Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 17 January 2019[1]

Case C-712/17

EN.SA. Srl
v
Agenzia delle Entrate — Direzione Regionale Lombardia Ufficio Contenzioso

(Request for a preliminary ruling from the Commissione Tributaria Regionale per la Lombardia (Regional Tax Court, Lombardy, Italy))

(Request for a preliminary ruling — Value added tax (VAT) — Fictitious transactions — Refusal to allow the deduction — Occurrence of tax liability through the issue of an invoice — Additional penalty equal to the full amount of the refused deduction — Compatibility with the principle of neutrality — Compatibility with the principle of proportionality)

I. Introduction

1. This is another case[2] concerning the issue of the 'punitive character' of VAT law. The Court is very strict on prevention of VAT fraud: deduction (and exemption) may be refused not only where tax evasion is committed by the taxable person himself, but also where a taxable person knew, or should have known, that, by his purchase, he was taking part in a transaction connected with the evasion of VAT.[3]

2. Does this strict approach (refusal to allow deduction at every stage of a supply chain) apply even where VAT fraud is ruled out, but other undue advantages are sought by means of fictitious transactions? Can those concerned — notwithstanding criminal penalties — be 'penalised' under VAT law by refusing deduction for each of the participants in a long supply chain, but at the same time establishing a tax liability and additionally applying an administrative penalty equal to the full amount of the refused deduction?

1 Original language: German.

2 Without any claim to exhaustivity, see judgments of 20 June 2018, *Enteco Baltic* (C-108/17, EU:C:2018:473); of 22 October 2015, *PPUH Stehcemp* (C-277/14, EU:C:2015:719); of 18 December 2014, *Schoenimport 'Italmoda' Mariano Previti* (C-131/13, C-163/13 and C-164/13, EU:C:2014:2455); of 9 October 2014, *Traum* (C-492/13, EU:C:2014:2267); of 13 February 2014, *Maks Pen* (C-18/13, EU:C:2014:69); of 6 December 2012, *Bonik* (C-285/11, EU:C:2012:774); of 6 September 2012, *Mecsek-Gabona* (C-273/11, EU:C:2012:547); of 21 June 2012, *Mahagében* (C-80/11 and C-142/11, EU:C:2012:373); and of 6 July 2006, *Kittel and Recolta Recycling* (C-439/04 and C-440/04, EU:C:2006:446).

3 Judgments of 22 October 2015, *PPUH Stehcemp* (C-277/14, EU:C:2015:719, paragraph 48); of 20 June 2018, *Enteco Baltic* (C-108/17, EU:C:2018:473, paragraph 94); of 13 February 2014, *Maks Pen* (C-18/13, EU:C:2014:69, paragraph 27); of 6 September 2012, *Mecsek-Gabona* (C-273/11, EU:C:2012:547, paragraph 54); of 6 December 2012, *Bonik* (C-285/11, EU:C:2012:774, paragraph 39); and of 6 July 2006, *Kittel and Recolta Recycling* (C-439/04 and C-440/04, EU:C:2006:446, paragraph 56); with regard to the resulting problem of overcompensation for the damage arising, see my Opinion in *Vetsch Int. Transporte* (C-531/17, EU:C:2018:677, point 39 et seq.).

II. Legal framework

A. EU law

3. The framework of the case in EU law is provided by Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax[4] ('the VAT Directive').

4. Point (a) of the first paragraph of Article 168 of that directive provides:

'In so far as the goods and services are used for the purposes of the taxed transactions of a taxable person, the taxable person shall be entitled, in the Member State in which he 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; …'

5. Article 203 of the VAT Directive states:

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

B. Italian law

6. In Italian law the provisions of the VAT Directive have been transposed in a number of decrees of the President of the Republic.

7. Article 19 of decreto del Presidente della Repubblica n. 633 (Decree 633 of the President of the Republic of 26 October 1972 ('Decree 633/72')) provides that 'the amount of tax paid or payable by the taxable person or charged to him in respect of goods and services imported or purchased in the course of a business, artistic activity or profession shall be deductible from the amount of tax on the transactions carried out'.

8. On the other hand, Article 21(7) of Decree 633/72 provides that 'if invoices for non-existent transactions are issued, or if in the invoice the revenue arising from the transactions or the related taxes is stated to be higher than it is in reality, tax shall be due for the whole amount indicated or corresponding to the particulars of the invoices'.

9. Where a transaction for which an invoice has been issued and recorded is not performed, in whole or in part, in accordance with Article 26 of Decree 633/72, in the cases and within the period prescribed therein, the supplier has the right to register and to deduct VAT, whilst the purchaser must seek repayment of the tax paid from the supplier, in set-off.

10. According to the referring court, Article 6(6) of Legislative Decree 471 of 18 December 1997 (Breach of obligations relating to documentation, registration and detection of transactions) permits the tax authorities to apply a penalty equal to the full amount of the deduction disregarded.

III. Main proceedings

11. The background to the main proceedings, as described by the referring court, is as follows.

4 OJ 2006 L 347, p. 1.

12. The appellant in the main proceedings (EN.SA. S.r.l., 'EN.SA') is an electricity trader and trades in electricity outside the Piattaforma dei Conti Energia (Energy Accounts Platform, PCE) on the basis of forward agreements.

13. In the tax years 2009 and 2010, EN.SA sold large quantities of electricity to companies in the 'Green Network' group, which it also purchased back from them in a 'circular' manner. For accounting purposes the transactions were entered in the correct amounts. Invoices were also duly issued for these transactions.

14. It is unclear whether EN.SA is part of the 'Green Network' group of undertakings or an independent undertaking. It is also unclear whether EN.SA bought back the same quantities of electricity promptly and at the same price. Similarly, it is unclear what was the purpose of buying from and selling to the same persons. The tax office presumes that it was to set out significant sums in the accounts of the companies involved so that they could gain (better) access to bank financing channels. This is disputed by EN.SA, however.

15. It is certain, on the other hand, that the VAT entered on the invoices for those transactions in electricity was duly paid in good time and claimed as deductible by the recipient in question. It is also certain that no prejudice was caused to the Treasury with regard to VAT. In particular, according to the referring court, so-called 'carousel fraud' is excluded here. It is clear from the question it has referred, however, that the national court considers that the transactions in electricity in the relevant years, 2009 and 2010, are to be regarded as non-existent.

16. In a notice the tax authorities refused to allow EN.SA deduction on the input side (in so far as it purchased the electricity) for those non-existent transactions. As regards the non-existent transactions on the output side (in so far as EN.SA sold the electricity), however, a corresponding tax liability was established, as VAT was entered separately in the invoices issued by EN.SA. This resulted in a tax liability being established (for additional VAT, interest and penalties) in the amount of EUR 47 618 491.00 for 2009 and EUR 22 001 078.00 for 2010.

17. EN.SA brought an action against that notice, which was dismissed by the Commissione Tributaria Provinciale di Milano (Provincial Tax Court, Milan, Italy). The referring court must rule on the appeal lodged by EN.SA.

IV. Request for a preliminary ruling and procedure before the Court

18. By decision of 9 October 2017, received on 20 December 2017, the Commissione Tributaria Regionale per la Lombardia (Regional Tax Court, Lombardy, Italy) referred the following question to the Court for a preliminary ruling pursuant to Article 267 TFEU:

'In the event of transactions found to be non-existent, which did not cause harm to the Treasury and did not confer any tax benefit on the taxpayer, are national rules resulting from the application of Article 19 (Deduction) and Article 21(7) (Invoicing of transactions) of Decreto de Presidente della Repubblica 633/72 of 16 October 1972 and Article 6(6) of Decreto Legislativo 471 of 18 December 1997 (Breach of obligations relating to documentation, registration and identification of transactions) consistent with the Community principles on VAT laid down by the Court of Justice, when their simultaneous application bring about a situation in which:

(a) the tax paid on purchases by the transferee is not deductible for any of the transactions at issue which relate to the same person and the same taxable amount;

(b) the tax is levied on the corresponding parallel sale transactions, which are also regarded as non-existent, and paid by the transferor (and a recovery of sums unduly paid is excluded);

(c) a penalty is levied that is equal to the amount of input tax deemed non-deductible.'

19. In the proceedings before the Court, the Italian Republic and the European Commission have submitted written observations.

V. Assessment

A. Preliminary remarks regarding the facts and the question referred

20. In answering the question referred, it must be assumed from the actual question that the transactions in electricity at issue are non-existent (fictitious) transactions (sham transactions) which did not take place as such.

21. Nevertheless, the presence of existent (genuine) transactions cannot necessarily be ruled out on the basis of the facts presented. Because transactions in electricity among electricity traders never involve a physical transmission of electricity, but rights to draw electricity are merely bought and sold (as a rule electronically), no specific delivery documents are necessary. If these rights were in fact transferred with legal effect, it cannot necessarily be inferred solely from the fact that the transactions were possibly intended merely to inflate the balance sheet artificially that there are non-existent transactions.[5] It could also be assumed that this aim indeed requires that actual transactions be carried out. In so far as the transaction costs in (electronic) energy trading are quite marginal, there is no reason to replace genuine transactions with fictitious transactions.

22. The referring court should therefore examine closely whether or not existent transactions are in fact present. The problem would then arise, in relation to those transactions, of the possible refusal of deduction in the case of conduct which is fraudulent, but permitted by VAT law, although the Court has not been asked about this point.

B. Legal assessment

23. However, the question referred for a preliminary ruling includes three other aspects, which I will examine separately. First, the referring court wishes to know, in essence, whether it follows from Article 168 of the VAT Directive that in the case of a supply chain with non-existent transactions deduction may be refused repeatedly (see under 1.). Second, the referring court would like to know whether it nonetheless follows from Article 203 of the VAT Directive that non-existent resales entail the levy of a tax (and the preclusion of recovery of sums unduly paid) (see under 2.). Third, the referring court wishes to know, in essence, whether in such a case an additional penalty equal to the amount of non-deductible tax is proportionate (see under 3.).

1. Refusal of deduction in respect of non-existent transactions

24. Article 168 of the VAT Directive allows the taxable person a right to deduct only under certain conditions. First of all, the taxable person must himself carry out transactions and, second, he may deduct only the VAT due or paid in respect of supplies of goods to him carried out by another taxable person. Under Article 15(1) of the VAT Directive, electricity is to be treated as tangible property.

5 Even the mere fact that conduct amounts to an offence does not entail exemption from tax, as is expressly stated in judgments of 6 July 2006, *Kittel and Recolta Recycling* (C-439/04 and C-440/04, EU:C:2006:446, paragraph 50); of 12 January 2006, *Optigen and Others* (C-354/03, C-355/03 and C-484/03, EU:C:2006:16, paragraph 49); and of 29 June 2000, *Salumets and Others* (C-455/98, EU:C:2000:352, paragraph 19).

25. A right to deduct thus requires that a supply of electricity actually took place.[6] Deduction is not therefore possible when there is no actual delivery of the goods.[7]

26. As the Commission and Italy submit, it is immaterial that the person making the fictitious supply owes tax pursuant to Article 203 of the VAT Directive because he has issued an invoice for the fictitious supply which shows VAT separately. The Court has already stated a number of times that the exercise of the right to deduct does not extend to a tax which is due solely because it appears on an invoice.[8]

27. It follows that EN.SA does not have a right to deduct if no supply was made to it. This conclusion is also not affected if there are a number of fictitious supplies in succession in a long supply chain. Article 168 of the VAT Directive does not distinguish between a single supply or several supplies made in succession or in a circular manner.

28. In the absence of entitlement to deduct, the question does not therefore arise here of a refusal to allow deduction on the basis of fraudulent conduct.

2. Tax liability as a result of the issue of an invoice

29. The next point to be examined is whether, despite a fictitious supply on the input side — which is not deductible — VAT can be assessed for the fictitious supply on the output side. In a long supply chain this would generate a very high tax revenue for the State concerned, even though the basic requirement under VAT law (Article 2(1) — supply of goods or services for consideration by a taxable person) is not satisfied.

(a) Tax liability of the issuer of the invoice for fictitious transactions

30. Articles 193 and 203 of the VAT Directive are crucial to the answer to this question. Article 193 of the VAT Directive provides that VAT is payable, first of all, by any taxable person carrying out a taxable supply of goods. According to the referring court, there is no supply. In addition, however, under Article 203 of the VAT Directive, VAT is also payable by any person who enters the VAT on an invoice. This is the situation in the case of EN.SA.

(1) Spirit and purpose of Article 203 of the VAT Directive

31. The spirit and purpose of Article 203 of the VAT Directive is to eliminate the risk of loss of tax revenue which might be entailed by an unjustified deduction being claimed by the recipient of an invoice on the basis of that invoice.[9] This risk is illustrated by the situation in the present case.

6 Judgments of 27 June 2018, *SGI and Valériane* (C-459/17 and C-460/17, EU:C:2018:501, paragraph 35); of 31 January 2013, *LVK* (C-643/11, EU:C:2013:55, paragraph 34); of 26 May 2005, *António Jorge* (C-536/03, EU:C:2005:323, paragraphs 24 and 25); of 29 April 2004, *Terra Baubedarf-Handel* (C-152/02, EU:C:2004:268, paragraph 31); and of 8 June 2000, *Breitsohl* (C-400/98, EU:C:2000:304, paragraph 36).

7 As was expressly stated, recently, in judgment of 27 June 2018, *SGI and Valériane* (C-459/17 and C-460/17, EU:C:2018:501, paragraph 36).

8 Judgments of 27 June 2018, *SGI and Valériane* (C-459/17 and C-460/17, EU:C:2018:501, paragraph 37); of 31 January 2013, *LVK* (C-643/11, EU:C:2013:55, paragraph 34); of 15 March 2007, *Reemtsma Cigarettenfabriken* (C-35/05, EU:C:2007:167, paragraph 23); and of 13 December 1989, *Genius* (C-342/87, EU:C:1989:635, paragraph 19).

9 As is expressly stated in the judgments of 31 January 2013, *LVK* (C-643/11, EU:C:2013:55, paragraphs 35 and 36); of 18 June 2009, *Stadeco* (C-566/07, EU:C:2009:380, paragraph 28 et seq.), with reference to the judgment of 19 September 2000, *Schmeink & Cofreth and Strobel* (C-454/98, EU:C:2000:469, paragraphs 57 and 61); and of 6 November 2003, *Karageorgou and Others* (C-78/02 to C-80/02, EU:C:2003:604, paragraph 50).

32. The right to deduct may be exercised only in respect of taxes corresponding to a transaction subject to VAT.[10] However, there is a risk of loss of tax revenue as long as the addressee of an invoice incorrectly mentioning VAT could still use it for the purposes of such deduction under Article 168 of the VAT Directive,[11] as it cannot be ruled out that the tax authorities will not be able to determine in good time that substantive grounds preclude the exercise of the right to deduct which exists formally.

33. Article 203 of the VAT Directive thus seeks a comparable parallelism between the deduction by the *recipient* of the invoice and the tax liability of the *issuer* of the invoice, as would normally exist in the case of a genuine supply for the supplier and the recipient of the supply. According to the wording of Article 203 of the VAT Directive, it is not necessary that a deduction has been made by the recipient of the invoice.

34. Consequently, the issuer of the invoice is strictly liable for the risk (that is, abstractly) of the recipient of the invoice being able to make an unjustified deduction on the basis of that (incorrect) invoice. There is abstract liability for risk on the part of the issuer of the invoice. It applies both in the case of an error as to the correct rate of tax (the invoice mentions the statutory rate of tax rather than the reduced rate) and, in particular, in the case of billing for fictitious transactions.

(2) No application in the case of billing for a fictitious supply?

35. However, in one decision the Court ruled that because the underlying supplies are not subject to VAT, the amount wrongly invoiced as VAT also cannot be classified as VAT.[12]

36. As a logical extension of this case-law, this would mean in the present case that billing for fictitious transactions — as they are also not subject to VAT (see above, point 24 et seq.) — would not trigger the legal consequences of Article 203 of the VAT Directive. Article 203 of the VAT Directive would then be applicable only to the case of overstated VAT for a (real) supply of goods or services. However, neither the wording nor the spirit and purpose, as abstract liability for risk, give any indication of such a restriction.

37. Furthermore, the Court held in that same decision and in one further decision[13] that the Sixth Directive[14] does not make express provision for the case where the VAT is mentioned in error on an invoice where it is not due. In the final analysis, however, those judgments relate to adjustments of such invoices, which are not actually provided for by Article 203 of the VAT Directive.[15] In addition, those judgments do not concern deliberate billing of fictitious transactions, but errors concerning status as a taxable person and the place of the transactions.

38. In particular, the Court confirmed in another case that Article 21(1)(c) of the Sixth Directive (which corresponds to Article 203 of the VAT Directive) also covers fictitious invoices (that is, invoices for fictitious transactions).[16]

10 Judgment of 13 December 1989, *Genius* (C-342/87, EU:C:1989:635, paragraph 13).

11 As is expressly stated in the judgment of 18 June 2009, *Stadeco* (C-566/07, EU:C:2009:380, paragraph 28 et seq.), with reference to judgment of 19 September 2000, *Schmeink & Cofreth and Strobel* (C-454/98, EU:C:2000:469, paragraph 57).

12 Judgment of 6 November 2003, *Karageorgou and Others* (C-78/02 to C-80/02, EU:C:2003:604, paragraph 53).

13 Judgments of 18 June 2009, *Stadeco* (C-566/07, EU:C:2009:380, paragraph 35), and of 6 November 2003, *Karageorgou and Others* (C-78/02 to C-80/02, EU:C:2003:604, paragraph 49).

14 Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment, OJ 1997 L 145, p. 1.

15 As is correctly recognised in the judgment of 19 September 2000, *Schmeink & Cofreth and Strobel* (C-454/98, EU:C:2000:469, paragraph 48): 'the Sixth Directive does not contain any provisions relating to the adjustment by the issuer of the invoice of VAT which has been improperly invoiced'.

16 Judgment of 15 October 2002, *Commission* v *Germany* (C-427/98, EU:C:2002:581, paragraph 41).

39. Lastly, it is not a matter of only the issuer of the invoice who makes an error regarding the rate of tax or deliberately enters VAT for an exempt transaction, but not one who deliberately bills for fictitious transactions, being held liable for the materialised (abstract) risk of loss of tax revenue. In both cases the risk of loss of tax revenue through an unjustified deduction by the recipient of the invoice is the same.[17] Both the Commission and Italy therefore consider Article 203 of the VAT Directive to be applicable in the present case.

40. Article 203 of the VAT Directive therefore also covers the situation in the present case, in which VAT is deliberately entered on an invoice even though it is not owed in the absence of transactions. EN.SA thus owes, in essence, the VAT which it entered on the invoices for the fictitious transactions.

(b) Correction of tax liability under Article 203 of the VAT Directive

41. It must still be examined whether that tax liability must be able to be corrected at least where no risk of loss of tax revenue has actually materialised. This question arises in particular because in its question the referring court indicates that recovery of unduly paid VAT is precluded.

42. In this regard, however, the Court has already ruled that the Sixth Directive (the same holds for the currently applicable VAT Directive) does not contain any provisions relating to the adjustment by the issuer of the invoice of VAT which has been improperly invoiced.[18] Accordingly, so long as this lacuna has not been filled by the EU legislature, it is for the Member States to provide a solution in that regard.[19]

(1) Duty to provide a possibility of adjustment

43. In this connection it is for the Member States, first of all, to provide for the possibility in their internal legal systems, in order to guarantee the neutrality of VAT, of correcting any tax improperly invoiced where the person who issued the invoice shows that he acted in *good faith*.[20]

44. Furthermore, the principle of the neutrality of VAT requires that VAT which has been improperly invoiced can be adjusted where the issuer of the invoice has, in sufficient time, wholly eliminated the risk of any loss of tax revenue; it is *not* possible for such an adjustment to be made conditional by the Member States upon the issuer of the relevant invoice having acted in good faith.[21] In addition, that refund cannot be dependent upon the discretion of the tax authorities.[22]

17 See also, in essence, judgment of 31 January 2013, *LVK* (C-643/11, EU:C:2013:55, paragraph 42); tax liability under Article 203 of the VAT Directive regardless of whether a taxable transaction actually exists.

18 As is expressly stated in judgment of 19 September 2000, *Schmeink & Cofreth and Strobel* (C-454/98, EU:C:2000:469, paragraph 48). Cited in judgments of 18 June 2009, *Stadeco* (C-566/07, EU:C:2009:380, paragraph 35), and of 6 November 2003, *Karageorgou and Others* (C-78/02 to C-80/02, EU:C:2003:604, paragraph 49), which nevertheless mention that the directive does not make express provision for the case where the VAT is mentioned in error on an invoice.

19 Judgments of 18 June 2009, *Stadeco* (C-566/07, EU:C:2009:380, paragraph 35); of 6 November 2003, *Karageorgou and Others* (C-78/02 to C-80/02, EU:C:2003:604, paragraph 49); and of 19 September 2000, *Schmeink & Cofreth and Strobel* (C-454/98, EU:C:2000:469, paragraph 49).

20 Judgments of 18 June 2009, *Stadeco* (C-566/07, EU:C:2009:380, paragraph 36), and of 13 December 1989, *Genius* (C-342/87, EU:C:1989:635, paragraph 18).

21 Judgments of 31 January 2013, *LVK* (C-643/11, EU:C:2013:55, paragraph 37); of 18 June 2009, *Stadeco* (C-566/07, EU:C:2009:380, paragraph 37); of 6 November 2003, *Karageorgou and Others* (C-78/02 to C-80/02, EU:C:2003:604, paragraph 50); and of 19 September 2000, *Schmeink & Cofreth and Strobel* (C-454/98, EU:C:2000:469, paragraph 58).

22 Judgments of 18 June 2009, *Stadeco* (C-566/07, EU:C:2009:380, paragraph 38), and of 19 September 2000, *Schmeink & Cofreth and Strobel* (C-454/98, EU:C:2000:469, paragraph 68).

45. Moreover, the measures that the Member States may adopt in order to ensure the correct levying and collection of the tax and for the prevention of fraud must not go further than is necessary to attain such objectives. They may not therefore be used in such a way that they would have the effect of undermining VAT neutrality, which is a fundamental principle of the common system of VAT.[23] This applies in particular to an abstract strict liability offence (see above, points 34 and 35).

46. Consequently, if reimbursement of the VAT becomes impossible or excessively difficult as a result of the conditions under which applications for reimbursement of tax may be made, those principles may require that the Member States provide for the instruments and the detailed procedural rules necessary to enable the taxable person to recover the unduly invoiced tax.[24]

47. According to the referring court, there is no risk of loss of tax revenue. This follows from the fact that the VAT arising was duly paid by the companies involved and consequently, on account of the parallelism of VAT and input tax, the Italian State did not pay out any VAT to any of those concerned, without first being able to collect the amount. In this regard, the objective of ensuring that a parallelism of deduction and tax liability is observed (see point 32 et seq. above) has not been prejudiced.

48. It is also clear from the description of the facts and from the question referred that the tax authorities are aware of all those involved and have refused to allow the unjustified deduction for all of them. From this point of view too, a risk of loss of tax revenue is ruled out. If there is no risk of loss of tax revenue from billing for fictitious transactions, an adjustment of that tax pursuant to Article 203 of the VAT Directive must be possible, even if EN.SA did not act in good faith with regard to the fictitious transactions.

(2) Time of adjustment

49. The appropriate time of adjustment is the time when it is established that there is no risk of loss of tax revenue. In this case, this could be, for example, the time when the tax authorities become aware that the recipient of the invoice is not entitled to deduct and effectively refuses to allow it the deduction.

50. In addition, given the lack of good faith[25] on the part of the 'Green Network' group which is involved here, there is no need to answer the question whether a repayment of the amount to the recipient of the invoice is a condition for an adjustment of the tax liability under Article 203 of the VAT Directive, where the recipient assumed in good faith that it was entitled to deduct.

(3) Conclusion

51. In conclusion, EU law (in particular the principles of proportionality and neutrality of VAT) requires a possibility of correcting a VAT liability under Article 203 of the VAT Directive, in the form of an abstract liability for risk, at the time when a risk of loss of tax revenue is ruled out.

52. As the Court has already ruled, however, EU law does not prevent Member States from treating the issuing of bogus invoices (for fictitious transactions) improperly mentioning VAT as a criminal offence and from imposing, in such a case, the penalties prescribed by their domestic law.[26]

23 Judgment of 18 June 2009, *Stadeco* (C-566/07, EU:C:2009:380, paragraph 39), and see by way of analogy judgment of 19 September 2000, *Schmeink & Cofreth and Strobel* (C-454/98, EU:C:2000:469, paragraph 59 and the case-law cited).

24 Judgment of 18 June 2009, *Stadeco* (C-566/07, EU:C:2009:380, paragraph 40); see, to that effect and by way of analogy, judgment of 15 March 2007, *Reemtsma Cigarettenfabriken* (C-35/05, EU:C:2007:167, paragraph 41).

25 If fictitious transactions are considered to exist within the group of undertakings, this also rules out, in principle, good faith within the group.

26 See to that effect judgment of 19 September 2000, *Schmeink & Cofreth and Strobel* (C-454/98, EU:C:2000:469, paragraph 62).

3. Proportionality of a penalty equal to the full amount of the wrongly claimed deduction

53. Lastly, it is necessary to answer the question raised in the third part of the request for a preliminary ruling whether in a case like the present one an additional penalty equal to the full amount of the wrongly claimed deduction is proportionate.

54. In the absence of harmonisation of EU legislation in the field of sanctions applicable where conditions laid down by arrangements under that legislation are not complied with, Member States remain empowered to choose the sanctions which seem to them to be appropriate. Nevertheless, the Member States must exercise that power in accordance with EU law and its general principles and, consequently, in accordance with the principle of proportionality. [27]

55. Thus, such penalties must not go beyond what is necessary to attain the objectives of ensuring the correct levying and collection of the tax and preventing fraud. In order to assess whether a penalty is consistent with the principle of proportionality, account must be taken inter alia of the nature and the degree of seriousness of the infringement which the penalty seeks to sanction, and of the means of establishing the amount of the penalty. [28]

56. As regards the possibilities for the Member States to apply financial penalties under VAT legislation, the Court has delivered a number of decisions from which it is clear that penalties are permitted. However, they may not have the effect of frustrating the approach taken by VAT law and in particular of undermining the neutrality of VAT. [29]

57. In the present case, the penalty equal to the full amount of the wrongly made deduction leads to the necessary possibility of adjustment in respect of the tax liability under Article 203 of the VAT Directive being redundant. Even if, in the absence of a risk of loss of tax revenue, the tax liability under Article 203 of the VAT Directive is adjusted, there is still a financial debt of a comparable amount. If the purchase price and the selling price are the same, there is still even a financial debt of the same amount.

58. The Court has already ruled that a penalty of 50% — where the conduct did not cause the tax authority any loss of revenue and showed no evidence of fraud — appears to be disproportionate, this being a matter for the referring court to determine. [30] This applies *a fortiori* to a penalty equal to the full amount in a case where loss of tax revenue and tax fraud are ruled out. [31]

59. Furthermore, as the Court has ruled in another context, [32] other — less onerous — means are also conceivable. Thus, in the present case the application of a fine or a financial penalty proportionate to the degree of seriousness of the infringement and the degree of seriousness of the damage is conceivable. It is apparent, however, that under the rule at issue in the main proceedings the penalty applies in any event without taking into consideration the specific circumstances and the specific danger to or loss of VAT revenue. As the Commission rightly observes, however, this exceeds what is necessary to ensure the correct levying and collection of the tax and to prevent fraud (see, with regard to these objectives, Articles 273 and 131 of the VAT Directive).

27 Judgment of 26 April 2017, *Farkas* (C-564/15, EU:C:2017:302, paragraph 59); see to that effect, inter alia, judgments of 6 February 2014, *Fatorie* (C-424/12, EU:C:2014:50, paragraph 50), and of 7 December 2000, *de Andrade* (C-213/99, EU:C:2000:678, paragraph 20).

28 Judgment of 26 April 2017, *Farkas* (C-564/15, EU:C:2017:302, paragraph 60); see to that effect judgments of 20 June 2013, *Rodopi-M 91* (C-259/12, EU:C:2013:414, paragraph 38), and of 8 May 2008, *Ecotrade* (C-95/07 and C-96/07, EU:C:2008:267, paragraphs 65 to 67).

29 Judgment of 15 September 2016, *Senatex* (C-518/14, EU:C:2016:691, paragraph 41); see to that effect judgment of 9 July 2015, *Salomie and Oltean* (C-183/14, EU:C:2015:454, paragraph 62).

30 See judgment of 26 April 2017, *Farkas* (C-564/15, EU:C:2017:302, paragraphs 65 and 66).

31 Similarly — albeit in a different context — judgment of 17 July 2014, *Equoland* (C-272/13, EU:C:2014:2091, paragraph 47).

32 Judgment of 15 September 2016, *Senatex* (C-518/14, EU:C:2016:691, paragraph 42); see to that effect judgment of 9 July 2015, *Salomie and Oltean* (C-183/14, EU:C:2015:454, paragraph 63).

60. For the same reason, the penalty at issue also cannot be regarded as a proportionate penalty in respect of the wrongly issued invoices (with regard to this possibility, see above, point 53), especially since it is not linked to the amount of the tax liability shown there or a risk, but to the previously wrongly claimed deduction.

61. It should also be borne in mind that the wrongly made deduction (on the basis of the fictitious supplies on the input side) corresponds to the likewise wrongly paid VAT from the fictitious supplies on the output side. Both 'payments' relate to the same object of supply and for that reason cannot be seen in isolation. Both were made wrongly and must therefore be returned.

62. Moreover, as the scheme of the VAT Directive clearly shows (see Article 206 of the VAT Directive), the tax liability of the taxable person is always composed of the tax owed from the outputs minus the deductible tax in respect of the inputs from the same tax period. Account should also be taken of this idea in assessing the appropriateness of a penalty for fictitious transactions.

63. If the two claims are offset, this produces a specific amount payable for EN.SA (and thus a loss of tax revenue for Italy) of EUR 0 if the purchase price and the selling price were the same, as is suggested by the referring court's statements. The application of a penalty equal to the full amount of the deduction wrongly claimed to the detriment of the Italian State without consideration of the amount of VAT also wrongly paid, but to the benefit of Italian State, is disproportionate on account of the closely linked substance of the two claims.

64. Italy nevertheless remains free to pay interest on the tax liability arising under Article 203 of the VAT Directive (abstract liability for risk) until it is adjusted and also — as has already been stated above — to apply a criminal penalty to the issue of invoices for fictitious transactions.

VI. Conclusion

65. I propose that the Court answer the question asked by the Commissione Tributaria Regionale per la Lombardia (Regional Tax Court, Lombardy, Italy) as follows:

Articles 168 and 203 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax do not preclude, in the case of fictitious transactions, a concurrent tax liability based on the issue of an invoice and a refusal to allow the deduction of input tax (even repeatedly within a circular supply chain). It is a condition that the tax liability under Article 203 of Directive 2006/112 can be corrected as soon as a risk of loss of tax revenue is ruled out. In such a case, a penalty may be applied in respect of the issue of an incorrect invoice, but a penalty equal to the full amount of the non-deductible input tax for the fictitious inputs is disproportionate if the corresponding value added tax for the fictitious outputs has been paid and there was therefore no risk of loss of tax revenue.