Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

22 October 2015*

(Reference for a preliminary ruling — Taxation — Value added tax — Sixth Directive — Right of deduction — Refusal — Sale by an entity regarded as non-existent)

In Case C-277/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland), made by decision of 6 March 2014, received at the Court on 5 June 2014, in the proceedings

PPUH Stehcemp sp. J. Florian Stefanek, Janina Stefanek, Jarosław Stefanek

v

Dyrektor Izby Skarbowej w Łodzi,

THE COURT (Fifth Chamber),

composed of T. von Danwitz (Rapporteur), President of the Fourth Chamber, acting as President of the Fifth Chamber, D. Šváby, A. Rosas, E. Juhász and C. Vajda, Judges,

Advocate General: Y. Bot,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— the Dyrektor Izby Skarbowej w Łodzi, by P. Szczerbiak and T. Szymański, acting as Agents,

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

— the Austrian Government, by G. Eberhard, acting as Agent,

— the European Commission, by L. Lozano Palacios and M. Owsiany-Hornung, acting as Agents,

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

gives the following

* Language of the case: Polish.

Judgment

1 This request for a preliminary ruling concerns the interpretation of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1), as amended by Council Directive 2002/38/EC of 7 May 2002 (OJ 2002 L 128, p. 41) ('the Sixth Directive').

2 The request has been made in proceedings between PPUH Stehcemp sp. j. Florian Stefanek, Janina Stefanek, Jarosław Stefanek ('PPUH Stehcemp') and the Dyrektor Izby Skarbowej w Łodzi (Director of the Tax Chamber in Łódź) concerning the latter's refusal to allow the deduction of input value added tax ('VAT') paid by PPUH Stehcemp on transactions considered to be suspicious.

Legal context

EU law

3 According to Article 2(1) of the Sixth Directive, 'the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such' is to be subject to VAT.

4 Article 4(1) and (2) of that directive provides:

'1. "Taxable person" shall mean any person who independently carries out in any place any economic activity specified in paragraph 2, whatever the purpose or results of that activity.

2. The economic activities referred to in paragraph 1 shall comprise all activities of producers, traders and persons supplying services including mining and agricultural activities and activities of the professions. The exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis shall also be considered an economic activity.'

5 According to Article 5(1) of the Sixth Directive, 'supply of goods' means the transfer of the right to dispose of tangible property as owner.

6 Article 10(1) and (2) of the Sixth Directive provides:

'1.

(a) "Chargeable event" shall mean the occurrence by virtue of which the legal conditions necessary for tax to become chargeable are fulfilled.

(b) The tax becomes "chargeable" when the tax authority becomes entitled under the law at a given moment to claim the tax from the person liable to pay, notwithstanding that the time of payment may be deferred.

2. The chargeable event shall occur and the tax shall become chargeable when the goods are delivered or the services are performed. …'

7 According to Article 17(1) of the Sixth Directive '[t]he right to deduct shall arise at the time when the deductible tax becomes chargeable'.

8 Article 17(2)(a) of the Sixth Directive, in the version resulting from Article 28f(1) thereof, provides:

'In so far as the goods and services are used for the purposes of his taxable transactions, the taxable person shall be entitled to deduct from the tax which he is liable to pay:

(a) [VAT] due or paid within the territory of the country in respect of goods or services supplied or to be supplied to him by another taxable person.'

9 Article 18(1)(a) of the Sixth Directive, in the version resulting from Article 28f(2) thereof, provides that, in order to exercise his right of deduction pursuant to Article 17(2)(a) of that directive, a taxable person must hold an invoice drawn up in accordance with Article 22(3) of that directive.

10 Article 22 of the Sixth Directive, which appears in Title XIII thereof, entitled 'Obligations of persons liable for payment', provides, in paragraphs 1(a), 3(b), 4(a) and 5 thereof, in the version resulting from Article 28h of the Sixth Directive:

'1.

(a) Every taxable person shall state when his activity as a taxable person commences, changes or ceases. Member States shall, subject to conditions which they lay down, allow the taxable person to make such statements by electronic means, and may also require that electronic means are used.

…

3.

… (b) Without prejudice to the specific arrangements laid down by this Directive, only the following details are required for VAT purposes on invoices issued under the first, second and third subparagraphs of point (a):

— the date of issue;

— a sequential number, based on one or more series, which uniquely identifies the invoice;

— the VAT identification number referred to in paragraph 1(c) under which the taxable person supplied the goods or services;

— where the customer is liable to pay tax on goods supplied or services rendered or has been supplied with goods as referred to in Article 28c(A), the VAT identification number as referred to in paragraph 1(c) under which the goods were supplied or the services rendered to him;

— the full name and address of the taxable person and of his customer;

— the quantity and nature of the goods supplied or the extent and nature of the services rendered;

— the date on which the supply of goods or of services was made or completed or the date on which the payment on account referred to in the second subparagraph of point (a) was made, insofar as that date can be determined and differs from the date of issue of the invoice;

— the taxable amount per rate or exemption, the unit price exclusive of tax and any discounts or rebates if they are not included in the unit price;

— the VAT rate applied;

— the VAT amount payable, except where a specific arrangement is applied for which this Directive excludes such a detail;…

4.

(a) Every taxable person shall submit a return by a deadline to be determined by Member States. That deadline may not be more than two months later than the end of each tax period. The tax period shall be fixed by each Member State at one month, two months or a quarter. Member States may, however, set different periods provided that they do not exceed one year. Member States shall, subject to conditions which they lay down, allow the taxable person to make such returns by electronic means, and may also require that electronic means are used.…

5. Every taxable person shall pay the net amount of the value added tax when submitting the regular return. Member States may, however, set a different date for the payment of that amount or may demand an interim payment.'

Polish law

11 Article 5(1)(1) of the Law on the tax on goods and services (Ustawa o podatku od towarów i usług) of 11 March 2004 (Dz. U. No 54, item 535; 'the VAT Law') provides that the supply of goods or services for consideration within the national territory is to be subject to tax on goods and services.

12 According to Article 7(1) of the VAT Law, 'supply of goods', within the meaning of Article 5(1)(1) thereof, means the transfer of the right to dispose of those goods as owner.

13 Article 15(1) and (2) of the VAT Law provides:

'1. "Taxable persons" shall mean legal persons, organisational entities without legal personality and natural persons who, independently, carry out one of the economic activities referred to in paragraph 2, whatever the purpose or results of that activity.

2. Any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions, shall be regarded as an economic activity, even where the activity concerned was carried out only once in circumstances indicating an intention to perform that activity repeatedly. The exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis shall also be regarded as an economic activity.'

14 According to Article 19(1) of the VAT Law, the liability to pay the tax arises when the goods or services are supplied.

15 Under Article 86(1) of the VAT Law, in so far as the goods and services are used to conduct taxable transactions, a taxable person within the meaning of Article 15 of that Law has the right to deduct the amount of input tax from the amount of tax which he owes. Article 86(2) provides that the amount of input tax is equal to the total amount of VAT specified in the invoices received by the taxable person for the acquisition of goods and services.

16 Article 14(2)(1)(a) of the Decree of the Minister for Finance of 27 April 2004 on the implementation of certain provisions of the Law on the tax on goods and services (Dz. U. No 97, item 970), in the version applicable to the facts in the main proceedings ('the Decree of 27 April 2004'), provides that, where the sale of goods or services has been documented by invoices or corrective invoices issued by a trader

who does not exist or who is not entitled to issue invoices or corrective invoices (a 'non-existent trader'), those invoices and customs documents may not form the basis for reducing the tax due and refunding the value added tax credit or refunding input tax.

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

17 In 2004, PPUH Stehcemp made a number of purchases of diesel fuel which it used in the course of its economic activity. The invoices relating to those fuel purchases were issued by Finnet sp. z o.o. ('Finnet'). PPUH Stehcemp deducted the VAT paid in respect of those fuel purchases.

18 Following a tax inspection, the tax authorities, by decision of 5 April 2012, refused to allow PPUH Stehcemp to deduct that VAT on the ground that the invoices corresponding to those fuel purchases had been issued by a non-existent trader.

19 The Director of the Tax Chamber in Łódź upheld that decision, by decision of 29 May 2012, on the ground that Finnet was to be regarded, in the light of the criteria provided for by the Decree of 27 April 2004, as a non-existent trader incapable of supplying goods. The finding that Finnet was a non-existent trader was based on the overall evidence, including the fact that that company was not registered for VAT purposes, did not submit a tax return and did not pay any taxes. In addition, that company did not publish its annual accounts and did not have a concession for the sale of liquid fuels. The building designated in the commercial register as being its corporate seat was in a dilapidated state, making any economic activity impossible. Finally, all attempts to contact Finnet or the person registered as its director in the commercial register had proved to be unsuccessful.

20 PPUH Stehcemp brought an action before the Wojewódzki Sąd Administracyjny w Łodzi (Regional Administrative Court, Łódź) against the decision of the Director of the Tax Chamber of Łódź of 29 May 2012. That action was dismissed on the ground that Finnet was a non-existent trader on the dates of the transactions at issue in the main proceedings and that PPUH Stehcemp had not demonstrated due diligence by reason of its failure to ascertain whether those transactions were connected with fraud.

21 PPUH Stehcemp brought an appeal on a point of law before the Naczelny Sąd Administracyjny (Supreme Administrative Court), invoking a breach of Article 86(1) and 86(2)(1)(a) of the VAT Law, read in conjunction with Article 17(2) of the Sixth Directive.

22 In support of its appeal on a point of law, PPUH Stehcemp submits that it is contrary to the principle of neutrality of VAT to deprive a taxable person, acting in good faith, of the right of deduction. It states that it received registration documents from Finnet indicating that that company was lawfully entitled to carry on trade, namely an extract from the commercial register, the allocation of a tax identification number and a certificate stating that it had been allocated a statistical identification number.

23 The referring court questions the importance which the case-law of the Court attaches to the good faith of the taxable person in the context of the right to deduct VAT (see, inter alia, judgments in *Optigen and Others*, C-354/03, C-355/03 and C-484/03, EU:C:2006:16; *Kittel and Recolta Recycling*, C-439/04 and C-440/04, EU:C:2006:446; *Mahagében and Dávid*, C-80/11 and C-142/11, EU:C:2012:373; *Tóth*, C-324/11, EU:C:2012:549, and orders in *Forvards V*, C-563/11, EU:C:2013:125, and in *Jagiełło*, C-33/13, EU:C:2014:184). It takes the view that the good faith of the taxable person cannot give rise to a right to deduct VAT if the material conditions governing that right are not met. In particular, it is unsure whether the acquisition of goods can be classified as a supply of goods when the invoices relating to that transaction refer to a non-existent trader and it is impossible to determine

the identity of the actual supplier of the goods at issue. A non-existent trader could not transfer the right to dispose of the goods as owner or receive payment. In those circumstances, the tax authorities would not have an enforceable tax claim, with the result that no tax would be due.

24 In those circumstances, the Naczelny Sąd Administracyjny (Supreme Administrative Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must Articles 2(1), 4(1) and (2), 5(1) and 10(1) and (2) of the Sixth … Directive … be interpreted as meaning that a transaction conducted in circumstances such as those in the main proceedings, in which neither the taxable person nor the tax authorities are in a position to establish the identity of the actual supplier of the goods, constitutes a supply of goods?

(2) If the reply to Question 1 is in the affirmative, must Articles 17(2)(a), 18(1)(a) and 22(3) of the Sixth Directive be interpreted as precluding provisions of national law under which, in circumstances such as those in the main proceedings, tax cannot be deducted by the taxable person since the invoice was issued by a person who was not the actual supplier of the goods and it is not possible to establish the identity of the actual supplier of the goods and to require that supplier to pay the tax, or to identify the person required to pay the tax pursuant to Article 21(1)(c) of the Sixth Directive by reason of the issue of the invoice?'

Consideration of the questions referred

25 By its questions, which it is appropriate to consider together, the referring court asks, in essence, whether the provisions of the Sixth Directive are to be interpreted as precluding national legislation, such as that at issue in the main proceedings, by which a taxable person is not allowed to deduct the VAT due or paid in respect of goods that were delivered to him on the grounds that the invoice was issued by a trader which is to be regarded, in the light of the criteria provided by that legislation, as a non-existent trader and that it is impossible to establish the identity of the party which actually supplied the goods.

26 According to settled case-law, the right of deduction provided for in Article 17 et seq. of the Sixth Directive is a fundamental principle of the common system of VAT, which in principle may not be limited, and which is exercisable immediately in respect of all the taxes charged on transactions relating to inputs (see, to that effect, judgments in *Mahagében and Dávid*, C-80/11 and C-142/11, EU:C:2012:373, paragraphs 37 and 38 and the case-law cited; *Bonik*, C-285/11, EU:C:2012:774, paragraphs 25 and 26; and *Petroma Transports and Others*, C-271/12, EU:C:2013:297, paragraph 22).

27 The deduction system is intended to relieve the trader entirely of the burden of the VAT due or paid in the course of all his economic activities. The common system of VAT therefore ensures that all economic activities, whatever their purpose or results, provided that they are, in principle, themselves subject to VAT, are taxed in a neutral way (see judgments in *Dankowski*, C-438/09, EU:C:2010:818, paragraph 24; *Tóth*, C-324/11, EU:C:2012:549, paragraph 25; and orders in *Forvards V*, C-563/11, EU:C:2013:125, paragraph 27, and *Jagiełło*, C-33/13, EU:C:2014:184, paragraph 25).

28 As regards the material conditions which must be met in order for the right to deduct to arise, it is apparent from the wording of Article 17(2)(a) of the Sixth Directive that, in order to be able to avail of that right, first, the interested party must be a taxable person within the meaning of that directive and, second, the goods or services relied on to give entitlement to that right must be used by the taxable person for the purposes of his own taxed output transactions, and that, as inputs, those goods or services must be supplied by another taxable person (see, to that effect, judgments in *Centralan*

Property, C-63/04, EU:C:2005:773, paragraph 52; *Tóth*, C-324/11, EU:C:2012:549, paragraph 26, and *Bonik*, C-285/11, EU:C:2012:774, paragraph 29; and order in *Jagiełło*, C-33/13, EU:C:2014:184, paragraph 27).

29 With regard to the formal conditions governing the right of deduction, Article 18(1)(a) of the Sixth Directive provides that the taxable person must hold an invoice drawn up in accordance with Article 22(3) of that directive. Pursuant to Article 22(3)(b) of that directive, the invoice must mention distinctly, inter alia, the VAT identification number under which the taxable person made the supply, the full name and address of the taxable person and the quantity and nature of the goods supplied.

30 With regard to the case in the main proceedings, it is apparent from the order for reference that PPUH Stehcemp, which wishes to exercise the right of deduction, has the status of a taxable person within the meaning of the Sixth Directive, that it actually received and paid for the goods concerned, namely fuel, indicated on the invoices issued by Finnet and that it used those goods subsequently for the purposes of its taxed transactions.

31 However, the referring court proceeds on the basis that the transaction mentioned on the invoice at issue in the main proceedings cannot give rise to a right to deduct the input VAT paid, since, even if Finnet were registered in the commercial register, that company is to be considered, in the light of the criteria set out in the legislation at issue in the main proceedings, as a non-existent trader on the date of those supplies of fuel. According to the referring court, that non-existence stems, in particular, from the fact that Finnet was not registered for VAT purposes, failed to submit a tax return, paid no taxes and did not have a concession to sell liquid fuels. In addition, the dilapidated state of the building designated as its corporate seat would make any economic activity impossible.

32 Since it is of the view that such a non-existent trader is not able to supply the goods or draw up an invoice relating to such a supply pursuant to the relevant provisions of the Sixth Directive, the referring court concludes that there was no supply of goods within the meaning of that directive, as it was also not possible to identify the actual supplier of those goods.

33 In that regard, it should be noted, first, that the criterion that the supplier of the goods must exist or be entitled to issue invoices, as appears from the legislation at issue in the main proceedings, as interpreted by the national court, does not feature among the conditions giving rise to the right to deduct identified in paragraphs 28 and 29 above. By contrast, Article 17(2)(a) of the Sixth Directive provides that that supplier must have the status of a taxable person within the meaning of Article 4(1) and (2) of that directive. Thus, the criteria set out in the national legislation at issue in the main proceedings, as interpreted by the national court, governing the question whether the supplier exists or whether he is entitled to issue invoices must not be at odds with the requirements which result from the status of a taxable person within the meaning of those provisions.

34 According to Article 4(1) and (2) of the Sixth Directive, a taxable person is any person who independently carries out any economic activity of producers and persons supplying services, whatever the purpose or results of that activity. It follows from this that the concept of 'taxable person' is defined widely, on the basis of the factual circumstances (see judgment in *Tóth*, C-324/11, EU:C:2012:549, paragraph 30).

35 With regard to Finnet, it cannot be ruled out that such economic activity took place given the circumstances surrounding the fuel supplies at issue in the main proceedings. That conclusion is not called into question by the fact, noted by the referring court, that the dilapidated state of the building in which Finnet's corporate seat is located did not allow any economic activity to take place, since such a finding does not mean that that activity could not be conducted in places other than the seat. In particular, when the economic activity in question involves supplies of goods made in the context of several successive sales, the first purchaser and reseller of those goods can simply order the first seller to transport the goods at issue directly to the second purchaser (see orders in *Forvards V*, C-563/11,

EU:C:2013:125, paragraphs 34, and in *Jagiełło*, C-33/13, EU:C:2014:184, paragraph 32), without that first purchaser and reseller necessarily having at his disposal the warehousing and transport facilities which are indispensable for supplying the goods at issue.

36 Similarly, any impossibility of establishing contact with Finnet or with the person registered as its director in the commercial register during the administrative proceedings cannot lead automatically to the conclusion that there was no economic activity on the date of the supplies of goods at issue in the main proceedings since those attempts at contact were made prior or subsequently to those supplies of goods.

37 In addition, Article 4(1) and (2) of the Sixth Directive does not indicate that the status of taxable person depends on any authorisation or licence granted by the authorities for the exercise of an economic activity (see, to that effect, judgment in *Tóth*, C-324/11, EU:C:2012:549, paragraph 30).

38 It is true that Article 22(1)(a) of the Sixth Directive provides that every taxable person is to state when his activity as a taxable person commences, changes or ceases. However, despite the importance of that declaration for the smooth functioning of the VAT system, it cannot constitute an additional condition to be met in order for the status of a taxable person to be recognised within the meaning of Article 4 of that directive, given that Article 22 appears in Title XIII, entitled 'Obligations of persons liable for payment', of that directive (see, to that effect, judgment in *Tóth*, C-324/11, EU:C:2012:549, paragraph 31).

39 It follows that that status also cannot depend on whether the taxable person complies with the obligations, stemming from Article 22(4) and (5), to submit a tax return and pay VAT. *A fortiori*, the recognition of the status of a taxable person cannot be made subject to the obligation to publish annual accounts or have a concession to sell fuel, since those obligations are not provided for by the Sixth Directive.

40 In that context, the Court has also held that any failure by the supplier of goods to meet the requirement to state when taxable activity commences cannot call into question the right of deduction to which the recipient of goods supplied is entitled in respect of the VAT paid for those goods. Accordingly, that recipient has a right to deduct even if the supplier of the goods is a taxable person who is not registered for VAT, where the invoices relating to the services supplied contain all of the information required by Article 22(3)(b) of the Sixth Directive, in particular the information necessary to identify the person who drew up those invoices and to ascertain the nature of the goods provided (see, to that effect, judgments in *Dankowski*, C-438/09, EU:C:2010:818, paragraphs 33, 36 and 38, and in *Tóth*, C-324/11, EU:C:2012:549, paragraph 32).

41 The Court concluded from this that the tax authorities cannot refuse the right of deduction on the ground that the issuer of the invoice no longer has an individual business operator's licence and that, accordingly, he no longer has the right to use his tax identification number, where that invoice contains all the information set out in Article 22(3)(b) of the Sixth Directive (see, to that effect, judgment in *Tóth*, C-324/11, EU:C:2012:549, paragraph 33).

42 In the present case, it is apparent from the documents submitted to the Court that the invoices relating to the transactions at issue in the main proceedings mentioned, in accordance with that provision, inter alia, the nature of the goods supplied and the amount of VAT due, and also Finnet's name, tax identification number and the address of its corporate seat. Accordingly, the circumstances noted by the referring court and summarised in paragraph 31 above do not support the conclusion that Finnet does not have the status of a taxable person and, consequently, do not allow PPUH Stehcemp to be refused the right of deduction.

43 It should be added, second, that, with regard to the fuel supplies at issue in the main proceedings, the other material conditions governing the right to deduct, set out in paragraph 28 above, were also met, notwithstanding Finnet's possible non-existence in the light of the Decree of 27 April 2004.

44 Since the concept of 'supply of goods' in Article 5(1) of the Sixth Directive does not refer to the transfer of ownership in accordance with the procedures prescribed by the applicable national law but covers any transfer of tangible property by one party which empowers the other party actually to dispose of it as if he were its owner (see, inter alia, judgments in *Shipping and Forwarding Enterprise Safe*, C-320/88, EU:C:1990:61, paragraph 7, and in *Dixons Retail*, C-494/12, EU:C:2013:758, paragraph 20 and the case-law cited), the possibility that Finnet lacks the power legally to dispose of the goods at issue in the main proceedings cannot mean that a supply of those goods within the meaning of that provision did not take place, since those goods were in fact delivered to PPUH Stehcemp, which used them for the purposes of its taxed transactions.

45 In addition, the VAT which PPUH Stehcemp actually paid in respect of the fuel supplies at issue in the main proceedings, according to the information in the documents submitted to the Court, was also 'due or paid', within the meaning of Article 17(2)(a) of the Sixth Directive. It is settled case-law that VAT applies to each transaction by way of production or distribution after deduction of the VAT directly borne by the various cost components (see, inter alia, judgments in *Optigen and Others*, C-354/03, C-355/03 and C-484/03, EU:C:2006:16, paragraph 54; *Kittel and Recolta Recycling*, C-439/04 and C-440/04, EU:C:2006:446, paragraph 49; and *Bonik*, C-285/11, EU:C:2012:774, paragraph 28). Therefore, the question whether or not the supplier of the goods at issue in the main proceedings has paid the VAT due on those transactions to the public purse has no bearing on the right of the taxable person to deduct input VAT (see, to that effect, judgments in *Optigen and Others*, C-354/03, C-355/03 and C-484/03, EU:C:2006:16, paragraph 54, and in *Véleclair*, C-414/10, EU:C:2012:183, paragraph 25).

46 It is apparent from the request for a preliminary ruling that, in the light of the circumstances in the main proceedings, the referring court is of the view that the transactions at issue in the main proceedings were actually carried out, not by Finnet, but by another trader whom it was impossible to identify, with the result that the tax authorities were unable to recover the tax relating to those transactions.

47 In that regard, it must be borne in mind that the prevention of tax evasion, avoidance and abuse is an objective recognised and encouraged by the Sixth Directive. It is therefore for the national courts and judicial authorities to refuse the right of deduction if it is shown, in the light of objective factors, that that right is being relied on for fraudulent or abusive ends (see judgments in *Bonik*, C-285/11, EU:C:2012:774, paragraphs 35 and 37 and the case-law cited, and in *Maks Pen*, C-18/13, EU:C:2014:69, paragraph 26).

48 Although that is the position where tax fraud is committed by the taxable person himself, it is also the case where a taxable person knew, or should have known, that, by his purchase, he was taking part in a transaction connected with VAT fraud. In such circumstances, the taxable person concerned must, for the purposes of the Sixth Directive, be regarded as a participant in such fraud, whether or not he 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 (see judgments in *Bonik*, C-285/11, EU:C:2012:774, paragraphs 38 and 39 and the case-law cited, and in *Maks Pen*, C-18/13, EU:C:2014:69, paragraph 27).

49 By contrast, where the material and formal conditions laid down by the Sixth Directive for the creation and exercise of that right are met, it is incompatible with the rules governing the right to deduct under that directive to impose a penalty, in the form of refusing that right to a taxable person who did not know, and could not have known, that the transaction concerned was connected with fraud committed by the supplier, or that another transaction forming part of the chain of supply prior or subsequent to that transaction carried out by the taxable person was vitiated by VAT fraud (see, to that

effect, judgments in *Optigen and Others*, C-354/03, C-355/03 and C-484/03, EU:C:2006:16; paragraphs 51, 52 and 55; *Kittel and Recolta Recycling*, C-439/04 and C-440/04, EU:C:2006:446, paragraphs 44 to 46 and 60; and in *Mahagében and Dávid*, C-80/11 and C-142/11, EU:C:2012:373, paragraphs 44, 45 and 47).

50 It is for the tax authorities, having found fraud or irregularities committed by the issuer of the invoice, to establish, on the basis of objective factors and without requiring the recipient of the invoice to carry out checks which are not his responsibility, that that recipient knew, or should have known, that the transaction on which the right to deduct is based was connected with VAT fraud, this being a matter for the referring court to determine (see, to that effect, judgments in *Bonik*, C-285/11, EU:C:2012:774, paragraph 45, and in *LVK — 56*, C-643/11, EU:C:2013:55, paragraph 64).

51 The determination of the measures which may, in a particular case, reasonably be required of a taxable person wishing to exercise the right to deduct VAT in order to satisfy himself that his transactions are not connected with fraud committed by a trader at an earlier stage of a transaction depends essentially on the circumstances of that particular case (see judgment in *Mahagében and Dávid*, C-80/11 and C-142/11, EU:C:2012:373, paragraph 59, and order in *Jagiełło*, C-33/13, EU:C:2014:184, paragraph 37).

52 Although such a taxable person could be obliged, when there are indications pointing to an infringement or fraud, to make enquiries about the trader from whom he intends to purchase goods or services in order to ascertain the latter's trustworthiness, the tax authorities cannot, however, as a general rule, require that taxable person, first, to ensure that the issuer of the invoice relating to the goods and services in respect of which the exercise of that right to deduct is sought was in possession of the goods at issue and was in a position to supply them and that he has complied with his obligations as regards the declaration and payment of VAT, in order to be satisfied that there are no irregularities or fraud at the level of the traders operating at an earlier stage of the transaction or, second, to be in possession of documents in that regard (see, to that effect, judgments in *Mahagében and Dávid*, C-80/11 and C-142/11, EU:C:2012:373, paragraphs 60 and 61; *Stroy trans*, C-642/11, EU:C:2013:54, paragraph 49, and order in *Jagiełło*, C-33/13, EU:C:2014:184, paragraphs 38 and 39).

53 In the light of the foregoing considerations, the answer to the questions referred is that the provisions of the Sixth Directive must be interpreted as precluding national legislation, such as that at issue in the main proceedings, by which a taxable person is not allowed to deduct the VAT due or paid in respect of goods that were delivered to him on the grounds that the invoice was issued by a trader which is to be regarded, in the light of the criteria provided by that legislation, as a non-existent trader, and that it is impossible to determine the identity of the actual supplier of the goods, except where it is established, on the basis of objective factors and without the taxable person being required to carry out checks which are not his responsibility, that that taxable person knew, or should have known, that that transaction was connected with VAT fraud, this being a matter for the referring court to determine.

Costs

54 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:

The provisions of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment, as amended by Council Directive 2002/38/EC of 7 May 2002, must

be interpreted as precluding national legislation, such as that at issue in the main proceedings, by which a taxable person is not allowed to deduct the value added tax due or paid in respect of goods that were delivered to him on the grounds that the invoice was issued by a trader which is to be regarded, in the light of the criteria provided by that legislation, as a non-existent trader, and that it is impossible to determine the identity of the actual supplier of the goods, except where it is established, on the basis of objective factors and without the taxable person being required to carry out checks which are not his responsibility, that that taxable person knew, or should have known, that that transaction was connected with value-added-tax fraud, this being a matter for the referring court to determine.

[Signatures]