduction.

40 However, in the second place, the taxable person may be refused that right if it is established, in the light of objective evidence, that that right is being relied on for fraudulent or abusive ends.

41 It must be noted that the fight against tax evasion, avoidance and abuse is an objective recognised and encouraged by Directive 2006/112 and that the Court has repeatedly held that EU law cannot be relied on for fraudulent or abusive ends. Therefore, even if the substantive conditions for the right of deduction are met, it is for the national authorities and courts to refuse that right if it is established, in the light of objective evidence, that that right is being invoked fraudulently or abusively (judgments of 3 March 2005, *Fini H*, C?32/03, EU:C:2005:128, paragraphs 34 and 35; of 19 October 2017, *Paper Consult*, C?101/16, EU:C:2017:775, paragraph 43; and of 1 December 2022, *Aquila Part Prod Com*, C?512/21, EU:C:2022:950, paragraph 26).

42 In the case of fraud, according to settled case-law, the right of deduction is to be refused not only where VAT fraud is committed by the taxable person himself or herself, but also where it is established, in the light of objective evidence, that the 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 purchase of those goods or services, he or she was participating in a transaction connected with such fraud (see, to that effect, judgments of 6 December 2012, *Bonik*, C?285/11, EU:C:2012:774, paragraph 40; of 11 November 2021, *Ferimet*, C?281/20, EU:C:2021:910, paragraph 48; and of 1 December 2022, *Aquila Part Prod Com*, C?512/21, EU:C:2022:950, paragraph 27).

43 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 ought to 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 9 January 2023, *A.T.S. 2003*, C?289/22, EU:C:2023:26, paragraph 53 and the case-law cited).

44 As regards abuse of rights, it follows from settled case-law that, in the sphere of VAT, an abusive practice can be found to exist only if, first, the transactions concerned, notwithstanding

formal application of the conditions laid down by the relevant provisions of Directive 2006/112 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, second, it is apparent from a number of objective factors that the essential aim of those transactions is solely to obtain that tax advantage (judgments of 21 February 2006, *Halifax and Others*, C?255/02, EU:C:2006:121, paragraphs 74 and 75; of 17 December 2015, *WebMindLicenses*, C?419/14, EU:C:2015:832, paragraph 36; and of 15 September 2022, *HA.EN*., C?227/21, EU:C:2022:687, paragraph 35).

45 As to whether the essential aim of a transaction is solely to obtain that tax advantage, the Court has already held in the sphere of VAT that, where the taxable person has a choice between two transactions, he or she is not obliged to choose the one which involves paying the higher amount of VAT but, on the contrary, may choose to structure his or her business so as to limit his or her tax liability. Taxable persons are thus generally free to choose the organisational structures and the form of transactions which they consider to be most appropriate for their economic activities and for the purpose of limiting their tax burdens (judgment of 17 December 2015, *WebMindLicenses*, C?419/14, EU:C:2015:832, paragraph 42, and order of 9 January 2023, *A.T.S. 2003*, C?289/22, EU:C:2023:26, paragraph 40).

46 Consequently, the principle that abusive practices are prohibited, which applies to the sphere of VAT, bars wholly artificial arrangements which do not reflect economic reality and are set up with the sole aim of obtaining a tax advantage the grant of which would be contrary to the purposes of Directive 2006/112 (judgments of 16 July 1998, *ICI*, C?264/96, EU:C:1998:370, paragraph 26; and of 27 October 2011, *Tanoarch*, C?504/10, EU:C:2011:707, paragraph 51; and order of 9 January 2023, *A.T.S. 2003*, C?289/22, EU:C:2023:26, paragraph 41).

47 It must also be noted that the measures which the Member States may adopt under Article 273 of Directive 2006/112, in order to ensure the correct collection of VAT and to prevent evasion, 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 9 December 2021, *Kemwater ProChemie*, C?154/20, EU:C:2021:989, paragraph 28 and the case-law cited).

48 In the present case, first, it should be noted that it is not apparent from the explanations provided by the referring court that the factors in the light of which a legal act relating to a transaction subject to VAT may be classified as fictitious and therefore declared invalid under the rules of national civil law are the same as factors which, in accordance with the information set out in paragraphs 33 to 38 of the present judgment, make it possible to classify, under EU law, an economic transaction subject to VAT as a fictitious transaction and therefore to justify, in accordance with the case-law referred to in paragraph 32 of this judgment, the refusal to grant the taxable person a right of deduction. Such invalidity cannot therefore, in principle, justify that refusal.

49 Second, it is apparent from the referring court’s findings that the national legislation at issue covers, generally, any situation in which a taxable person has carried out a legal transaction regarded as fictitious and therefore invalid under the Civil Code, without it being necessary to establish, independently of the applicable rules of civil law and in the light of objective evidence, that that right was invoked fraudulently or abusively. Although the fictitious nature, under the provisions of national civil law, of the contract concluded between the taxable person and the issuer of the invoice may constitute evidence of a fraudulent or abusive practice within the meaning, and for the application, of Directive 2006/112, such a practice cannot be inferred from that fact alone.

50 In those circumstances, having regard to all of the foregoing, it must be concluded that, by providing that the annulment, pursuant to a rule of civil law, of a legal transaction regarded as

fictitious results in the refusal of the right to deduct VAT, without it being necessary to establish that the criteria enabling a taxable economic transaction to be classified, under EU law, as a fictitious transaction, are met or, where that transaction has actually been carried out, to establish that that right of deduction has been exercised fraudulently or abusively, national legislation such as that at issue in the main proceedings goes beyond what is necessary to achieve the objectives of Directive 2006/112 aimed at ensuring the correct collection of VAT and preventing evasion.

51 The answer to the question referred is, therefore, that Article 167, Article 168(a), Article 178(a) and Article 273 of Directive 2006/112, read in the light of the principles of fiscal neutrality and proportionality, must be interpreted as precluding national legislation under which a taxable person is deprived of the right to deduct input VAT solely because a taxable economic transaction is regarded as fictitious and invalid under the provisions of national civil law, without it being necessary to establish that the criteria for classifying, under EU law, that transaction as fictitious are met or, where that transaction has actually been carried out, that it is the result of VAT evasion or abuse of rights.

Costs

52 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:

Article 167, Article 168(a), Article 178(a) and Article 273 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 principles of fiscal neutrality and proportionality,

must be interpreted as precluding national legislation under which a taxable person is deprived of the right to deduct input value added tax solely because a taxable economic transaction is regarded as fictitious and invalid under the provisions of national civil law, without it being necessary to establish that the criteria for classifying, under EU law, that transaction as fictitious are met or, where that transaction has actually been carried out, that it is the result of value added tax evasion or abuse of rights.

[Signatures]

* Language of the case: Polish.