Case C-281/20

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

26 June 2020

Referring court:

Tribunal Supremo (Supreme Court, Spain)

Date of the decision to refer:

11 February 2020

Appellant:

Ferimet, S. L.

Respondent:

Administración General del Estado (General Administration of the State)

Subject matter of the main proceedings

An appeal arising from a decision by which the tax authorities denied an undertaking the right to deduct value added tax ('VAT') where, under the reverse charge procedure, it issued an invoice to itself on which the stated supplier of the goods was not the actual supplier.

Subject matter and legal basis of the request for a preliminary ruling

Request for a preliminary ruling pursuant to Article 267 TFEU seeking an interpretation of Articles 168, 193, 199(1)(d), 200 and 226(11) of the VAT Directive.

Questions referred

1. Must Article 168 and related provisions of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, the principle of

tax neutrality arising from that directive, and the associated case-law of the Court of Justice be interpreted as not allowing a trader to deduct input VAT where, under the reverse charging of VAT, known in EU law as the reverse charge procedure, the documentary evidence (invoice) issued by that trader for the goods he or she has purchased states a fictitious supplier, although it is not disputed that the trader in question did actually make the purchase and used the purchased materials in the course of his or her trade or business?

2. In the event that a practice such as that described above — of which the interested party must have been aware — can be characterised as abusive or fraudulent for the purposes of refusing the deduction of input VAT, is it necessary, in order for the deduction to be refused, to prove in full the existence of a tax advantage that is incompatible with the guiding objectives of VAT regulation?

3. Lastly, if such proof is required, must the tax advantage which would be grounds for refusing the deduction and which must be identified in the specific case in question relate exclusively to the taxpayer (who purchased the goods), or could that advantage be one which relates to other parties involved in the transaction?

Provisions of EU law cited

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'), Articles 168, 193, 199(1)(d), 200 and 226(11).

Case-law of the Court of Justice

Judgment of 1 April 2004, *Bockemühl*, C-90/02, on the VAT reverse charge procedure in relation to the supply of services and applicable *mutatis mutandis* to the supply of goods.

> 'A taxable person who is liable as the recipient of services for the VAT relating thereto is not obliged to hold an invoice drawn up in accordance with Article 22(3) of the Sixth Directive in order to be able to exercise his right to deduct, and only has to fulfil the formalities laid down by the Member State concerned' (paragraph 47).
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> While Member States may establish formalities concerning the exercise of the right to deduct in cases where the reverse charge procedure applies, 'that power may be exercised only in so far as, by the number or the technical nature of such formalities, their imposition does not make it practically impossible or excessively difficult to exercise the right to deduct' (paragraph 49).

> ‘The … extent of formalities to be complied with in order to be able to exercise the right to deduct should not exceed what is strictly necessary for the purposes of verifying the correct application of the reverse charge procedure concerned’ (paragraph 50).
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> ‘Where the tax administration has the information necessary to establish that the taxable person is, as the recipient of the supply in question, liable to VAT, it cannot, in relation to the right of that taxable person to deduct that VAT, impose additional conditions which may have the effect of rendering that right ineffective for practical purposes’ (paragraph 51).

Judgment of 8 May 2008, *Ecotrade*, C-95/07 and C-96/07, on the reverse charge procedure, which, with regard to the formalities for exercising the right to deduct, states as follows:

> ‘Although it is true that that provision [Article 18(1)(d) of the Sixth VAT Directive] allows Member States to lay down the formalities relating to the exercise of the right to deduct in the case of the reverse charge procedure, a failure to comply with those formalities by the taxable person cannot deprive him of his right to deduct’ (paragraph 62), and ‘since the reverse charge procedure was indisputably applicable to the cases in the main proceedings, the principle of fiscal neutrality requires deduction of input tax to be allowed if the substantive requirements are satisfied, even if the taxable person has failed to comply with some of the formal requirements’ (paragraph 63), accordingly ‘although those provisions allow Member States to take certain measures, they must not however go further than is necessary to attain the objectives mentioned in the preceding paragraph. Such measures may not therefore be used in such a way that they would have the effect of systematically undermining the right to deduct VAT, which is a fundamental principle of the common system of VAT established by the relevant Community legislation’ (paragraph 66).
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> In short, ‘a failure to comply with accounting obligations, such as that at issue in the main proceedings, cannot be regarded as giving rise to a risk of loss of tax revenues, since, as stated in paragraph 56 of this judgment, in the context of the application of the reverse charge procedure, no tax is due in principle to the Exchequer. For those reasons, such a failure also cannot be treated as a transaction designed to evade tax or as a misuse of Community rules, since it was not intended to obtain a tax advantage to which there was no entitlement’ (paragraph 71).

Judgment of 10 July 2019, *Kuršu zeme*, C-273/18, also concerning a similar situation to the one at issue here, in which the Supreme Court of Latvia referred the following question to the Court of Justice for a preliminary ruling:

> ‘Must Article 168(a) of [the VAT] Directive … be interpreted as precluding a refusal of the deduction of input …VAT … where the refusal is based

solely on the fact that the taxpayer is knowingly involved in the arrangement of sham transactions, but it is not indicated how the outcome of those specific transactions is detrimental to the Treasury because of failure to pay VAT or an unjustified claim for repayment of VAT, as compared with the situation that would have obtained had the transactions been arranged to reflect the actual circumstances?'

In essence, the reply by the Court of Justice, which reframed the question, was as follows:

'In the sphere of VAT, an abusive practice can be found to exist only if two conditions are satisfied, namely, 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, 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' (paragraph 35).

'The fact that goods have not been received directly from the issuer of the invoice is not necessarily the result of fraudulent concealment of the true supplier and does not necessarily constitute an abusive practice, but … there may be other reasons for it, such as, inter alia, the existence of two successive sales of the same goods which, on instructions, are transported directly from the first vendor to the second person acquiring the goods, with the result that there are two successive supplies within the meaning of Article 14(1) of the VAT Directive, but a single actual transport … it is not necessary for the first person acquiring the goods in question to have become the owner of those goods at the time of that transport, given that the existence of a supply within the meaning of that provision does not presuppose the transfer of the legal ownership of the goods' (paragraph 36).

In view of the failure of the Latvian authorities to establish the existence of an undue tax advantage, 'the sole existence of a chain of transactions and the fact that Kuršu zeme acquired material possession of the goods at issue in [an undertaking's] warehouse without actually receiving them from the company mentioned on the invoice as the supplier of those goods' are not in themselves grounds for concluding that Kuršu zeme did not acquire those goods and therefore that the acquisition did not take place (paragraph 37).

Judgment of 17 October 2019, *Unitel*, C-653/18.

'The characterisation of a transaction as a supply of goods within the meaning of Articles 146(1)(a) and (b) of the VAT Directive cannot be held subject to the condition that the person acquiring the goods must be identified' (paragraph 25). 'However, in the second place, it is for the Member States to lay down, in accordance with Article 131 of the VAT

Directive, the conditions under which they will exempt transactions on exportation for the purposes of ensuring the correct and straightforward application of the exemptions provided for in that directive and of preventing any possible evasion, avoidance or abuse. When they exercise their powers, Member States must nonetheless respect the general principles of law which form part of the legal order of the European Union, including, in particular, the principle of proportionality' (paragraph 26).

'As regards that principle of proportionality, it must be recalled that a national measure goes beyond what is necessary to ensure the correct collection of the tax if, in essence, it makes the right of exemption from VAT subject to compliance with formal obligations, without any account being taken of the substantive requirements and, in particular, without any consideration being given as to whether those requirements have been satisfied. Transactions should be taxed taking into account their objective characteristics' (paragraph 27).

'When those substantive requirements have been satisfied, the principle of fiscal neutrality requires the VAT exemption to be granted even if certain formal requirements have been omitted by the taxable persons' (paragraph 28).

'According to the Court's case-law, there are only two situations in which the failure to meet a formal requirement may result in the loss of entitlement to an exemption from VAT' (paragraph 29).

'First, a breach of a formal requirement may lead to the refusal of an exemption from VAT if the effect of the breach is to prevent the production of conclusive evidence that the substantive requirements have been satisfied' (paragraph 30).

'Therefore, if the failure to identify the person actually acquiring the goods prevents, in a given case, it from being proved that the transaction at issue constitutes a supply of goods within the meaning of Article 146(1)(a) and (b) of the VAT Directive, that fact may lead to refusal of the exemption on exportation provided for in that article. On the other hand, requiring in all cases that the person who acquires the goods in the non-Member State must be identified, without seeking to ascertain whether the substantive conditions for that exemption, in particular the exit of the goods concerned from the customs territory of the European Union, have been met, is not in accordance with either the principle of proportionality or the principle of fiscal neutrality' (paragraph 31).

'Secondly, the principle of fiscal neutrality cannot be relied on for the purposes of an exemption from VAT by a taxable person who has intentionally participated in tax evasion which has jeopardised the operation of the common system of VAT … it is not contrary to EU law to require an

operator to act in good faith and to take every step which could reasonably be asked of him to satisfy himself that the transaction which he is carrying out does not result in his participation in tax evasion. If it were concluded that the taxable person concerned knew or ought to have known that the transaction he carried out was part of a fraud committed by the person acquiring the goods and that he has not taken every step which could reasonably be asked of him to prevent that fraud from being committed, he would have to be refused the exemption' (paragraph 33).

'On the other hand, the supplier cannot be held liable for the payment of the VAT irrespective of his involvement in the tax evasion committed by the person acquiring the goods[, since] it would clearly be disproportionate to hold a taxable person liable for the shortfall in tax caused by fraudulent acts of third parties over which he has no influence whatsoever' (paragraph 34).

Provisions of national law cited

Ley 37/1992, de 28 de diciembre, del Impuesto sobre el Valor Añadido (Law 37 of 28 December 1992 on value added tax; 'the VAT Law').

Article 84(1)(2)(c) of the VAT Law establishes that, in the case of transactions involving the supply of recovered materials (among other materials), the taxable person is the trader or professional for whom the taxable transaction is carried out.

Article 92(1)(3) of the VAT Law provides that taxable persons may deduct the tax accruing within the country's territory in respect of input tax charged to them or paid by them on supplies of goods falling within Article 84(1)(2) of the VAT Law, among other provisions, from the VAT due on the taxed transactions they carry out within the country.

Article 97(1) of the VAT Law provides that the right to deduct may be exercised only by traders or professionals who have documentary evidence of their right and that, for those purposes, the only acceptable documentary evidence of the right to deduct is an invoice issued by the taxable person in accordance with the provisions of Article 165(1) of that law. Article 97(2) of the VAT Law states that any such documents that do not satisfy all the statutory and regulatory requirements will not be treated as evidence of a right to deduct.

Article 165(1) of the VAT Law establishes that where Article 84(1)(2) of that law (among other provisions) applies, an invoice issued by the supplier of the goods or services, or the accounting record of the transaction, must be accompanied by a VAT invoice. The VAT invoice must satisfy the requirements laid down in regulations.

Case-law of the Tribunal Supremo (Supreme Court)

Judgment of 25 March 2009 (4608/2006): 'All the formal requirements are designed to facilitate the correct application of VAT, and therefore it does not make sense to ascribe the same importance to breach of the formal requirements where the reverse charge procedure is used and the taxpayer fails to declare it, because he or she believes the transaction is not subject to the tax, under an interpretation of the legislation which, while reasonable, is incorrect, since it would infringe the principle of neutrality.' Accordingly, 'the right to deduct must be considered a substantive right that plays an undeniably important part in the VAT system, which is why a purely formal obligation — however important in facilitating the correct application of the relevant administrative procedure — cannot lead to the loss of that right to deduct'.

Judgment of 28 January 2013 (3272/2010). In this case, the inspectorate found that the addresses of the undertakings listed as the suppliers by the taxpayer on its invoices were fictitious and, moreover, that those undertakings could not have supplied the goods formally included in the invoices, because they were shell companies intended to be used as conduit companies in order to create an appearance that would enable the taxable person to acquire the goods from actual suppliers in 'B', that is, without their being recorded in the accounts. The inspectorate therefore disallowed the deduction of VAT, on the ground that the transactions recorded in the invoices had not actually taken place with the undertakings stated in the invoices, and were a sham.

That judgment notes that the Court of Justice has stated that if the transaction carried out by the taxable person does not in itself constitute fraud, his or her right to deduct input tax cannot be affected by the fact that, in the chain of supply of which his or her transaction forms part, another prior or subsequent transaction is vitiated by VAT fraud, without that taxable person knowing or having any means of knowing. It also refers to the view expressed by the Court of Justice that a taxable person who knew, or should have known, that, by his or her purchase, he or she was taking part in a transaction connected with VAT fraud must be regarded as a participant in that fraud, whether or not he or she profits from the resale of the goods. It is, therefore, for the referring court to refuse entitlement to the right to deduct where it is ascertained, having regard to objective factors, that the taxable person knew or should have known that, by his or her purchase, he or she was participating in a transaction connected with fraudulent evasion of VAT, and to do so even where the transaction in question met the objective criteria which form the basis of the concepts of 'supply of goods effected by a taxable person acting as such' and 'economic activity'.

It is also noted in the judgment of the Supreme Court that, according to the Court of Justice, although Article 21(3) of the Sixth Directive allows a Member State to make a person jointly and severally liable for the payment of VAT if, at the time of the supply, that person knew or had reasonable grounds to suspect that the VAT payable in respect of that supply, or of any previous or subsequent supply, would

go unpaid, and to rely on presumptions in that regard, such presumptions may not be formulated in such a way as to make it practically impossible or excessively difficult for the taxable person to rebut them with evidence to the contrary, thereby bringing about a system of strict liability, since Member States must comply with the general principles of law which form part of the Community legal order, which include, in particular, the principles of legal certainty and proportionality.

The Supreme Court went on to state in that judgment that the interested party issued the invoices in the knowledge that it had not contracted with the undertaking which it was invoicing and that, in such a situation, the case-law of the Court of Justice to the effect that the right to deduct could not be denied to a trader who was involved in a carousel fraud but who did not know and could not have known what was happening did not apply, for the simple reason that the undertaking knew that the other undertaking it had named in the invoice as the supplier was a shell company with which it had not contracted.

Consequently, the approach to be applied was that established by the Court of Justice which provides for the taxable person to be denied the right to deduct where it has been demonstrated that he or she knew, or should have known, that, by his or her purchase, he or she was participating in a transaction connected with fraudulent evasion of VAT, even where the transaction in question meets the objective criteria which form the basis of the concepts of supply of goods.

Brief summary of the facts and the main proceedings

1 In 2008, the appellant, Ferimet, S. L., purchased recovered materials (scrap metal) from the company Reciclatges de terra alta, which it accounted for under the reverse charge procedure for VAT, issuing the relevant self-billed invoices.

2 The tax inspectorate conducted an audit and inspection, and concluded that the supplier, Reciclatges de terra alta, did not have the material and human resources required to supply the material, and that the invoices the company issued to the purchaser were false. It therefore took the view that the transaction was a sham in that, while there was no denying that the materials had been supplied, the real supplier had deliberately been concealed. The inspectorate therefore concluded that Ferimet was not entitled to the deduction of input VAT it had made, and fined the company.

3 The Tribunal Económico-Administrativo Regional de Cataluña (Regional Tax Tribunal, Catalonia) upheld that conclusion.

4 Ferimet challenged those administrative decisions in the Sala de lo Contencioso Administrativo del Tribunal Superior de Justicia de Cataluña (Administrative Chamber of the High Court of Justice, Catalonia), citing Spanish and European legislation and case-law from the Court of Justice, and arguing as follows:

– It was not disputed (and was accepted by the Inspectorate) that Ferimet had purchased the recovered materials.

– The naming of a fictitious supplier was a purely formal issue given that, in material terms, the purchase had taken place.

– Under European legislation and case-law, the right to deduct cannot be refused where the transaction is shown to exist and where the reverse charge procedure ensures not only that the VAT is collected and monitored, but also that there is no possible tax advantage to the taxpayer.

5 The court referred to gave judgment, dismissing the action on 23 November 2017 on the following grounds:

– The inspection clearly demonstrated that the supplier was a sham.

– Provision of the supplier's details, which must be included in a self-billed invoice, cannot be considered a purely formal matter, as it enables the lawfulness of the VAT chain to be checked and, therefore, has an impact on the principle of tax neutrality.

– While it is true that, under the reverse charge procedure, in principle there is no loss of tax revenue, in that the debt and the right to deduct cancel each other out, this does not mean that there is a right to deduct even where the recorded transaction is fictitious (in this case, as regards the supplier), because the right to deduct is conditional on satisfying material requirements, which include a requirement for the stated supplier to be the actual supplier.

6 Ferimet lodged an appeal against that judgment.

Main arguments of the parties to the main proceedings

7 In the appeal, Ferimet argues that the tax legislation and the large body of case-law from the Court of Justice necessarily lead to the conclusion that it was entitled to deduct the input VAT in the transaction under examination since: (a) it was the genuine customer in the transaction, and it did indeed purchase and receive the scrap metal and (b) there was not, and could not have been, any loss of tax revenue because (i) it did not owe any VAT as it was using the reverse charge mechanism and (ii) its suppliers did not owe any VAT either, since they could not charge VAT as they were part of that reverse charge procedure.

8 In commenting on whether a reference should be made to the Court of Justice for a preliminary ruling, Ferimet put forward the following arguments:

– The application of the reverse charge procedure in itself already ensures that VAT is collected and monitored, and therefore there is no need to turn what is a purely formal requirement for the supplier of the goods to be correctly stated on

the invoice into an essential condition for exercising the right to deduct, because the reverse charge procedure itself makes it impossible to obtain any tax advantage.

– Since the taxpayer has not obtained an unjustified tax advantage, under the principle of neutrality, any potential fraudulent intent on the part of an operator involved in the same chain of supply other than the person liable for the VAT is irrelevant, because, according to the Court of Justice, 'each transaction must … be regarded on its own merits'.

9 In opposing the appeal, the Government's representative focused on three arguments: (a) there can be no doubt as to the existence of a sham transaction, given that the named supplier of the materials is fictitious; (b) that concealment of the true supplier's identity from the tax authorities must be considered to be connected with VAT fraud and direct tax fraud; and (c) the appellant has failed to prove its assertion that there is no tax advantage.

Brief summary of the reasons for the request for a preliminary ruling

The VAT reverse charge procedure

10 The Supreme Court explains that, as a general rule, the taxable person is the natural or legal person who, in his or her capacity as a professional or trader, issues an invoice and charges his or her customer VAT; he or she then pays every 3 months to the Exchequer the total amount of VAT collected. Consequently, as a rule, the taxable person is the person who issues the invoice, charges the VAT, and subsequently submits a VAT return and pays the VAT into the Exchequer.

11 However, in certain circumstances, which are set out in Article 84 of the VAT Law, it is the recipient, rather than the issuer, of the invoice who is required to declare and pay the VAT. One of the circumstances where the 'reverse charge' procedure applies is set out in Article 84(1)(2)(c), which applies to traders buying and selling recovered materials (scrap metal). Under that procedure, the seller of the goods issues an invoice in which he does not charge VAT, and the purchaser of the goods issues an invoice (a 'self-billed invoice') which includes the applicable VAT. As the issuer and recipient of the self-billed invoice are the same person, the purchaser of the goods must record the same amount of both output and input VAT, which he or she must include in his or her quarterly VAT return.

The dispute in the main proceedings

12 The issue in the proceedings concerns whether it is possible to deduct VAT that is both charged by the appellant as output VAT and payable by it as input VAT in a self-billed invoice issued under the reverse charge procedure in a situation where: (i) the transaction has actually taken place (which is not disputed) and (ii) the true supplier of the goods has been concealed.

13 In order to rule on the main proceedings, it is necessary to determine: (i) whether the omission of the supplier of those goods is a purely formal requirement; (ii) the impact of the fact that the actual supplier recorded was false and the purchaser knew it was false and (iii) whether European case-law inevitably means — even where bad faith is involved — that the right to deduct can be denied only 'where there is a risk of a loss of tax revenues for the Member State', bearing in mind that, under the reverse charge procedure, in principle the taxable person owes the Exchequer nothing.

14 The Supreme Court does not believe that the Court of Justice's case-law necessarily implies that it is never possible to deny the right to deduct where it is demonstrated that the supply of goods and the purchase by the taxpayer actually took place. Nor does the case-law show that the naming of a fictitious supplier in the documentary evidence of the transaction (a self-billed invoice) constitutes a purely formal infringement that is irrelevant for the purposes of obtaining the deduction where the transaction itself is real.

15 The Supreme Court is aware of the position adopted by the Court of Justice that domestic law or national tax authorities may not impose restrictions on the right to deduct VAT (which is essential to ensuring tax neutrality) that go beyond what is required to prevent fraud or that make it extremely complicated to exercise that right. However, the Court of Justice has also stated that it is not permissible to apply for and obtain a deduction where the applicant has participated in a transaction connected with the fraudulent evasion of VAT, even where the transaction in question satisfies the relevant objective criteria. In that context, the Supreme Court is uncertain whether the fact that the interested party knows that the supplier is fictitious rather than genuine means that the transaction can be characterised as abusive or fraudulent.

16 In addition, with regard to the concept of 'tax advantage' — which the Court of Justice has also repeatedly held to be an essential requirement in order for the right to deduct to be denied — European case-law does not demonstrate unequivocally that the concept of 'tax advantage' relates only to the party that is applying for the deduction and cannot potentially apply to other parties involved in the transaction giving rise to the deduction. In other words, it is not clear that the conduct of the supplier of the goods must necessarily be disregarded, particularly where the purchaser of the goods has deliberately concealed the supplier's identity and this may jeopardise direct taxation, since for the true seller of the goods the transaction is fiscally opaque, and the tax authorities are unaware of its existence.