Case C-596/21

Request for a preliminary ruling

Date lodged:

28 September 2021

Referring court:

Finanzgericht Nürnberg (Germany)

Date of the decision to refer:

21 September 2021

Applicant:

A

Defendant:

Finanzamt M

[…]

Order

In the case of

A

– Applicant –

[…]

v

Finanzamt M

– Defendant –

concerning turnover tax in 2011,

the 2nd Chamber of the Finanzgericht Nürnberg (Finance Court, Nuremberg, Germany) […]

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made the following order on 21 September 2021:

I. **The following questions are referred to the Court of Justice of the European Union for a preliminary ruling:**

1. **Can the second purchaser of a good be refused the right of deduction in respect of the purchase because he or she should have known that the original seller had evaded value added tax (VAT) in the first sale, even though the first purchaser had known that the original seller had evaded VAT in the first sale?**

2. **If Question 1 is answered in the affirmative, is the refusal of the right of deduction in the case of the second purchaser limited in terms of amount to the shortfall in tax revenue caused by the evasion?**

3. **If Question 2 is answered in the affirmative, is the shortfall in tax revenue calculated**

   a. **by comparing the tax lawfully payable in the supply chain with the tax actually assessed,**

   b. **by comparing the tax lawfully payable in the supply chain with the tax actually paid, or**

   c. **in another way, and, if so, what way?**

II. The proceedings are stayed pending the decision of the Court of Justice of the European Union.

[…]

Grounds

I.

1 In 2011, the applicant, a trader, purchased a used car for his business from C, who was claiming to be W and had purchased the car from a third party in a previous year. W was aware that C was claiming to be him and agreed to it. C issued an invoice in the name of W for the supply of the used car for EUR 52 100.84 plus EUR 9 899.16 VAT, and W issued an invoice in the name of the applicant for EUR 64 705.88 plus EUR 12 294.12 VAT and passed that invoice on to C, who presented it to the applicant. The applicant paid a total of EUR 77 000 to C, who kept it for himself. C only accounted for a sale price of EUR 52 100.84 plus EUR 9 899.16 VAT in his accounts and tax returns and also only paid tax in the resulting amount. W did not record the transaction in either his accounts or his tax returns and did not pay any tax in that regard.

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2 The applicant claims input VAT of EUR 12 294.12 in respect of the purchase of the used car. By contrast, the defendant takes the view that the applicant should not be permitted to deduct any input VAT because he should have been aware of C's tax fraud.

3 On the basis of the case file and the outcome of the hearing, the referring court proceeds on the assumption that, in the circumstances of the specific case, the applicant would have been obliged to ascertain the identity of his business partner because of a number of anomalies and would then have found, on the one hand, that C had deliberately concealed his identity, which could have no other purpose than to evade VAT arising from the sale of the used car, and, on the other hand, that W was indifferent to his tax obligations and was unwilling to comply with them in the required manner.

II.

4 The Chamber referred the questions set out in the operative part to the Court for a preliminary ruling in accordance with the second paragraph of Article 267 of the Treaty on the Functioning of the European Union (TFEU), read in conjunction with point (a) of the first paragraph of Article 267 thereof.

5 1. Legal framework

6 a. EU law

7 According to Article 14(2)(c) of Directive 2006/112/EC on the common system of value added tax ('the VAT Directive'), the following is to be regarded as a supply of goods

8 '… the transfer of goods pursuant to a contract under which commission is payable on purchase or sale.'

9 Article 167 of the VAT Directive provides:

10 'A right of deduction shall arise at the time the deductible tax becomes chargeable'.

11 Article 168(a) of the VAT Directive reads:

12 '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 carried out these transactions, to deduct the following from the VAT 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.'

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13 In accordance with Article 178(a) of the VAT Directive, in order to exercise the right of deduction in respect of supplies of goods and services, a taxable person must meet, inter alia, the following condition:

14 '… he must hold an invoice drawn up in accordance with Sections 3 to 6 of Chapter 3 of Title XI'.

15 **b. National law**

16 Paragraph 3(3) of the Umsatzsteuergesetz (Law on turnover tax; 'the UStG') provides:

'In the case of a transaction for commission (Paragraph 383 of the Handelsgesetzbuch [Commercial Code]), there is a supply between the principal and the commission agent. Where commission is payable on purchase, the commission agent is considered to be the purchaser, and, where commission is payable on sale, the principal is deemed to be the purchaser.'

17 The first and second sentences of point 1 in Paragraph 15(1) of the UStG, as it applied in the relevant years, read as follows:

18 'The trader may deduct the following as input tax:

1. the tax lawfully payable on goods and services provided to his business by another trader. The exercise of the right of deduction presupposes that the trader holds an invoice issued in accordance with Paragraphs 14 and 14a.'

19 2. Assessment on the basis of national law and relevance of the questions referred to the decision to be given

20 In the present case, on the basis of the case file and the outcome of the hearing, the question arises as to the amount in which the applicant is to be refused the right of deduction of input tax in respect of the purchase of the used car since he should have been aware of C's tax fraud.

21 The factual requirements for a deduction of input tax under the first sentence of point 1 of Paragraph 15(1) of the UStG are fulfilled for the turnover tax evidenced by the invoice raised by W. The fact that W agreed to C's actions gave rise to an atypical case of a transaction in which commission is payable on purchase, with the peculiarity that the principal – C – is also the agent of the commission agent. It must therefore be assumed that C first supplied the car to W, then W supplied the car to the applicant.

22 However, the conditions for a refusal are also met in principle. In accordance with the national case-law handed down at the highest judicial level, which follows the settled case-law of the Court in this respect (for example, order of 14 April 2021, *Finanzamt Wilmersdorf*, C-108/20, EU:C:2021:266 and the case-law cited), the right of deduction is to be refused where, although the conditions of that right are

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in fact met, it is established on the basis of 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 to VAT fraud committed by the supplier or by another trader acting upstream or downstream in the supply chain (judgment of the BFH of 18 February 2016).

23 In accordance with that case-law, the applicant would possibly be refused the right of deduction in the amount of EUR 12 294.12 even though C evaded VAT in the amount of only EUR 2 394.96 and, in the supply chain from C through W to the applicant, it is only by that amount that the tax actually paid falls short of the tax that would have been owed if the transaction had been carried out properly.

24 3. Assessment on the basis of EU law

25 The referring court has doubts as to whether that outcome is consistent with the VAT Directive, as interpreted by the Court.

26 In accordance with the case-law of the Court, the refusal of rights in the event of participation in tax evasion is intended to avoid incorrect taxation (see judgment of the Grand Chamber of 7 December 2010, *R.*, C-285/09, EU:C:2010:742, paragraph 52, concerning the refusal to grant a tax exemption on intra-community supplies) and to preserve the public exchequer's rights (judgments of 21 June 2012, *Mahagében and Dávid*, Joined Cases C-80/11 and C-142/11, EU:C:2012:373, paragraph 48; of 6 December 2012, *Bonik*, C-285/11, EU:C:2012:774, paragraph 42). Such refusal is based on the fact that the person who participates in tax evasion is to be held liable for the shortfall in tax revenue caused by the tax evasion (judgment of 17 October 2019, *Unitel*, C-653/18, EU:C:2019:876, paragraph 34). The referring court takes the view that this militates in favour of refusing rights only to the extent necessary to compensate for the shortfall in tax revenue.

27 However, the order in *Finanzamt Wilmersdorf* (EU:C:2021:266) contains considerations according to which the purpose of the refusal may extend beyond compensation or liability for evaded taxes. According to the statements in paragraph 35 et seq. of that judgment, the refusal does not depend on whether the tax fraud conferred a tax or economic advantage on the participant, but is intended to prevent fraudulent transactions by depriving the outlet of the goods and services which were the subject of a transaction connected to fraud and, therefore, contributes to the prevention of fraud. The Court does not regard such a refusal as a breach of the principle of fiscal neutrality.

28 If the refusal were to be limited in terms of amount to the shortfall in tax revenue caused, however, it could remain ineffective in many cases if it is only the tax assessments that are compared for the purpose of determining the shortfall in tax revenue, because refusal is usually possible only after the tax evasion has been discovered and the tax authorities then typically also correct the incorrect original tax assessments. By contrast, a comparison between the tax to be assessed and the

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tax collected takes into account the frequently occurring case in which the tax authorities refuse rights after discovering tax evasion and correct tax assessments vis-à-vis tax evaders but cannot recover the payments to be made retroactively on the basis of the corrected tax assessments because the tax evaders spent or concealed the sums evaded.

29 Taking into account, in particular, the judgment of the Grand Chamber in *R.* (EU:C:2010:742), the referring court is inclined to limit the refusal to the shortfall in tax revenue caused and to determine that shortfall by comparing the tax lawfully payable in the supply chain as a whole – if the transaction had been carried out properly – and the tax actually paid. Accordingly, in the present case, the applicant could deduct EUR 9 899.16 in input tax, and it would be necessary to refuse him the right of deduction only in respect of the amount in excess of that sum, corresponding to the shortfall in tax revenue.

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