Reports of Cases

JUDGMENT OF THE COURT (Tenth Chamber)

1 December 2022*

(Reference for a preliminary ruling – Taxation – Common system of value added tax (VAT) – Directive 2006/112/EC – Article 168 – Right to deduct VAT – Principles of fiscal neutrality, effectiveness and proportionality – Evasion – Proof – Duty of diligence on the part of the taxable person – Taking into account of a breach of obligations arising from national provisions and from EU law relating to the safety of the food supply chain – Authority granted by the taxable person to a third party to carry out the taxable transactions – Charter of Fundamental Rights of the European Union – Article 47 – Right to a fair hearing)

In Case C-512/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Fővárosi Törvényszék (Budapest High Court, Hungary), made by decision of 31 May 2021, received at the Court on 17 August 2021, in the proceedings

Aquila Part Prod Com SA

v

Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága,

THE COURT (Tenth Chamber),

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

Advocate General: P. Pikamäe,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Aquila Part Prod Com SA, by L. Réti, ügyvéd,

– the Hungarian Government, by M.Z. Fehér and K. Szíjjártó, acting as Agents,

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

* Language of the case: Hungarian.

– the European Commission, by B. Béres and J. Jokubauskaitė, 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 9(1), Articles 10 and 167, Article 168(a) and Article 178(a) 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 together with the principles of fiscal neutrality, proportionality and legal certainty and with Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter').

2 The request has been made in proceedings between Aquila Part Prod Com SA and the Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága (Appeals Division of the National Tax and Customs Authority, Hungary) ('the Appeals Division') concerning the amount of value added tax (VAT) owed by that company for the months of August to November 2012.

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 Under Article 10 of that directive:

'The condition in Article 9(1) that the economic activity be conducted "independently" shall exclude employed and other persons from VAT in so far as they are bound to an employer by a contract of employment or by any other legal ties creating the relationship of employer and employee as regards working conditions, remuneration and the employer's liability.'

5 Article 167 of that directive provides that a right of deduction is to arise at the time the deductible tax becomes chargeable.

6 Article 168 of Directive 2006/112 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;

…’

7 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;

…’

Hungarian law

8 Paragraph 1 of the adózás rendjéről szóló 2003. évi XCII. törvény (Law No XCII of 2003 on the Code of fiscal procedure) (*Magyar Közlöny* 2003/131, 14 November 2003, p. 9990; ‘the Code of fiscal procedure’) provides, in subparagraph 7 thereof:

‘Contracts, transactions and other similar acts must be classified by reference to their actual substance. A contract or any other transaction which is invalid shall be relevant for tax purposes in so far as its economic consequences can be demonstrated.’

9 Paragraph 2(1) of the Code of fiscal procedure provides:

‘All rights in legal relationships for tax purposes shall be exercised in accordance with their purpose. Under the tax laws, the conclusion of contracts or the carrying out of other transactions whose purpose is to circumvent the provisions of tax laws may not be classified as exercise of rights in accordance with their purpose.’

10 Under Paragraph 97(4) and (6) of that code:

‘4. In the course of the inspection, it shall be the duty of the tax authority to establish and prove the facts unless, by virtue of legislation, the burden of proof lies with the taxpayer.

…

6. When establishing the facts, the tax authority shall have a duty also to seek facts favourable to the taxpayer. Except where estimates are made, an unproven fact or circumstance shall not be assessed to the taxpayer’s disadvantage.’

11 Paragraph 26 of the általános forgalmi adóról szóló 2007. évi CXXVII. törvény (Law No CXXVII of 2007 on value added tax) (*Magyar Közlöny* 2007/155, 16 November 2007, p. 10893; 'the Law on VAT') provides:

'Where dispatch or transport is effected by the supplier, by the customer or, on behalf of either, by a third party, the place of supply of the goods shall be the place where the goods are located at the time of dispatch or of departure of transport mentioning the customer as the recipient.'

12 Paragraph 27(1) of the Law on VAT provides:

'Where goods are sold successively in such a way that they are dispatched or transported directly from the original supplier to the final customer mentioned as recipient, Paragraph 26 shall apply exclusively to a single supply of goods.'

13 Under Paragraph 119(1) of the Law on VAT:

'Unless otherwise provided in this Law, a right of deduction shall arise at the time the amount due in respect of input VAT is determined (Paragraph 120).'

14 Paragraph 120 of the Law on VAT provides:

'In so far as the taxable person, acting as such, uses or otherwise exploits goods or services in order to carry out a taxable supply of goods or services, he or she shall be entitled to deduct from the tax that he or she is liable to pay:

(a) the amount of tax he or she was charged, in connection with the purchase of the goods or the use of the services, by another taxable person – including any person or entity subject to simplified corporation tax.

…'

15 Paragraph 127(1) of the Law on VAT provides:

'Exercise of the right of deduction shall be subject to the substantive condition that the taxable person is himself or herself in possession:

(a) in the situation referred to in Paragraph 120(a), of an invoice issued in his or her name which attests to the performance of the transaction;

…'

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

16 Aquila Part Prod Com is the successor in law to Agrirom SRL, a Romanian company which has had a VAT registration number in Hungary since 2 June 2010. The main activity of Aquila Part Prod Com is to act as an intermediary in the wholesale trade of foodstuffs, beverages and tobacco products. On 1 April 2011, that company concluded with another company an agency contract by which it entrusted the latter company with carrying out the activity of buying and selling goods on behalf of the principal.

17 From 2012 to 2017, the tax authority undertook a VAT inspection in relation to the months of August to November 2012, carrying out numerous investigations. Following that inspection, the tax authority adopted four decisions by which it made a VAT adjustment of 86 815 000 Hungarian forint (HUF) (approximately EUR 206 000) for August 2012, of HUF 66 012 000 (approximately EUR 157 000) for September 2012, of HUF 109 400 000 (approximately EUR 260 000) for October 2012 and of HUF 24 607 000 (approximately EUR 58 500) for November 2012, corresponding, for the most part, to a VAT refund claim regarded as unfounded and, to a lesser extent, to an underpayment of tax. In addition, a tax fine was imposed and default interest was charged.

18 In those decisions, the tax authority found that, during the periods examined, the taxable person had participated in a carousel fraud. That finding is based, inter alia, on the infringement of provisions of national law relating to the safety of the food supply chain and provisions of Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety (OJ 2002 L 31, p. 1), which demonstrates that the objective pursued was the transfer of the goods concerned from Slovakia back to Hungary. That finding is also based on the financial transactions of the various companies involved in the supply chain, on the low commercial margin applied by each of those companies and on the unreasonable commercial behaviour of some of them, which establish the existence of an invoicing chain aimed at acquiring an unlawful tax advantage and at knowingly evading taxation.

19 In those decisions, the tax authority put forward a substantial amount of evidence establishing that the taxable person had actively participated in fraud, including the fact that the contracts were concluded with the taxable person's participation, the existence of an unusual clause in the contracts of carriage, the fact that the Slovak customer resold in Hungary the goods which he had procured on the same day in Hungary and the existence of links between the persons involved in the invoicing chain. The tax authority also relied on evidence that the taxable person had failed to exercise sufficient diligence, including the fact that the manager of the company with which the taxable person had concluded an agency contract had previously participated in VAT fraud, the fact that that company had been involved in the fraudulent invoicing chain and other evidence which demonstrate that that manager participated in the fraud.

20 The four decisions of the tax authority having been upheld by a decision of the Appeals Division of 8 December 2017, Aquila Part Prod Com brought an action before the referring court, the Fővárosi Törvényszék (Budapest High Court, Hungary), in support of which that company submits that the conduct of the tax proceedings was informed by a preconception and relies, in essence, on the absence of evidence that the company could have been aware of the existence of fraud committed upstream. It claims to have exercised due diligence to avoid participating in fraud by establishing internal rules on procurement which require suppliers to be checked prior to the conclusion of a contract and which prohibit any payment in cash. In that connection, Aquila Part Prod Com complains, inter alia, that the tax authority disregarded the agency contract it had concluded with another company and equated the knowledge which the latter's legal representative had of the facts constituting the fraud with its own knowledge of those facts.

21 The Appeals Division disputes those arguments before the referring court, maintaining, in particular, that an infringement of the rules on the safety of the food supply chain may constitute one element among others which show that the taxable person knew or ought to have known that he or she was participating in a transaction connected with fraudulent evasion of VAT.

22 The referring court considers it necessary for the Court to provide guidance as to whether the circumstances relied on by the Appeals Division can be regarded as objective evidence, within the meaning of the judgment of 21 June 2012, *Mahagében and Dávid* (C-80/11 and C-142/11, EU:C:2012:373), supporting the conclusion that the taxable person has committed fraud, and whether, taking into account the nature of the supply chain identified in the main proceedings, the extent of the duty of diligence imposed by the tax authority in the main proceedings is consistent with the rules of evidence as interpreted by the Court, with the provisions of Directive 2006/112, and with the principles governing the exercise of the right to deduct VAT.

23 In particular, the referring court asks, first, whether the tax authority could equate knowledge of the facts constituting fraud on the part of a natural person (the legal representative of a company with which the taxable person had concluded an agency contract for the pursuit of its activity) with that taxable person's knowledge of those facts, without examining the content of the agency contract. Second, it raises the issue, in the light of the facts in the main proceedings, of the diligence which may be required of a taxable person in order to avoid participation in fraud and, in the context of a carousel fraud, the issue of the circumstances which may be relied on to establish that the taxable person could have knowledge of that fraud. Third, it asks whether the tax authority may, in order to refuse the right to deduct VAT, rely on an infringement of rules other than those of tax law, such as those relating to the safety of the food supply chain.

24 It is in those circumstances that the Fővárosi Törvényszék (Budapest High Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is a practice of a tax authority compatible with EU law, in particular Articles 9(1) and [Article] 10 of [Directive 2006/112] and the principle of fiscal neutrality, in circumstances in which what is known to a natural person having a legal relationship with a legal person independent of the taxable person who is the principal, with its own legal personality and acting as an agent, is automatically and without any verification, imputed to be known by the taxable person, even though that natural person does not have a relationship with the taxable person, thereby ignoring the provisions of the contract concluded between the principal and the agent and also the provisions of foreign law governing the agency relationship?

(2) Are [Article] 167, [Article] 168(a) and [Article] 178(a) of [Directive 2006/112] to be interpreted as meaning that, where a tax authority identifies the existence of a circular invoicing chain, that fact alone suffices as objective evidence of tax fraud or in such a case is the tax authority also required to indicate which member(s) of the chain committed the tax fraud and what their modus operandi was?

(3) Are the articles cited of [Directive 2006/112], read together with the principles of proportionality and reasonableness, to be interpreted as meaning that even if, based on the specific circumstances of the case, the tax authority considers that the taxable person should have been more diligent, that person cannot be required to verify facts which the tax authority was only able to discover after an inspection lasting approximately five years, which necessitated numerous additional checks using instruments of public law, such that the protection of taxable persons' trade secrets was not an impediment to the checks? In the event that greater diligence is required, is it sufficient proof of due diligence that the taxable person's scrutiny extends to matters beyond those indicated in the … judgment [of 21 June 2012, *Mahagében and Dávid* (C-80/11 and C-142/11, EU:C:2012:373)] in relation to possible trading partners, such that the taxable person has internal supply rules for the

purpose of conducting checks on those trading partners, does not accept cash payments, includes clauses concerning the possible risks in the contracts it concludes, and also examines other matters during the transaction?

(4) Must the articles cited above of Directive [2006/112] be interpreted as meaning that, if the tax authority finds that the taxable person actively participated in the tax fraud, it is sufficient in that regard that the evidence gathered by that authority establishes that, using due diligence, the taxable person could have become aware of the fact that it was participating in a tax fraud, without that evidence showing that the taxable person knew that it was participating in a tax fraud, because it participated due to its active conduct in that fraud? If active participation in a tax fraud, in other words, awareness of that participation, is proven, is the tax authority required to establish the fraudulent actions of the taxable person, evidenced by its concerted conduct with the members preceding it in the chain, or is it sufficient for the tax authority to rely on objective evidence that the members of the chain knew one another?

(5) Is a practice of a tax authority pursuant to which that authority bases its ruling on an alleged infringement of provisions governing the safety of the food supply chain, which have no bearing on compliance by the taxable person with his or her tax obligations or on the circulation of his or her invoices, which the tax legislation does not provide for in any way in relation to the taxable person, and which have no effect on the veracity of the transactions inspected by the tax authority and on the taxable person's knowledge examined in the tax proceedings, compatible with the articles cited above of [Directive 2006/112], with the right to a fair trial recognised as a general principle in Article 47 of the [Charter], and with the principle of legal certainty?

(6) In the event the previous question is answered in the affirmative:

Is a practice of a tax authority whereby that authority, without the involvement of the official body responsible for the safety of the food supply chain, which has material and territorial competence, sets out in its ruling findings concerning the taxable person which come within that official body's sphere of competence, such that, based on infringements identified in relation to the safety of the food supply chain – a matter outside its sphere of competence – it draws tax consequences for the taxable person, without that person being able to challenge the finding that he or she infringed the provisions on food supply chain safety in proceedings which are separate from the tax proceedings and which comply with the fundamental guarantees and the parties' rights, compatible with the articles cited above of [Directive 2006/112], with the right to a fair trial recognised as a general principle in Article 47 of the Charter, and with the principle of legal certainty?'

The questions referred for a preliminary ruling

The second question

25 By its second question, which it is appropriate to examine in the first place, the referring court asks, in essence, whether, where a tax authority intends to refuse a taxable person the right to deduct the input VAT paid on the ground that that taxable person has participated in a VAT carousel fraud, Directive 2006/112 must be interpreted as precluding that tax authority from merely establishing that that transaction forms part of a circular invoicing chain, without identifying all the operators involved in that fraud and their respective conduct.

26 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 that 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 that 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, and of 11 November 2021, *Ferimet*, C-281/20, EU:C:2021:910, paragraph 45 and the case-law cited).

27 With regard to fraud, according to the settled case-law, a taxable person is to be refused the right to deduct not only where VAT evasion 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 to deduct is claimed, was made – knew or should have known that, through the acquisition of those goods or services, he or she was participating in a transaction connected to 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; and of 11 November 2021, *Ferimet*, C-281/20, EU:C:2021:910, paragraph 46).

28 The Court has repeatedly held, 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 (judgment of 11 November 2021, *Ferimet*, C-281/20, EU:C:2021:910, paragraph 48 and the case-law cited).

29 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 (judgment of 11 November 2021, *Ferimet*, C-281/20, EU:C:2021:910, paragraph 49 and the case-law cited).

30 Furthermore, 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 (judgment of 11 November 2021, *Ferimet*, C-281/20, EU:C:2021:910, paragraph 50 and the case-law cited).

31 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 (judgment of 11 November 2021, *Ferimet*, C-281/20, EU:C:2021:910, paragraph 51 and the case-law cited).

32 It follows from the case-law referred to in paragraphs 27 to 31 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. 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, judgment of 11 November 2021, *Ferimet*, C-281/20, EU:C:2021:910, paragraph 52 and the case-law cited).

33 It must be inferred from this that tax authorities which intend to refuse the right of deduction must establish to the requisite legal standard, in accordance with the rules of evidence laid down in national law and without undermining the effectiveness of EU law, both objective evidence establishing the existence of the VAT fraud itself and objective evidence establishing that the taxable person committed that fraud or that he or she knew, or ought to have known, that the transaction relied on as a basis for that right was connected with that fraud.

34 That evidential requirement prohibits, irrespective of the type of fraud or the conduct under examination, the use of assumptions or presumptions which, by reversing the burden of proof, would have the effect of undermining the fundamental principle of the common system of VAT constituted by the right of deduction and, therefore, of impairing the effectiveness of EU law.

35 Accordingly, although the existence of a circular invoicing chain is strong evidence of the existence of fraud, which must be taken into account in the overall assessment of all the evidence and all the factual circumstances of the case, there are no grounds for accepting that the tax authority may, for the purpose of proving the existence of carousel fraud, merely establish that the transaction in question forms part of a circular invoicing chain.

36 It is for the tax authority, on the one hand, to provide a precise description of the constituent elements of the fraud and to adduce evidence of the fraudulent conduct and, on the other hand, to establish that the taxable person actively participated in that fraud or that he or she knew, or ought to have known, that the transaction relied on as a basis for that right was connected with that fraud. However, establishing the existence of the fraud and of the taxable person's participation in that fraud does not necessarily entail identifying all the operators involved in the fraud and their respective conduct. It is, as was recalled in paragraph 30 of the present judgment, for the national courts to verify that the existence of those elements has been established to the requisite legal standard by the tax authority.

37 It follows from the foregoing considerations that the answer to the second question is that Directive 2006/112 must be interpreted as meaning that:

– where a tax authority intends to refuse a taxable person the right to deduct the input VAT paid on the ground that that taxable person has participated in a VAT carousel fraud, that directive

precludes that tax authority from merely establishing that that transaction forms part of a circular invoicing chain;

– it is for that tax authority to provide, first, an accurate description of the constituent elements of the fraud and to prove fraudulent conduct and, second, to establish that the taxable person actively participated in that fraud or that he or she knew, or ought to have known, that the transaction relied on as a basis for that right was connected with that fraud, which does not necessarily entail identifying all the operators involved in the fraud and their respective conduct.

The fourth question

38 By its fourth question, which it is appropriate to examine second, the referring court asks, in essence, whether, where a tax authority relies on a taxable person's active participation in VAT fraud in order to refuse the right of deduction, Directive 2006/112 must be interpreted as precluding the tax authority from basing its refusal on evidence establishing that that taxable person could have known, by exercising all due diligence, that the transaction concerned was connected with such fraud, rather than on evidence of participation in that fraud. The referring court also asks whether the fact that the members of the supply chain, of which that transaction forms part, knew one other is a circumstance sufficient to establish the taxable person's participation in the fraud.

39 It follows from the case-law of the Court, referred to in paragraph 27 of the present judgment, that, in the case of VAT fraud, the right to deduct must be refused in three cases, that is to say, first, where it is established that the taxable person has him or herself committed VAT fraud; second, where it is established that the taxable person knew that, through his or her acquisition, he or she was participating in a transaction connected with fraudulent evasion of VAT and, third, where it is established that the taxable person ought to have known that, through his or her acquisition, he or she was participating in a transaction connected with such fraud.

40 With regard to the second and third cases, which amount to passive participation in fraud, it has been considered 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 the 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 the taxable person, in such a situation, aids the perpetrators of that fraud and becomes their accomplice (judgment of 11 November 2021, *Ferimet*, C-281/20, EU:C:2021:910, paragraph 47 and the case-law cited).

41 Where it is established that the taxable person knew, in any way whatsoever, that, by his or her purchase, he or she was participating in a transaction connected to fraud of input VAT committed in the chain of supply or services, the only positive act which determines the basis for a refusal of the right to deduct is the acquisition of the goods or services concerned. There is therefore no need, in order to justify such a refusal, to establish that that taxable person actively participated in that fraud, in one way or another, even if only by actively encouraging or facilitating it (see, to that effect, order of 14 April 2021, *Finanzamt Wilmersdorf*, C-108/20, EU:C:2021:266, paragraph 26).

42 Where it is established that a taxable person should have known that, by his or her purchase, he or she was participating in a transaction connected to input VAT fraud in the chain of supply or services, it is the failure to take certain steps which leads to a refusal of the right to deduct (see, to that effect, order of 14 April 2021, *Finanzamt Wilmersdorf*, C-108/20, EU:C:2021:266, paragraph 27).

43 Where a tax authority relies on a taxable person's active participation in VAT fraud in order to refuse the right of deduction, it is incumbent on that authority, according to the case-law recalled in paragraph 30 of the present judgment, to adduce evidence of this. However, there is nothing to preclude that authority, in such a case, from basing that refusal, in addition or in the alternative, on evidence establishing that, in any event, the taxable person, had he or she exercised due diligence, ought to have known that, through his or her acquisition, he or she was participating in a transaction connected with fraud. Evidence of that fact, if it is adduced, is sufficient to establish the taxable person's participation in the fraud and, therefore, to justify that refusal.

44 In all cases, the mere fact that the members of the supply chain knew one other, although it is to be taken into account in the overall assessment of all the evidence and all the factual circumstances of the case, is not sufficient to establish the taxable person's participation in the fraud.

45 In the light of the foregoing considerations, the answer to the fourth question is that Directive 2006/112 must be interpreted as meaning that:

– where a tax authority relies on a taxable person's active participation in VAT fraud in order to refuse the right of deduction, that directive does not preclude that tax authority from basing that refusal, in addition or in the alternative, on evidence establishing not such participation but the fact that that taxable person could have known, by exercising all due diligence, that the transaction concerned was connected with such fraud;

– the mere fact that the members of the supply chain, of which that transaction forms part, knew one other is not sufficient to establish the taxable person's participation in the fraud.

The third question

46 By its third question, which it is appropriate to examine third, the referring court asks, in essence, whether Directive 2006/112, read together with the principle of proportionality, must be interpreted as meaning that, when there are indications pointing to an infringement or fraud, that directive precludes the taxable person from being required to exercise greater diligence for the purpose of ensuring that the transaction he or she is carrying out does not result in his or her participation in fraud and to carry out complex and far-reaching checks such as those which may be undertaken by the tax authority.

47 The referring court asks, in that respect, whether the taxable person can be regarded as having exercised sufficient diligence where he or she demonstrates, inter alia, that he or she has established internal procurement rules aimed at carrying out checks on his or her trading partners and that he or she refuses any payment in cash.

48 The Court has held on several occasions that it is not contrary to EU law to require that a trader take every step which could reasonably be asked of him or her to satisfy him or herself that the transaction which he or she is carrying out does not result in his or her participation in tax evasion and that 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 him or herself that his or her 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, to that effect, judgments of 21 June 2012, *Mahagében and Dávid*, C-80/11 and C-142/11, EU:C:2012:373, paragraphs 54 and 59, and of 19 October 2017, *Paper Consult*, C-101/16, EU:C:2017:775, paragraph 52; and order of 14 April 2021, *Finanzamt Wilmersdorf*, C-108/20, EU:C:2021:266, paragraph 28).

49 The Court has clarified that, when there are indications pointing to an infringement or fraud, a reasonable trader could, depending on the circumstances of the case, be obliged to make enquiries about another trader from whom he or she intends to purchase goods or services in order to ascertain the latter's trustworthiness (judgment of 21 June 2012, *Mahagében and Dávid*, C-80/11 and C-142/11, EU:C:2012:373, paragraph 60; orders of 3 September 2020, *Vikingo Fővállalkozó*, C-610/19, EU:C:2020:673, paragraph 55; and of 14 April 2021, *Finanzamt Wilmersdorf*, C-108/20, EU:C:2021:266, paragraph 29).

50 However, the tax authority may not oblige a taxable person to undertake complex and far-reaching checks as to that person's supplier, thereby de facto transferring their own investigative tasks to that person (judgment of 19 October 2017, *Paper Consult*, C-101/16, EU:C:2017:775, paragraph 51).

51 In particular, the Court has already held that the tax authority cannot, as a general rule, require the taxable person wishing to exercise the right to deduct VAT, 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 has the capacity of a taxable person, that he or she was in possession of the goods at issue and was in a position to supply them and that he or she has satisfied his or her obligations as regards 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 (judgments of 21 June 2012, *Mahagében and Dávid*, C-80/11 and C-142/11, EU:C:2012:373, paragraph 61, and of 4 June 2020, *C.F. (Tax inspection)*, C-430/19, EU:C:2020:429, paragraph 47).

52 It follows that the diligence required of the taxable person and the measures which may reasonably be required of him or her to satisfy him or herself that, through his or her acquisition, he or she is not participating in a transaction connected with fraud committed by a trader at an earlier stage of a transaction depend on the circumstances of the case and, in particular, on whether or not there are indications available to the taxable person, at the time of his or her acquisition, pointing to an infringement or fraud. Accordingly, where there are indications of fraud, the taxable person may be expected to exercise greater diligence. However, the taxable person cannot be required to carry out complex and far-reaching checks, such as those which the tax authority has the means to carry out.

53 The question whether the taxable person has exercised sufficient diligence where he or she demonstrates, inter alia, that he or she has established internal procurement rules aimed at carrying out checks on his or her trading partners and that he or she refuses any payment in cash forms part of the assessment of the facts in the main proceedings and, consequently, falls within the exclusive jurisdiction of the national courts (see, to that effect, judgment of 16 June 2022, *DuoDecad*, C-596/20, EU:C:2022:474, paragraph 37). It is for those courts to assess whether, in

the light of the circumstances of that particular case, the taxable person has exercised sufficient diligence and has taken the measures which may reasonably be required of him or her in those circumstances.

54 It follows from the foregoing considerations that the answer to the third question is that Directive 2006/112, read together with the principle of proportionality, must be interpreted as meaning that:

– when there are indications pointing to an infringement or fraud, that directive does not preclude the taxable person from being required to exercise greater diligence for the purpose of ensuring that the transaction he or she is carrying out does not result in his or her participation in fraud;

– however, the taxable person cannot be required to carry out complex and far-reaching checks such as those which may be undertaken by the tax authority;

– it is for the national court to assess whether, in the light of all the circumstances of the case, the taxable person has exercised sufficient diligence and has taken the measures which may reasonably be required of him or her in those circumstances.

The fifth and sixth questions

55 By its fifth and sixth questions, which it is appropriate to examine together, in the fourth place, the referring court asks, in essence, whether Directive 2006/112, the right to a fair hearing, enshrined in Article 47 of the Charter, and the principle of legal certainty must be interpreted as precluding the tax authority from refusing a taxable person the right to deduct VAT on the ground that he or she has not complied with the obligations arising from national provisions or from EU law relating to the safety of the food supply chain, in the absence of a prior decision by the administrative body competent to establish such an infringement.

56 Since the referring court has not explained the reasons why it is asking the Court to interpret the principle of legal certainty, those two questions do not, in that regard, satisfy the requirements of Article 94 of the Rules of Procedure of the Court of Justice, with the result that they are, in so far as they refer to that principle, manifestly inadmissible.

57 With regard to Directive 2006/112, the Court held in paragraph 41 of the judgment of 3 October 2019, *Altic* (C-329/18, EU:C:2019:831), that Article 168(a) thereof must be interpreted as precluding a taxable person who participates in the food chain from being refused the right to deduct input VAT on the sole ground, assuming that it has been duly established, that that taxable person has not complied with his or her obligations under Article 18(2) of Regulation No 178/2002 to identify his or her suppliers for the purposes of traceability of foodstuffs. The Court added that non-compliance with those obligations may, however, constitute one element among others which, taken together and in a consistent manner, tends to show that the taxable person knew or should have known that he or she was involved in a transaction involving VAT fraud.

58 The same applies, by extension, as regards the infringement of both national provisions and any provision of EU law relating to the safety of the food supply chain and as regards establishing both proof of the existence of VAT fraud and the active or passive participation of the taxable person in that fraud. Such an infringement is not, in itself, evidence of those facts, but may be

one piece of evidence among others of the existence of such fraud, as well as evidence that may be used, in the overall assessment of the evidence and facts of the case, to establish that the taxable person participated in that fraud, notwithstanding the fact that that infringement has not previously been established by the administrative body with competence in relation to such an infringement.

59 Since the referring court questions the compatibility of a practice of the tax authority that consists in taking into account such an infringement, even though it has not previously been established by the competent administrative body, it must be recalled, as the right to a fair hearing is enshrined in Article 47 of the Charter, that under that article, everyone whose rights and freedoms guaranteed by EU law are infringed has the right to an effective remedy before a tribunal in accordance with the conditions laid down therein. Therefore, the latter does not apply for the purposes of examining the lawfulness of an administrative practice.

60 In so far as the referring court asks whether the right to a fair hearing enshrined in Article 47 of the Charter must be interpreted as precluding the court hearing an action against the tax authority's decision from taking into account, as evidence of the existence of VAT fraud or of the participation of the taxable person therein, an infringement of obligations arising from national provisions or from EU law relating to the safety of the food supply chain, relied on by the tax authority, even in the absence of a prior decision by the national administrative body competent to establish such an infringement, it must be recalled that, in order to satisfy the requirements associated with the right to a fair hearing, it is important for the parties to be apprised of, and to be able to debate and be heard on, the matters of fact and of law which will determine the outcome of the proceedings (judgment of 16 October 2019, *Glencore Agriculture Hungary*, C-189/18, EU:C:2019:861, paragraph 62 and the case-law cited).

61 Consequently, the fact that the court hearing the action against the tax authority's decision could take into account, as evidence of the existence of VAT fraud or of the participation of the taxable person in that fraud, the infringement of obligations arising from national provisions or from EU law relating to the safety of the food supply chain, does not undermine the right to a fair hearing, if that evidence can be contested, debated on and heard before that court.

62 By contrast, if that court is not empowered to examine the existence of an infringement of obligations arising from national provisions or from EU law relating to the safety of the food supply chain, relied on as evidence of the existence of VAT fraud or of the participation of the taxable person therein, that evidence cannot be accepted without undermining the right to an effective judicial remedy and must therefore be disregarded (see, by analogy, judgments of 17 December 2015, *WebMindLicenses*, C-419/14, EU:C:2015:832, paragraphs 87 to 89, and of 16 October 2019, *Glencore Agriculture Hungary*, C-189/18, EU:C:2019:861, paragraphs 66 to 68).

63 In the light of the foregoing considerations, the answer to the fifth and sixth questions is that:

– Directive 2006/112 must be interpreted as meaning, first, that it precludes the tax authority from refusing to allow a taxable person to exercise the right to deduct VAT on the sole ground that he or she has failed to comply with the obligations arising from the national provisions or from EU law relating to the safety of the food supply chain and, second, that failure to comply with those obligations may, however, constitute one element among others which may be taken into account by the tax authority in order to establish both the existence of VAT fraud and the participation of that taxable person therein, even in the absence of a prior decision by the administrative body competent to establish such an infringement;

– the right to a fair hearing, enshrined in Article 47 of the Charter, must be interpreted as not precluding the court hearing the action against the tax authority's decision from taking into account, as evidence of the existence of VAT fraud or of the participation of the taxable person therein, an infringement of the abovementioned obligations, if that evidence can be contested, debated on and heard before that court.

The first question

64 By its first question, which it is appropriate to examine in the fifth and last place, the referring court asks, in essence, whether Directive 2006/112 and the principle of fiscal neutrality must be interpreted as precluding a tax practice which, for the purpose of refusing a taxable person the right to deduct VAT on the ground that he or she has participated in VAT fraud, consists in taking into account the fact that the legal representative of the taxable person's agent had knowledge of the facts constituting that fraud, irrespective of the applicable national rules governing agency and of the terms of the agency contract concluded in that case.

65 As recalled in paragraph 26 of the present judgment, the prevention of tax evasion is an objective recognised and encouraged by Directive 2006/112.

66 In addition, it follows from paragraphs 29 and 40 of the present judgment, according to which, first, the introduction of a system of strict liability would go beyond what is necessary to preserve the public exchequer's rights and, second, the taxable person who knew or should have known that, by his or her purchase, he or she was participating in a transaction involving fraud aids the perpetrators of that fraud and becomes an accomplice thereto, that such participation constitutes a fault for which that taxable person is liable (see, to that effect, order of 14 April 2021, *Finanzamt Wilmersdorf*, C-108/20, EU:C:2021:266, paragraph 36).

67 Regardless of the national rules governing agency and of the terms of the agency contract by which the taxable person has entrusted to a third party the performance of taxable transactions, the taxable person cannot, vis-à-vis the Treasury, escape that liability by relying on the existence of an agency contract, on the national rules governing it or on the terms of that contract, and by claiming that he or she was unaware of the facts constituting VAT fraud known to his or her agent. To allow the taxable person to act in that way would facilitate fraud and thus run counter to the objective of preventing tax evasion.

68 It follows from the foregoing considerations that the answer to the first question is that Directive 2006/112 and the principle of fiscal neutrality must be interpreted as not precluding a tax practice which, for the purpose of refusing a taxable person the right to deduct on the ground that he or she has participated in VAT fraud, consists in taking into account the fact that the legal representative of the taxable person's agent had knowledge of the facts constituting that fraud, irrespective of the applicable national rules governing agency and of the terms of the agency contract concluded in that case.

Costs

69 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 (Tenth Chamber) hereby rules:

1. **Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax**

   must be interpreted as meaning that where a tax authority intends to refuse a taxable person the right to deduct the input value added tax (VAT) paid on the ground that that taxable person has participated in a VAT carousel fraud, that directive precludes that tax authority from merely establishing that that transaction forms part of a circular invoicing chain;

   it is for that tax authority, first, to provide an accurate description of the constituent elements of the fraud and to prove fraudulent conduct and, second to establish that the taxable person actively participated in that fraud or that he or she knew, or ought to have known, that the transaction relied on as a basis for that right was connected with that fraud, which does not necessarily entail identifying all the operators involved in the fraud and their respective conduct.

2. **Directive 2006/112**

   must be interpreted as meaning that where a tax authority relies on a taxable person's active participation in value added tax fraud in order to refuse the right of deduction, the directive does not preclude that tax authority from basing its refusal, in addition or in the alternative, on evidence establishing not such participation but the fact that that taxable person could have known, by exercising all due diligence, that the transaction concerned was connected with such fraud;

   the mere fact that the members of the supply chain, of which that transaction forms part, knew one other is not sufficient to establish the taxable person's participation in the fraud.

3. **Directive 2006/112, read together with the principle of proportionality,**

   must be interpreted as meaning that when there are indications pointing to an infringement or fraud, that directive does not preclude the taxable person from being required to exercise greater diligence for the purpose of ensuring that the transaction he or she is carrying out does not result in his or her participation in fraud;

   however, the taxable person cannot be required to carry out complex and far-reaching checks such as those which may be undertaken by the tax authority;

   it is for the national court to assess whether, in the light of all the circumstances of the case, the taxable person has exercised sufficient diligence and has taken the measures which may reasonably be required of him or her in those circumstances.

4. **Directive 2006/112**

   must be interpreted as meaning that it precludes the tax authority from refusing to allow a taxable person to exercise the right to deduct value added tax (VAT) on the sole

ground that he or she has not complied with the obligations arising from national provisions or from EU law relating to the safety of the food supply chain;

failure to comply with those obligations may, however, constitute one element among others which may be taken into account by the tax authority in order to establish both the existence of VAT fraud and the participation of that taxable person therein, even in the absence of a prior decision by the administrative body competent to establish such an infringement.

5. **The right to a fair hearing, enshrined in Article 47 of the Charter of Fundamental Rights of the European Union,**

must be interpreted as meaning that it does not preclude the court hearing the action against the tax authority's decision from taking into account, as evidence of the existence of value added tax fraud or of the participation of the taxable person in that fraud, an infringement of the abovementioned obligations, if that evidence can be contested, debated on and heard before that court.

6. **Directive 2006/112 and the principle of fiscal neutrality**

must be interpreted as meaning that they do not preclude a tax practice which, for the purpose of refusing a taxable person the right to deduct on the ground that he or she has participated in value added tax fraud, consists in taking into account the fact that the legal representative of the taxable person's agent had knowledge of the facts constituting that fraud, irrespective of the applicable national rules governing agency and of the terms of the agency contract concluded in that case.

[Signatures]