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Provisional text

JUDGMENT OF THE COURT (Fourth Chamber)

15 September 2022 (*)

(Reference for a preliminary ruling – Value added tax (VAT) – Directive 2006/112/EC – Right to deduct input VAT – Sale of an item of immovable property between taxable persons – Vendor subject to insolvency proceedings – National practice under which the purchaser is denied the right of deduction on the ground that he or she knew or should have known of the vendor's difficulties in paying the output tax – Fraud and abuse of rights – Conditions)

In Case C?227/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Lietuvos vyriausiasis administracinis teismas (Supreme Administrative Court of Lithuania), made by decision of 31 March 2021, received at the Court on 9 April 2021, in the proceedings

UAB 'HA.EN.'

v

Valstybin? mokes?i? inspekcija prie Lietuvos Respublikos finans? ministerijos,

THE COURT (Fourth Chamber),

composed of C. Lycourgos, President of the Chamber, S. Rodin, J.?C. Bonichot, L.S. Rossi and O. Spineanu-Matei (Rapporteur), Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– UAB 'HA.EN.', by G. Kaminskas and Z. Stuglyt?, advokatai,

– the Lithuanian Government, by K. Dieninis and V. Kazlauskait?-Šven?ionien?, acting as Agents,

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

– the European Commission, by J. Jokubauskait? and L. Lozano Palacios, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 5 May 2022,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1; 'the VAT Directive').

2 The request has been made in proceedings between UAB 'HA.EN.' and the Valstybin? mokes?i? inspekcija prie Lietuvos Respublikos finans? ministerijos (State Tax Inspectorate under the Ministry of Finance of the Republic of Lithuania; 'the tax authority') concerning denial of the right to deduct value added tax (VAT) on account of an alleged abuse of rights by HA.EN.

Legal context

European Union law

3 Recitals 7 and 42 of the VAT Directive are worded as follows:

'(7) The common system of VAT should, even if rates and exemptions are not fully harmonised, result in neutrality in competition, such that within the territory of each Member State similar goods and services bear the same tax burden, whatever the length of the production and distribution chain.

…

(42) Member States should be able, in specific cases, to designate the recipient of supplies of goods or services as the person liable for payment of VAT. This should assist Member States in simplifying the rules and countering tax evasion and avoidance in identified sectors and on certain types of transactions.'

4 Article 168 of the VAT 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 193 of the VAT Directive states:

'VAT shall be payable by any taxable person carrying out a taxable supply of goods or services, except where it is payable by another person in the cases referred to in Articles 194 to 199 and Article 202.'

6 Article 199(1) of the VAT Directive provides:

'Member States may provide that the person liable for payment of VAT is the taxable person to whom any of the following supplies are made:

…

(g) the supply of immovable property sold by a judgment debtor in a compulsory sale procedure.'

7 As set out in Article 273 of the VAT Directive:

'Member States may impose other obligations which they deem necessary to ensure the correct collection of VAT and to prevent evasion, subject to the requirement of equal treatment as between domestic transactions and transactions carried out between Member States by taxable persons and provided that such obligations do not, in trade between Member States, give rise to formalities connected with the crossing of frontiers.

…'

Lithuanian law

8 Article 58(1) of the Lietuvos Respublikos prid?tin?s vert?s mokes?io ?statymas (Law of the Republic of Lithuania on value added tax), as amended by Law No IX?751 of 5 March 2002, provides:

'A VAT payer shall have the right to deduct input and/or import VAT in respect of goods and/or services acquired and/or imported, if those goods and/or services are intended to be used for the following activities of that VAT payer: … the supply of goods and/or services on which VAT is chargeable;

…'

9 Article 719(1) of the Lietuvos Respublikos civilinio proceso kodeksas (Code of Civil Procedure of the Republic of Lithuania), as amended by Law No XII?889 of 15 May 2014, provides:

'If an auction is declared void due to the absence of any bidder …, the property shall be transferred to the person seeking enforcement, for the initial price of sale of the property at the auction.'

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

10 By agreement of 21 September 2007, UAB 'Medicinos Bankas' ('the bank') granted UAB 'Sostin?s b?stai' ('the vendor') a loan to carry out real estate development activity. For the purpose of securing due performance of the agreement, the vendor granted the bank a contractual mortgage over a plot of land in the city of Vilnius (Lithuania) on which a building was under construction.

11 By an assignment of claim agreement concluded on 27 November 2015, HA.EN. acquired from the bank for consideration all the monetary claims arising from the credit agreement concluded between the bank and the vendor and all the rights established to secure the performance of obligations, including the contractual mortgage. When concluding that agreement, HA.EN. confirmed, inter alia, that it had become acquainted with the vendor's economic and financial situation and legal status, and that it was aware that the vendor was insolvent and the subject of administration proceedings pending before the Vilniaus apygardos teismas (Regional Court, Vilnius, Lithuania). By agreement concluded on 18 December 2015, the bank assigned the mortgage over the vendor's property to HA.EN.

12 The auction of a part of the vendor's item of immovable property ('the immovable property at issue') was announced by order of a bailiff of 23 May 2016, but no purchaser showed an interest in acquiring it. As the auctioning had been unsuccessful, HA.EN. was offered, in the context of the auction procedure, the immovable property at issue for its initial price of sale at the auction, an

acquisition which would extinguish a part of HA.EN.'s claims. HA.EN. exercised that right and took over the immovable property at issue.

13 For that purpose, on 21 July 2016 a bailiff drew up an instrument recording the transfer of ownership of the immovable property at issue to HA.EN.

14 On 5 August 2016, the vendor issued an invoice indicating that ownership of the immovable property at issue had been transferred to HA.EN. by that instrument for the total amount of EUR 5 468 000, that is to say, a sum of EUR 4 519 008.26 together with EUR 948 991.74 in VAT. HA.EN. entered the invoice in its accounts and deducted the input VAT set out on the invoice in its VAT declaration for November 2016. The vendor also entered the invoice in its accounts and it declared the output tax set out on it, as VAT payable, in its declaration for August 2016, but it never paid that tax into the public purse.

15 On 1 October 2016, the vendor was declared insolvent.

16 On 20 December 2016, HA.EN. requested the tax authority to refund it the excess VAT resulting from deduction of the input VAT, namely EUR 948 991.74. After conducting a tax inspection in respect of HA.EN., the tax authority found that, in entering into the transaction for acquisition of the immovable property at issue although it knew or should have known that the vendor would not pay the VAT generated by that transaction into the public purse, HA.EN. had acted in bad faith and committed an abuse of rights. It was on the basis of that reasoning that, by decision of 12 July 2017, the tax authority denied HA.EN. the right to deduct that input VAT, charged it interest of EUR 38 148.46 for late payment of VAT and imposed upon it a fine of EUR 284 694.

17 HA.EN. contested that decision before the Mokestini? gin?? komisija prie Lietuvos Respublikos Vyriausyb?s (Tax Disputes Commission under the Government of the Republic of Lithuania), which, by decision of 22 January 2018, set aside the tax authority's decision so far as concerns the interest for late payment and the fine but, finding that HA.EN. had committed an abuse of rights, upheld it in so far as it denied HA.EN. the right to deduct VAT.

18 HA.EN. brought an action against that decision of the Tax Disputes Commission under the Government of the Republic of Lithuania before the Vilniaus apygardos administracinis teismas (Regional Administrative Court, Vilnius, Lithuania), which, by judgment of 14 November 2018, confirmed the tax authority's position and dismissed the action as unfounded.

19 On 12 December 2018, HA.EN. brought an appeal before the referring court, the Lietuvos vyriausiasis administracinis teismas (Supreme Administrative Court of Lithuania), which, by order of 13 May 2020, partially upheld the appeal, set aside the judgment of the Vilniaus apygardos administracinis teismas (Regional Administrative Court, Vilnius) and referred the case back to it, stating in particular that it had to assess the conditions for, and indications of, the presence of abuse of rights in the case in point.

20 After re-examining the tax dispute, the Vilniaus apygardos administracinis teismas (Regional Administrative Court, Vilnius), by judgment of 3 September 2020, again found that HA.EN. had committed an abuse of rights and consequently held that the tax authority was justified in denying it the right to deduct input VAT. HA.EN. then brought a fresh appeal before the referring court.

21 The referring court states that, since the invoice relating to the compulsory sale transaction indicated a net amount of EUR 4 519 008.26 and VAT amounting to EUR 948 991.74, HA.EN. in fact bore the VAT. On that basis, the referring court takes the view that there was prima facie no justification for the tax authority to hold that the substantive and formal conditions laid down by the

VAT Directive for exercise by HA.EN of its right of deduction were not met.

22 Nevertheless, the referring court is uncertain whether, in order to deny HA.EN. the right to deduct the VAT relating to the acquisition of the immovable property at issue, the tax authority was entitled to rely on the fact that it knew or should have known that the vendor, because of its financial difficulties and potential insolvency, would not pay, or would not be able to pay, the VAT into the public purse.

23 It is in those circumstances that the Lietuvos vyriausiasis administracinis teismas (Supreme Administrative Court of Lithuania) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Is [the VAT Directive], in conjunction with the principle of fiscal neutrality, to be interpreted as prohibiting or not prohibiting a practice of national authorities under which the right of a taxable person to deduct input VAT is denied where that person, when acquiring items of immovable property, knew (or should have known) that the supplier, due to his insolvency, would not pay (or would not be able to pay) the output VAT into the public purse?'

Consideration of the question referred

24 By its question, the referring court asks, in essence, whether Article 168(a) of the VAT Directive, read in the light of the principle of fiscal neutrality, must be interpreted as precluding a national practice under which, in the context of the sale of an item of immovable property between taxable persons, the purchaser is denied the right to deduct input VAT merely because he or she knew or should have known that the vendor was in financial difficulty, or even insolvent, and that that circumstance could result in the vendor not paying or not being able to pay VAT into the public purse.

25 First of all, it should be recalled that, in accordance with settled case-law of the Court, the right of taxable persons to deduct from the VAT which they are liable to pay the VAT due or paid on goods purchased and services received by them as inputs is a fundamental principle of the common system of VAT established by EU legislation. The deduction system, of which Article 168 of the VAT Directive is part, is intended to relieve the trader entirely of the burden of the VAT due or paid in the course of all his or her economic activities. The common system of VAT therefore ensures that all economic activities, whatever their purpose or results, provided that they are, in principle, themselves subject to VAT, are taxed in a neutral way (see, to that effect, judgment of 15 September 2016, *Senatex*, C?518/14, EU:C:2016:691, paragraphs 26 and 27 and the case-law cited). As the Court has repeatedly held, the right of deduction provided for in Article 167 et seq. of the VAT Directive is an integral part of the VAT scheme and in principle may not be limited (judgment of 16 October 2019, *Glencore Agriculture Hungary*, C?189/18, EU:C:2019:861, paragraph 33 and the case-law cited).

26 In that regard, the Court has already held that the question whether or not the supplier of the goods has paid the VAT due on sale transactions to the public purse has no bearing on the right of the taxable person to deduct input VAT (judgment of 22 October 2015, *PPUH Stehcemp*, C?277/14, EU:C:2015:719, paragraph 45 and the case-law cited). Making the right to deduct VAT conditional upon the actual prior payment of that VAT by the supplier of goods would lead to the taxable person being subject to an economic burden which should not be his or hers and the avoidance of which is the specific aim of the rules governing deduction (see, to that effect, judgment of 29 March 2012, *Véleclair*, C?414/10, EU:C:2012:183, paragraph 30).

27 At the same time, the prevention of tax evasion, tax avoidance and abuse is an objective recognised and encouraged by the VAT Directive and the Court has consistently held that EU law

cannot be relied on for abusive or fraudulent ends. It is therefore for the national courts and authorities to refuse the right of deduction if it is shown, in the light of objective evidence, that that right is being relied on for fraudulent or abusive ends (judgment of 10 July 2019, *Kuršu zeme*, C?273/18, EU:C:2019:588, paragraph 34 and the case-law cited).

28 However, 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 fraud or an abuse of rights or knew or should have known that the transaction relied on as a basis for the right of deduction was connected with fraud. It is for the national courts subsequently to determine whether the tax authorities concerned have established the existence of such objective evidence (see, to that effect, judgment of 11 November 2021, *Ferimet*, C?281/20, EU:C:2021:910, paragraph 50 and the case-law cited).

29 It is in the light of that case-law that it should be determined whether, where an item of immovable property is sold by a company in financial difficulty, the national tax authorities may legitimately deny the purchaser of that property the right to deduct input VAT on the ground that, because of his or her knowledge of that financial difficulty and its possible consequences for payment of VAT into the public purse, he or she knew or should have known that he or she was participating in a transaction connected with VAT fraud or was committing an abuse of rights.

30 First, as regards any participation of the purchaser of the item of immovable property in a transaction connected with VAT fraud, it should be pointed out that the financial interests of the European Union include, in particular, revenue arising from VAT (judgment of 2 May 2018 *Scialdone*, C?574/15, EU:C:2018:295, paragraph 27 and the case-law cited).

31 It should also be noted that the concept of 'fraud affecting the European Communities' financial interests', as defined in Article 1 of the Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests, signed in Brussels on 26 July 1995 and annexed to the Council Act of 26 July 1995 (OJ 1995 C 316, p. 48), covers, inter alia, 'any intentional act or omission relating to … the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the illegal diminution of the resources of the general budget of the European Communities or budgets managed by, or on behalf of, the European Communities'. Therefore, and as follows from the previous paragraph, that concept encompasses any intentional act or omission affecting revenue derived from applying a uniform rate to the harmonised VAT assessment bases determined according to EU rules (see, to that effect, judgment of 8 September 2015, *Taricco and Others*, C?105/14, EU:C:2015:555, paragraph 41).

32 The Court has already held that, in so far as the taxable person has duly complied with his or her obligations to declare VAT, the mere failure to pay duly declared VAT cannot constitute VAT fraud, irrespective of whether such a failure is intentional or not (see, to that effect, judgment of 2 May 2018, *Scialdone*, C?574/15, EU:C:2018:295, paragraphs 38 to 41).

33 Therefore, a taxable person who is a judgment debtor facing financial difficulties and sells one of his or her assets in a statutory compulsory sale procedure in order to settle his or her debts, then declares the VAT due on that basis, but subsequently is unable, because of those difficulties, to pay that VAT in whole or in part, cannot be regarded as committing VAT fraud on that account alone. Consequently, the purchaser of such an asset, a fortiori, cannot be criticised in such circumstances on the basis that he or she knew or should have known that, in acquiring that asset, he or she was participating in a transaction connected with VAT fraud.

34 Second, so far as concerns the existence of any abuse of rights on the part of the purchaser

of the immovable property at issue, it should be pointed out that EU law on VAT precludes any right of a taxable person to deduct input VAT where the transactions from which that right derives constitute an abusive practice (judgment of 21 February 2006, *Halifax and Others*, C?255/02, EU:C:2006:121, paragraph 85). That right cannot extend to abusive practices by economic operators, that is to say, transactions carried out not in the context of normal commercial operations but solely for the purpose of wrongfully obtaining advantages provided for under EU law (see, to that effect, judgment of 22 December 2010, *Weald Leasing*, C?103/09, EU:C:2010:804, paragraph 26).

35 In the sphere of VAT, two conditions must be met in order to find that an abusive practice exists. First, the transactions concerned, notwithstanding formal application of the conditions laid down by the relevant provisions of the VAT Directive and the national legislation transposing it, must result in the accrual of a tax advantage the grant of which would be contrary to the purpose of those provisions. Second, it must be 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 11 November 2021, *Ferimet*, C?281/20, EU:C:2021:910, paragraph 54 and the case-law cited). Within that framework, it is for the national court to verify in accordance with the rules of evidence of national law whether action constituting an abusive practice has taken place. However, the Court, when giving a preliminary ruling, may, where appropriate, provide clarification designed to give the national court guidance in its interpretation (see, to that effect, judgment of 21 February 2006, *Halifax and Others*, C?255/02, EU:C:2006:121, paragraphs 76 and 77).

36 As to the first condition, even assuming that the deduction that is sought by the purchaser of immovable property of the input VAT paid by him or her when taking over that property may be classified as a tax advantage, that advantage cannot be regarded as contrary to the objectives of the VAT Directive. As the Advocate General has stated in points 40 to 44 of her Opinion, that is what is revealed by Article 199(1)(g) of the VAT Directive, which permits the Member States, in the case of the supply of immovable property sold by a judgment debtor in a compulsory sale procedure, to have recourse to the reverse charge mechanism and to transfer the VAT burden to the taxable person to whom the taxable supply is made. Whilst the Republic of Lithuania chose not to have recourse to that mechanism, the very existence of the option provided for by that provision shows that the EU legislature did not regard deduction of the VAT paid by the purchaser of immovable property in a compulsory sale procedure as contrary to the objectives of the VAT Directive.

37 It is true that, in paragraphs 42 to 45 of the judgment of 20 May 2021, *ALTI*, (C?4/20, EU:C:2021:397), the Court ruled, in essence, that the VAT Directive does not preclude national legislation pursuant to which the other party to a contract with a person liable for payment for VAT, in respect of whom it has been established that he or she knew or should have known that that person liable for payment would not pay that VAT, while exercising him or herself the right to deduct input tax, is deemed to be a debtor jointly and severally liable for the unpaid VAT and increases thereto.

38 However, for the reasons set out by the Advocate General in points 46 and 47 of her Opinion, the situation of a taxable person who purchases immovable property at the end of a statutory compulsory sale procedure, under the supervision of the public authorities, is not comparable to the situation of the other party to the contract with the principal VAT debtor that was at issue in the case which gave rise to that judgment. An unlawful intention on the part of a debtor whose asset is sold by way of enforcement not to pay VAT cannot be inferred merely from the financial difficulties that he or she faces. Accordingly, the view cannot be taken on that basis alone

that, in carrying out a commercial transaction with that debtor, the purchaser of the asset commits an abuse of rights.

39 Under the second condition for an abuse of rights, it must be apparent from a number of objective factors that the essential aim of the transaction concerned is solely to obtain a tax advantage. In that regard, it should be pointed out first of all that it is apparent from the documents before the Court that, in the main proceedings, HA.EN. was a creditor of the vendor and held a mortgage over the immovable property at issue, which was the subject of a compulsory sale. In such circumstances, the view is to be taken that the fundamental reason for which a creditor, after an unsuccessful auction, has taken over immovable property over which he or she held such security may be not in order to obtain some tax advantage, but the creditor's wish to recover all or part of his or her debt from a debtor in administration, by legal means available to the creditor, such as a compulsory sale procedure.

40 Having regard to the fact that it takes place in a statutory procedure, which is admittedly intended to apply in a context that is exceptional – that of an economic operator's insolvency – but nevertheless one inherent in economic life, and in the light of the prima facie legitimate objective that it pursues, such a transaction cannot be equated to a wholly artificial arrangement that does not reflect economic reality and is set up with the sole aim of obtaining a tax advantage, which the principle that abusive practices are prohibited has the effect of barring (see, to that effect, judgments of 17 December 2015, *WebMindLicenses*, C?419/14, EU:C:2015:832, paragraph 35 and the case-law cited, and of 20 May 2021, *ALTI*, C?4/20, EU:C:2021:397, paragraph 35 and the case-law cited).

41 The fact that the purchaser is aware of the vendor's financial difficulties, his or her potential insolvency or, as in the present instance, the initiation of administration proceedings, and of the possible impact of such circumstances on payment of the VAT relating to the transaction into the public purse, seems to constitute a circumstance inherent in compulsory sale procedures and cannot in itself be sufficient to establish that the transaction at issue is an abuse and, therefore, to justify denial of the right of deduction.

42 In the light of the foregoing, the tax authorities of a Member State cannot, from the point of view of EU law, legitimately take the view that, in the context of the sale of an item of immovable property between taxable persons following a statutory compulsory sale procedure, the mere fact the purchaser knew or should have known that the vendor had financial difficulties and that that could result in the vendor not paying VAT into the public purse means that the purchaser committed an abuse of rights, and therefore deny him or her the right to deduct input VAT.

43 A national practice of that kind would also be contrary to the principle of fiscal neutrality in that it implies that purchasers of immovable property are not allowed to deduct the input VAT that they have paid in a compulsory sale procedure, which effectively makes them bear the burden of that tax, whereas the principle of fiscal neutrality is meant specifically to relieve the trader entirely of the burden of the VAT payable or paid in the course of all his or her economic activities (see, to that effect, judgment of 13 March 2014, *Malburg*, C?204/13, EU:C:2014:147, paragraph 41 and the case-law cited).

44 That practice effectively makes such purchasers bear the risk that the vendor's insolvency entails for actual payment of the VAT into the public purse, a risk which is, however, in principle for the public purse to take on.

45 Such a conclusion is all the more compelling as the Republic of Lithuania chose not to make use of the option made available by Article 199(1)(g) of the VAT Directive of setting up, in these specific circumstances, a reverse charge mechanism, which is intended precisely to counter the

risk of insolvency of the VAT debtor (see, to that effect, judgment of 13 June 2013, *Promociones y Construcciones BJ 200*, C?125/12, EU:C:2013:392, paragraph 28).

46 As the Advocate General has observed in points 47, 51 and 52 of her Opinion, that practice, in that it effectively deprives taxable persons who have acquired immovable property in a compulsory sale procedure of their right of deduction, could also contribute to restricting the circle of potential purchasers. Therefore, it runs counter to the objective pursued by that type of procedure, namely the optimal realisation of the debtor's assets in order to satisfy his or her creditors to the greatest possible extent. It also tends to isolate economic operators faced with financial difficulties and to hamper their ability to carry out transactions, in a way which is not consistent with the principle of fiscal neutrality, as that principle precludes distinctions between taxable persons on the basis of their financial situation.

47 In the light of all the foregoing considerations, the answer to the question referred is that Article 168(a) of the VAT Directive, read in conjunction with the principle of fiscal neutrality, must be interpreted as precluding a national practice under which, in the context of the sale of an item of immovable property between taxable persons, the purchaser is denied the right to deduct input VAT merely because he or she knew or should have known that the vendor was in financial difficulty, or even insolvent, and that that circumstance could result in the vendor not paying or not being able to pay VAT into the public purse.

Costs

48 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 (Fourth Chamber) hereby rules:

Article 168(a) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, read in conjunction with the principle of fiscal neutrality,

must be interpreted as precluding a national practice under which, in the context of the sale of an item of immovable property between taxable persons, the purchaser is denied the right to deduct input value added tax (VAT) merely because he or she knew or should have known that the vendor was in financial difficulty, or even insolvent, and that that circumstance could result in the vendor not paying or not being able to pay VAT into the public purse.

[Signatures]

* Language of the case: Lithuanian.