Reports of Cases

ORDER OF THE COURT (Fifth Chamber)

9 January 2023*

(Reference for a preliminary ruling – Article 99 of the Rules of Procedure – Taxation – Value added tax (VAT) – Directive 2006/112/EC – Articles 167, 168 and 178 – Right to deduct input VAT – Fraud – Proof – Duty of care of the taxable person – Consideration of an infringement of the national provisions governing the supply of services at issue)

In Case C-289/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the Fővárosi Törvényszék (Budapest High Court, Hungary), made by decision of 28 February 2022, received at the Court on 3 May 2022, in the proceedings

A.T.S. 2003 Vagyonvédelmi és Szolgáltató Zrt., 'f.a.', in liquidation,

v

Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága,

THE COURT (Fifth Chamber),

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

Advocate General: P. Pikamäe,

Registrar: A. Calot Escobar,

having decided, after hearing the Advocate General, to rule by reasoned order, pursuant to Article 99 of the Rules of Procedure of the Court of Justice,

makes the following

* Language of the case: Hungarian.

Order

1 This request for a preliminary ruling concerns the interpretation of Article 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 in conjunction with the principles of fiscal neutrality, proportionality and legal certainty, and Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter').

2 The request has been made in proceedings between A.T.S. 2003 Vagyonvédelmi és Szolgáltató Zrt. 'f.a.', in liquidation ('A.T.S. 2003'), and the Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága (Appeals Directorate of the National Tax and Customs Administration, Hungary) ('the Appeals Directorate') concerning the amount of value added tax (VAT) relating to receipted invoices during the period from 1 January 2009 to 30 September 2013.

Legal context

European Union law

3 Having regard to the dates of the facts in the main proceedings, it must be noted that Directive 2006/112, as amended by Council Directive 2010/45/EU of 13 July 2010 (OJ 2010 L 189, p. 1), applicable as from 1 January 2013, applies *ratione temporis* to some of those facts. However, since the amendments made by the latter directive are not directly relevant to the present case, only the provisions of Directive 2006/112 in its original version are referred to.

4 Article 167 of Directive 2006/112 provides that a right of deduction is to arise at the time the deductible tax becomes chargeable.

5 Article 168 of that directive states:

'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;

…'

6 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

7 Paragraph 1(7) of adózás rendjéről szóló 2003. évi XCII. törvény (Law No XCII of 2003 on the Code of fiscal procedure) (*Magyar Közlöny* 2003/131.; 'the Code of fiscal procedure') provides as follows:

'Contracts, transactions and other similar acts are to be classified according to their actual content. An invalid contract or any other invalid legal act is relevant in relation to taxation to the extent that its economic result can be demonstrated.'

8 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 the purpose of which is to circumvent the provisions of tax laws may not be classified as exercising rights in accordance with their purpose.'

9 Paragraph 97(4) and (6) of that code provides:

'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.'

10 Paragraph 119(1) of általános forgalmi adóról szóló 2007. évi CXXVII. törvény (Law No CXXVII of 2007 on value added tax) (*Magyar Közlöny* 2007/155.) provides:

'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).'

11 Paragraph 120(a) of that law 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'.

12 Paragraph 127(1) of that law 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

13 A.T.S. 2003 provided property-protection and cleaning services during the period from 1 January 2009 to 30 September 2013. Those services were provided by its staff as well as by subcontractors and workers engaged through a temporary-employment agency. The latter subsequently became a subcontractor of A.T.S. 2003 and, to that effect, it too made use of a temporary-employment agency.

14 The tax authority found that A.T.S. 2003 owed 141 457 000 forint (HUF) (approximately EUR 345 155) in relation to VAT, personal income tax, social security contributions and other contributions for the period from December 2010 to September 2013. It also imposed a tax penalty on A.T.S. 2003 and applied late-payment surcharges.

15 As regards deductible VAT, the tax authority found that A.T.S. 2003 was accused of an offence of tax evasion, after an investigation carried out by the Criminal Cases Directorate of that authority revealed the existence of a fictitious invoicing chain and that the contracted temporary-employment agencies did not carry on any real economic activity and did not meet the conditions laid down in national law for carrying on that activity. In the light of the data and information gathered during the investigation, the tax authority considered that A.T.S. 2003 not only failed to act with due care, but also contributed to establishing a supply chain that had been created artificially by, inter alia, entering into contracts for the supply of staff with agencies that did not have the means necessary to provide the agreed services or that had not carried on any real economic activity. The tax authority decided that, in those circumstances, the invoices issued by those agencies were not authentic.

16 Following an action brought against the decision of the tax authority, the Appeals Directorate confirmed that decision in relation to VAT. A.T.S. 2003 then brought an action before the Fővárosi Törvényszék (Budapest High Court, Hungary), the referring court, in which it disputes the allegations made against it and claims, in essence, that it exercised all due care and attention that could reasonably be expected of it in order to ensure that the invoices at issue were not connected with a fraud.

17 The referring court, observing that the Court has already interpreted the provisions of Directive 2006/112 in several cases involving Hungary, in particular in those which gave rise to the orders of 3 September 2020, *Vikingo Fővállalkozó* (C-610/19, EU:C:2020:673), and of 3 September 2020, *Crewprint* (C-611/19, not published, EU:C:2020:674), states that there are discrepancies between the approaches taken by national courts in interpreting and applying EU law and in interpreting decisions of the Court as regards the burden of proof borne by the taxable person and by the tax

authority respectively. In the light of those circumstances, the referring court, in order to fulfil its role as a review body in the present case, seeks guidance from the Court on how evidence relied on by the tax authority is to be assessed.

18 The referring court states that it is necessary to assess, in the main proceedings, whether the circumstances relied on by the Appeals Directorate, that is to say that the traders acting upstream in the supply chain do not have staff of their own and have not fulfilled their tax obligations, may be regarded as objective evidence justifying the refusal of the right of deduction, even though the Court has already held that such circumstances do not in themselves constitute such objective evidence.

19 That court states that it must, in particular, assess whether the tax authority could, on the basis of those same circumstances, find that the invoices were not genuine and, therefore, that there was fraud, since, first, A.T.S. 2003 benefited from the possibility afforded to it by national legislation not to employ staff and to resort to temporary-employment agencies and subcontracting and, secondly, the substantive and formal conditions for the right of deduction were met.

20 The referring court asks in particular whether the fact that the tax authority does not recognise either that a contract has been concluded between the taxable person and the issuer of the invoice or that the supply of services that is the subject of that invoice has actually been made, while requiring the taxable person to carry out checks with regard not only to his or her immediate partner, but also to all traders making up the supply chain, relating in particular to the lawfulness of their activity, does not amount to an extension of the duty of care which the taxable person must observe, according to the case-law of the Court, in order to ensure that the transaction relied on as a basis for the right of deduction is not connected with VAT fraud.

21 Since it has doubts as to whether the requirement to carry out such checks complies with the principles of fiscal neutrality and proportionality, the referring court asks, more specifically, whether the fact that the taxable person realises that the traders acting upstream in the supply chain have breached the rules concerning the supply of services at issue, without that breach having an impact on that supply, may lead to the conclusion that that taxable person participated in VAT fraud and to that person being refused the right of deduction.

22 According to that court, the tax authority's practice of calling into question the rationality of taxable persons' commercial decisions, without taking account of their contractual freedom and the specific nature of economic life, is problematic. It doubts, in that regard, whether the exercise of the right of deduction can be regarded as not being consistent with its purpose and, therefore, constituting fraud where the taxable person exercises that right in an arrangement that makes it possible to reduce his or her costs, including those relating to VAT.

23 According to the referring court, the question also arises as to whether, given that supply chain fraud is widespread in the field of agency work, the tax authority is required to state in each case the constituent elements of the tax evasion and to prove that it took place.

24 In those circumstances, 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) Are Articles 167, 168(a) and 178(a) of [Directive 2006/112] to be interpreted as meaning that, if the tax authority finds, in respect of any member of a supply chain, that there has been an infringement of special legislation concerning the services provided under a contract concluded with the [taxable person] or under agreements concluded between the members of the chain, or an infringement of any other legislation, such an infringement is sufficient in itself, as an objective circumstance, to establish the existence of tax evasion, even where the activities of the members of the chain are lawful in all respects, or does the tax authority also have to specify in that case what the tax evasion consists of, and by which members of the chain and by means of what action it has been committed? In that context, if such a breach is found, is it necessary for the tax authority to examine the causal link between the breach of the regulatory obligations governing the economic activity and the [taxable person]’s right of deduction, so that it is only if such a link is established that it can refuse the [taxable person] his or her right to deduct VAT?

(2) Having regard to those articles of [Directive 2006/112], and the right to a fair trial enshrined as a general principle of law in Article 47 of [the Charter] and the fundamental principles of proportionality and legal certainty, can the [taxable person] be required, in the context of his or her general duty of control, to verify whether the previous members of the chain have complied with the obligations laid down by special legislation for carrying out the services invoiced and the conditions to operate lawfully? If that question is answered in the affirmative, is this a continuous obligation for the [taxable person] for the duration of the legal relationship or, if appropriate, how often must it be complied with?

(3) Are Articles 167, 168(a) and 178(a) of [Directive 2006/112] to be interpreted as meaning that, if the [taxable person] finds that any previous member of the chain has failed to fulfil his or her obligations, a duty arises for the [taxable person] not to exercise his or her right to deduct input VAT in such a case, failing which the application of the VAT deduction would be regarded as tax evasion?

(4) Are those articles of [Directive 2006/112], in light of the principles of legal certainty and fiscal neutrality, to be interpreted as meaning that, when examining and categorising the fraudulent nature of the chain, and also when establishing the relevant facts and assessing the evidence supporting those facts, the tax authority cannot disregard the provisions of the special legislation relating to services invoiced, in particular the rules governing the rights and obligations of the parties?

(5) Is it consistent with the abovementioned articles of [Directive 2006/112], and with the right to a fair trial enshrined as a general principle of law in Article 47 of the Charter and with the fundamental principle of legal certainty, for the tax authority [to adopt] a practice whereby, as a result of a review of the right of deduction in respect of an economic transaction carried out in the course of supplying services, the actual existence of that economic transaction, documented by invoices, contracts and other accounting records, may be refuted on the basis of the findings made by the inspection authority during the inspection, the statements made during the inspection by the persons inspected and the witness statements made by employees engaged through temporary employment agencies as to what they think of their employment relationship, how they legally define it and who they consider to be the employer?

(6) Is it compatible with the abovementioned articles of [Directive 2006/112], and also with the right to a fair trial enshrined in Article 47 of the Charter and with the fundamental principle of legal certainty for the tax authority [to adopt] a practice whereby the choice of a [taxable person] to carry out his or her economic activity in a way that enables that [taxable person] to reduce his or her costs as much as possible is classified as an unlawful exercise of the right and, on that basis, the tax authority exercises its right to reclassify contracts in such a way as to create a contract between parties who were not previously in a contractual relationship?'

Consideration of the questions referred

25 Under Article 99 of its Rules of Procedure, the Court may, in particular, where the reply to a question referred for a preliminary ruling may be clearly deduced from existing case-law or where the answer to the question referred for a preliminary ruling admits of no reasonable doubt, decide at any time, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, to rule by reasoned order.

26 In the present case, the answers to the referring court's questions may be clearly deduced from existing case-law.

27 Admittedly, that court, in its request for a preliminary ruling, refers to persistent discrepancies between the approaches taken by national courts in interpreting and applying EU law and in interpreting decisions of the Court as regards the burden of proof regarding the existence of VAT fraud and the participation of the taxable person in such a fraud, which must be adduced in order to refuse that person the right to deduct input VAT. It states, in particular, in that regard, that the decisions that it delivered following the orders of 3 September 2020, *Vikingo Fővállalkozó* (C-610/19, EU:C:2020:673), and of 3 September 2020, *Crewprint* (C-611/19, not published, EU:C:2020:674), were set aside by the Kúria (Supreme Court, Hungary) and states that, due to the divergent interpretations of the latter order, it must formulate its questions for a preliminary ruling in greater detail as regards the assessment of the evidence relied on by the tax authority, in order to limit the possibility of divergent interpretations.

28 It must, however, be stated that the referring court gives no details as to the differences of interpretation of EU law or of decisions of the Court to which it refers and that it is apparent from the information provided by the referring court that those differences seem to relate more to the assessment of evidence in given circumstances.

29 In those circumstances, it must be recalled that, in proceedings under Article 267 TFEU, which are based on a clear separation of functions between the national courts and the Court of Justice, the national court alone has jurisdiction to find and assess the facts in the case before it. The Court has no jurisdiction to apply rules of law to a particular situation, since Article 267 TFEU empowers the Court only to rule on the interpretation of the Treaties and of acts adopted by the EU institutions (judgment of 16 June 2022, *DuoDecad*, C-596/20, EU:C:2022:474, paragraph 37 and the case-law cited).

30 In paragraphs 8 and 11 of the Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings (OJ 2019 C 380, p. 1), it is stated that the request for a preliminary ruling cannot concern the issues of fact raised in the main proceedings and that the Court does not itself apply EU law to that dispute.

31 At most, the Court may, in the context of the proceedings under Article 267 TFEU and in a spirit of cooperation with the national courts, provide the referring court with all the guidance that it deems necessary (see, to that effect, judgments of 1 July 2008, *MOTOE*, C-49/07, EU:C:2008:376, paragraph 30, and of 10 February 2022, *HR Rail*, C-485/20, EU:C:2022:85, paragraph 46).

32 Thus, with regard to VAT, where a taxable person is refused the right of deduction due to fraud, it is incumbent on the national courts to ascertain whether the tax authority established, to the requisite legal standard, the objective evidence from which it may be concluded that the taxable person committed 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 (see, to that effect, order of 3 September 2020, *Vikingo Fővállalkozó*, C-610/19, EU:C:2020:673, paragraph 57, and judgment of 11 November 2021, *Ferimet*, C-281/20, EU:C:2021:910, paragraph 50 and the case-law cited).

33 In that regard, the Court, interpreting Directive 2006/112, has already referred on numerous occasions to the principles flowing from that directive as regards the burden of proof and has provided guidance in assessing the relevance of certain facts. The Court did so, inter alia, in the orders of 3 September 2020, *Vikingo Fővállalkozó* (C-610/19, EU:C:2020:673), and of 3 September 2020, *Crewprint* (C-611/19, not published, EU:C:2020:674), and in the judgment of 1 December 2022, *Aquila Part Prod Com* (C-512/21, EU:C:2022:950), in response to questions submitted by the referring court which are very similar to those raised by the referring court in the present case.

34 Therefore, the Court of Justice finds that that court had at its disposal, before it submitted its request for a preliminary ruling, elements of interpretation and a large part of the guidance that should have enabled it to resolve the dispute in the main proceedings. As to the remainder, the Court considers that the guidance sought leaves no room for reasonable doubt.

35 Consequently, Article 99 of the Rules of Procedure must be applied in the present case.

36 Moreover, as the referring court has not set out the reasons why it seeks a ruling from the Court on the interpretation of Article 47 of the Charter and of the principle of legal certainty, the second, fourth, fifth and sixth questions do not meet the requirements of Article 94 of the Rules of Procedure in that respect, with the result that they are inadmissible in so far as they relate to that provision of the Charter or that principle.

The sixth question

37 By its sixth question, which it is appropriate to examine in the first place, the referring court asks, in essence, whether Directive 2006/112 must be interpreted as precluding a national practice whereby the choice of a taxable person to carry on an economic activity in a way that enables that taxable person to reduce his or her costs is classified as 'an unlawful exercise of the right' and, on that ground, that taxable person is refused the right to deduct input VAT.

38 In that regard, since the referring court mentioned, in its request, a possible abuse of rights to explain the situation considered in its question, it should be pointed out that preventing possible tax evasion, avoidance and abuse is an objective recognised and encouraged by that directive and that the effect of the principle that abusive practices are prohibited, which applies to the field of VAT, is to bar wholly artificial arrangements which do not reflect economic reality and are set up

with the sole aim of obtaining a tax advantage (see, to that effect, judgments of 21 February 2006, *Halifax and Others*, C-255/02, EU:C:2006:121, paragraphs 70 and 71, and of 17 December 2015, *WebMindLicenses*, C-419/14, EU:C:2015:832, paragraph 35).

39 However, 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, secondly, it is apparent from a number of objective factors that the essential aim of the transactions concerned is solely to obtain that tax advantage (see, to that effect, judgments of 21 February 2006, *Halifax and Others*, C-255/02, EU:C:2006:121, paragraphs 74 and 75, and of 17 December 2015, *WebMindLicenses*, C-419/14, EU:C:2015:832, paragraph 36).

40 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, that person 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 (see, to that effect, judgments of 21 February 2006, *Halifax and Others*, C-255/02, EU:C:2006:121, paragraph 73, and of 17 December 2015, *WebMindLicenses*, C-419/14, EU:C:2015:832, paragraph 42).

41 Consequently, as the Court also noted in paragraph 41 of the order of 3 September 2020, *Crewprint* (C-611/19, not published, EU:C:2020:674), the principle that abusive practices are prohibited bars only 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.

42 In the light of those considerations, the answer to the sixth question is that Directive 2006/112 must be interpreted as precluding a national practice whereby the choice of a taxable person to carry on an economic activity in a way that enables that taxable person to reduce his or her costs is classified as 'an unlawful exercise of the right' and, on that ground, that taxable person is refused the right to deduct input VAT, where it has not been established that there is a wholly artificial arrangement which does not reflect economic reality and is set up with the sole aim or, at the very least, with the essential aim, of obtaining a tax advantage the grant of which would be contrary to the purposes of that directive.

The fifth question

43 In the light of the facts set out in the request for a preliminary ruling, it must be held that, by its fifth question, which must be examined in the second place, the referring court asks, in essence, whether Directive 2006/112 must be interpreted as precluding a tax authority from refusing a taxable person the right to deduct VAT in respect of a supply of services, on the basis of findings resulting from statements in the light of which that authority called into question the existence of that supply of services or considered that it was connected with VAT fraud.

44 It should be noted that the right to deduct VAT is subject to compliance with both substantive requirements or conditions and formal requirements or conditions.

45 With regard to the substantive requirements or conditions, it is apparent from Article 168(a) of that directive that, in order for that right to be available, it is necessary, first, that the interested party be a 'taxable person' within the meaning of that directive and, secondly, 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, those goods or services be supplied by another taxable person.

46 That second substantive requirement or condition to which the right of deduction is subject implies that the supply of goods or services to which the invoice relates has actually been carried out. The Court has held that verifying whether there is a taxable transaction must be done in accordance with the rules of evidence under national law, carrying out an overall assessment of all the facts and circumstances of the case (order of 3 September 2020, *Vikingo Fővállalkozó*, C-610/19, EU:C:2020:673, paragraph 46 and the case-law cited).

47 As to the detailed rules governing the exercise of the right to deduct VAT, which may be considered formal requirements or conditions, Article 178(a) of Directive 2006/112 provides that the taxable person must hold an invoice drawn up in accordance with Articles 220 to 236 and Articles 238 to 240 of that directive (order of 3 September 2020, *Vikingo Fővállalkozó*, C-610/19, EU:C:2020:673, paragraph 43 and the case-law cited).

48 The Court has also stated, in relation to the burden of proof, that it is for the taxable person seeking deduction of VAT to establish that he or she meets the conditions for eligibility. Accordingly, the taxable person is required to provide objective evidence that goods or services were actually supplied as inputs by taxable persons for the purposes of his or her own transactions subject to VAT, in respect of which he or she has actually paid VAT (judgment of 11 November 2021, *Ferimet*, C-281/20, EU:C:2021:910, paragraphs 38 and 39 and the case-law cited).

49 Moreover, the Court has held on numerous occasions that the fact that the supply concerned was not actually made by the supplier mentioned on the invoices, inter alia because it did not have the personnel, equipment or assets required, is not, in itself, sufficient to exclude the right of deduction, since that fact may be the result both of a fraudulent pretence by the suppliers and simply of recourse to subcontractors (see, to that effect, order of 3 September 2020, *Vikingo Fővállalkozó*, C-610/19, EU:C:2020:673, paragraph 47 and the case-law cited).

50 It follows that, if, as the referring court states, the supply of services at issue in the main proceedings has actually been carried out and those services were used by A.T.S. 2003 for the purposes of its own taxed output transactions, A.T.S. 2003 cannot, in principle, be refused the right of deduction (see, by analogy, order of 3 September 2020, *Vikingo Fővállalkozó*, C-610/19, EU:C:2020:673, paragraph 49 and the case-law cited).

51 However, even if the material conditions for the right of deduction are met, it is for the 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).

52 In the case of fraud, according to settled case-law, a taxable person is to be refused the right of deduction 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 that taxable person – to whom the supply of goods or services, on the basis of which the right of deduction is claimed, was made – knew or ought to have known that, through the acquisition of goods or services on the basis of which the right of deduction is claimed, he or she was participating in a transaction connected with such VAT fraud committed by the supplier or by another trader acting upstream or downstream in the chain of supply of those goods or services (see, to that effect, judgment of 11 November 2021, *Ferimet*, C-281/20, EU:C:2021:910, paragraphs 46 and 48 and the case-law cited).

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

54 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).

55 It follows from the case-law referred to in paragraphs 52 to 54 above 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 the right of deduction was connected with such a fraud. Entitlement to that right 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).

56 In the present case, it is apparent from the request for a preliminary ruling that the tax authority considered that A.T.S. 2003 and other economic operators had put in place a fictitious invoicing chain through the false subcontracting of temporary staff and false subcontracting invoices, in order to reduce, inter alia, their VAT obligations. That authority noted that it is apparent from the statements of the suspected persons questioned in the course of a criminal investigation and of the workers engaged that the temporary-employment agencies concerned were not carrying on any real economic activity. Such facts, which constitute fraud, if they are established in accordance with the rules of evidence under national law, are capable of justifying a refusal of the right to deduct VAT.

57 On the other hand, the fact that the chain of transactions which led to that supply of services appears to be economically irrational or not reasonably justified cannot be regarded as constituting fraud in itself (see, to that effect, orders of 3 September 2020, *Vikingo Fővállalkozó*, C-610/19, EU:C:2020:673, paragraph 63, and of 3 September 2020, *Crewprint*, C-611/19, not published, EU:C:2020:674, paragraph 42).

58 In the light of the foregoing considerations, the answer to the fifth question is that Directive 2006/112 must be interpreted as not precluding the tax authority from refusing a taxable person the right to deduct VAT in respect of a supply of services, on the basis of findings resulting from witness statements in the light of which that tax authority called into question the existence of that supply of services or considered that it was connected with VAT fraud, if, in the first case, it is not established by the taxable person that that supply of services has actually been made or if, in the second case, it is established by that tax authority, in accordance with the rules of evidence under national law, that that 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.

The first and fourth questions

59 By its first and fourth questions, which must be examined together and in the third place, the referring court asks, in essence, whether Directive 2006/112 must be interpreted as precluding the tax authority from refusing a taxable person the right of deduction by considering as sufficient evidence of VAT fraud the fact that that taxable person, or other traders acting upstream in the supply chain, have breached the national rules on the supply of services at issue, without an actual link between that breach and the right to deduct VAT being established.

60 In that context, that court also asks, in essence, whether it is for the tax authority to characterise the elements constituting fraud and to identify the perpetrators of that fraud as well as their respective actions.

61 It must be stated that the breach of national rules on the supply of services at issue by the taxable person or another trader operating in the supply chain does not in itself constitute evidence establishing proof that the taxable person committed VAT fraud or participated in such a fraud. However, such a breach may, depending on the factual circumstances of the case, constitute one of a number of indications of VAT fraud and evidence which may be taken into account, in an overall assessment of the circumstances, to establish that the taxable person is the perpetrator of or actively participated in that fraud, or to establish that that taxable person knew or ought to have known that the transaction relied on as a basis for the right of deduction was connected with that fraud (see, to that effect, judgments of 3 October 2019, *Altic*, C-329/18, EU:C:2019:831, paragraph 41, and of 1 December 2022, *Aquila Part Prod Com*, C-512/21, EU:C:2022:950, paragraph 58).

62 Moreover, it is for the tax authority, which bears the burden of proof, to characterise the elements constituting VAT fraud, to adduce evidence of fraudulent activity and to establish that the taxable person is the perpetrator of or actively participated in that fraud, or knew or ought to have known that the transaction relied on as a basis for the right of deduction was connected with that fraud. However, such a requirement does not necessarily involve identifying all the perpetrators of the fraud and their respective actions. It is for the national courts to verify that the tax authorities have provided such evidence to the requisite legal standard (see, to that effect, judgment of 1 December 2022, *Aquila Part Prod Com*, C-512/21, EU:C:2022:950, paragraph 36).

63 In the light of the foregoing, the answer to the first and fourth questions is that Directive 2006/112 must be interpreted as meaning that:

– it precludes the tax authority from refusing a taxable person the right of deduction by considering as sufficient evidence of VAT fraud the fact that the taxable person, or other traders acting upstream in the supply chain, have breached the national rules on the supply of services at issue, without an actual link between that breach and the right to deduct VAT being established;

– such a breach may, however, depending on the factual circumstances of the case, constitute one of a number of indications of such a fraud and evidence which may be taken into account, in an overall assessment of the circumstances, to establish that the taxable person is the perpetrator of or actively participated in that fraud, or to establish that that taxable person knew or ought to have known that the transaction relied on as a basis for the right of deduction was connected with that fraud;

– it is for the tax authority to characterise the elements constituting VAT fraud, to adduce evidence of fraudulent activity and to establish that the taxable person is the perpetrator of or actively participated in that fraud, or knew or ought to have known that the transaction relied on as a basis for the right of deduction was connected with that fraud;

– that requirement does not necessarily involve identifying all the perpetrators of the fraud and their respective actions.

The second and third questions

64 By its second and third questions, which it is appropriate to examine together and in the last place, the referring court asks, in essence, whether Directive 2006/112, read in conjunction with the principle of proportionality, must be interpreted as meaning that it is for the taxable person to verify that the supplier and other traders acting upstream in the supply chain have respected the national rules on the supply of services at issue as well as the other national rules applicable to their activity.

65 It is apparent from the case-law referred to in paragraph 52 above that the right of deduction must be refused where it is established 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 acquisition of those goods or services, he or she was participating in a transaction connected with a VAT fraud committed by the supplier or by another trader acting upstream or downstream in the chain of supply of those goods or services.

66 The Court has already held on several occasions that it is not contrary to EU law to require that traders take every step which could reasonably be asked of them to satisfy themselves that the transaction which they are carrying out does not result in their participation in tax evasion and that the determination of the measures which may, in a particular case, reasonably be required of such taxable persons wishing to exercise the right to deduct VAT in order to satisfy themselves that their transactions are not connected to a 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).

67 The Court has stated that, when there are indications pointing to irregularities 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).

68 However, the tax authorities 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).

69 In particular, the Court has held that the tax authorities 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 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 complied with the obligations relating to 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, secondly, 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).

70 It follows that the duty of care required of taxable persons and the measures that could reasonably be expected of them to ensure that, through their acquisition, they are not participating in a transaction connected with a fraud committed by a trader acting upstream depend on the factual circumstances and, in particular, whether or not there are indications, at the time that acquisition is made, that may lead the taxable persons to suspect irregularities or fraud. Thus, where there are indications of fraud, greater care may be expected of taxable persons. However, they cannot be required to carry out complex and thorough checks, such as those which the tax authority has the means to carry out (judgment of 1 December 2022, *Aquila Part Prod Com*, C-512/21, EU:C:2022:950, paragraph 52).

71 As regards compliance with the national rules on the supply of services at issue, it should be noted that, as is apparent from paragraph 61 above, the breach of such rules may, depending on the factual circumstances of the case, constitute one of a number of indications of VAT fraud and evidence which may be taken into account, in an overall assessment of the circumstances, to establish that the taxable person is the perpetrator of or actively participated in that fraud, or to establish that that taxable person knew or ought to have known that the transaction relied on as a basis for the right of deduction was connected with that fraud. The same applies for the breach of other national rules applicable to the activity of the supplier or other traders acting upstream in the supply chain.

72 It follows from all of the foregoing that a taxable person wishing to exercise the right to deduct VAT cannot be required to verify, at the time the acquisition is made or at a later stage, that the supplier or other traders acting upstream in the supply chain have complied with national rules on the supply of services at issue as well as the other national rules applicable to their activity. However, where there are indications, resulting from the breach of those rules and which are such as to give rise to suspicions on the part of the taxable person, at the time the acquisition is made, of irregularities or of fraud, that taxable person may be required to exercise greater care and to take measures that could reasonably be expected of him or her to ensure that, through that acquisition, he or she is not participating in a transaction connected with VAT fraud.

73 Consequently, the answer to the second and third questions is that Directive 2006/112, read in conjunction with the principle of proportionality, must be interpreted as meaning that it is not, in principle, for the taxable person wishing to exercise the right to deduct VAT to verify that the supplier or other traders acting upstream in the supply chain have complied with the national rules on the supply of services at issue as well as the other national rules applicable to their activity. However, where there are indications, resulting from the breach of those rules and which are such as to give rise to suspicions on the part of the taxable person, at the time the acquisition is made, of irregularities or of fraud, that taxable person may be required to exercise greater care and to take measures that could reasonably be expected of him or her to ensure that, through that acquisition, he or she is not participating in a transaction connected with VAT fraud.

Costs

74 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:

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

must be interpreted as precluding a national practice whereby the choice of a taxable person to carry on an economic activity in a way that enables that taxable person to reduce his or her costs is classified as 'an unlawful exercise of the right' and, on that ground, that taxable person is refused the right to deduct input value added tax, where it has not been established that there is a wholly artificial arrangement which does not reflect economic reality and is set up with the sole aim or, at the very least, with the essential aim, of obtaining a tax advantage the grant of which would be contrary to the purposes of that directive.

2. Directive 2006/112

must be interpreted as not precluding the tax authority from refusing a taxable person the right to deduct value added tax (VAT) in respect of a supply of services, on the basis of findings resulting from witness statements in the light of which that tax authority called into question the existence of that supply of services or considered that it was connected with VAT fraud, if, in the first case, it is not established by the taxable person that that supply of services has actually been made or if, in the second case, it is established by that tax authority, in accordance with the rules of evidence under

national law, that that 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.

3. Directive 2006/112

must be interpreted as meaning that

– **it precludes the tax authority from refusing a taxable person the right of deduction by considering as sufficient evidence of value added tax (VAT) fraud the fact that the taxable person, or other traders acting upstream in the supply chain, have breached the national rules on the supply of services at issue, without an actual link between that breach and the right to deduct VAT being established;**

– **such a breach may, however, depending on the factual circumstances of the case, constitute one of a number of indications of such a fraud and evidence which may be taken into account, in an overall assessment of the circumstances, to establish that the taxable person is the perpetrator of or actively participated in that fraud, or to establish that that taxable person knew or ought to have known that the transaction relied on as a basis for the right of deduction was connected with that fraud;**

– **it is for the tax authority to characterise the elements constituting VAT fraud, to adduce evidence of fraudulent activity and to establish that the taxable person is the perpetrator of or actively participated in that fraud, or knew or ought to have known that the transaction relied on as a basis for the right of deduction was connected with that fraud;**

– **that requirement does not necessarily involve identifying all the perpetrators of the fraud and their respective actions.**

4. Directive 2006/112, read in conjunction with the principle of proportionality,

must be interpreted as meaning that it is not, in principle, for the taxable person wishing to exercise the right to deduct value added tax (VAT) to verify that the supplier or other traders acting upstream in the supply chain have complied with the national rules on the supply of services at issue as well as the other national rules applicable to their activity. However, where there are indications, resulting from the breach of those rules and which are such as to give rise to suspicions on the part of the taxable person, at the time the acquisition is made, of irregularities or of fraud, that taxable person may be required to exercise greater care and to take measures that could reasonably be expected of him or her to ensure that, through that acquisition, he or she is not participating in a transaction connected with VAT fraud.

[Signatures]