

Case C-114/22

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:

18 February 2022

Referring court:

Naczelny Sąd Administracyjny (Poland)

Date of the decision to refer:

23 November 2021

Appellant:

Dyrektor Izby Administracji Skarbowej w Warszawie

Respondent:

W. Sp. z o.o.

Subject matter of the main proceedings

Value added tax (VAT); right to deduct

Subject matter and legal basis of the request

VAT Directive; Article 267 TFEU

Question referred for a preliminary ruling

Must the provisions of Articles 167, 168(a), 178(a) and 273 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1) and the principles of neutrality and proportionality be interpreted as precluding a national provision, such as Article 88(3a)(4)(c) of the Ustawa z dnia 11 marca 2004 r. o podatku od towarów i usług (Law of 11 March 2004 on the Tax on Goods and Services, Dziennik Ustaw (Journal of Laws) of 2011, No 177, item 1054, as amended), which deprives a taxable person of the right to deduct VAT on the acquisition of a right (asset) deemed to have been

made under false pretences within the meaning of the provisions of national civil law, irrespective of whether the result sought was a tax advantage, the granting of which would be contrary to one or more of the objectives of the directive and whether it constituted the principal aim of the contractual approach adopted?

Provisions of European Union law relied on

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, as amended by Council Directive 2010/45/EU of 13 July 2010 ('the VAT Directive'): Articles 167, 168(a), 178(a) and 273

Provisions of national law relied on

Ustawa z dnia 11 marca 2004 r. o podatku od towarów i usług (Law of 11 March 2004 on the Tax on Goods and Services, Dziennik Ustaw (Journal of Laws) of 2011, No 177, item 1054, as amended, 'the VAT Law')

Article 88(3a)(4)(c):

3a. Invoices and customs documents shall not form the basis for reducing output tax and refunding the tax difference or refunding input tax where these:

...

c) document transactions to which the provisions of Articles 58 and 83 of the Civil Code apply – in the part concerning those transactions.

Ustawa z dnia 23 kwietnia 1964 r. Kodeks cywilny (Law of 23 April 1964 – Civil Code, consolidated text: Dziennik Ustaw (Journal of Laws) of 2020, item 1740, as amended, 'the CC')

Article 58

§ 1. A legal transaction contrary to the law or intended to circumvent the law shall be void unless a relevant provision provides otherwise, in particular that the invalid provisions of the legal transaction are to be replaced by the relevant provisions of the law.

§ 2. A legal transaction contrary to the rules of social conduct shall be void.

...

Article 83

§ 1. A declaration of intent made under false pretences to another party with that party's consent shall be invalid. Where such a declaration is made to conceal

another legal transaction, the validity of the declaration shall be judged by the nature of that legal transaction.

§ 2. Making a declaration of intent under false pretences shall not affect the effectiveness of a legal transaction involving consideration and made on the basis of that declaration, if as a result of that legal transaction a third party acquires a right or is released from an obligation, unless that third party has acted in bad faith.

Succinct presentation of the facts and procedure in the main proceedings and the essential arguments of the parties

- 1 By decision of 20 October 2017, the Naczelnik Urzędu Skarbowego W. (Head of the Tax Office in W.) determined for the applicant, *inter alia*, the amount of excess of input tax over output tax to be refunded and the amount of excess of input tax over output tax to be deducted in subsequent settlement periods for October 2015. The authority challenged the sale of trademarks to the applicant and considered it void under Article 58(2) of the Civil Code (as contrary to the rules of social conduct), which was the basis for depriving the taxable person, pursuant to Article 88(3a)(4)(c) of the VAT Law, of the right to deduct VAT from the invoice dated 27 October 2015 issued by the seller.
- 2 By decision of 11 October 2018, the Dyrektor Izby Administracji Skarbowej w Warszawie (Director of the Tax Administration Chamber in Warsaw, ‘the DIAS’) upheld the above decision, but cited as grounds for the refusal the fact that the transaction involving the sale of trademarks was conducted under false pretences within the meaning of Article 83 of the Civil Code.
- 3 The party appealed against the DIAS’s decision to the Wojewódzki Sąd Administracyjny w Warszawie (Regional Administrative Court in Warsaw, Poland), which annulled the above decision and ruled that the tax authorities had failed to demonstrate that the sale in question was made under false pretences.
- 4 Subsequently, the DIAS brought an appeal on a point of law against that judgment before the Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland – the referring court).

Succinct presentation of the reasoning in the request for a preliminary ruling

- 5 In the view of the referring court, the legal basis adopted by the authority for refusing the right to deduct VAT raises doubts as to whether it is grounded in the provisions of the VAT Directive.
- 6 It is undisputed that the applicant included in its VAT purchase register the invoice dated 27 October 2015 relating to the purchase of trademarks, and in its

VAT return it recognised the amount of VAT from that invoice to be deducted (refunded).

- 7 It is also undisputed that the seller submitted a VAT return recognising the above transaction, which was taxed at 23%, and that the tax was paid.
- 8 However, the DIAS refused the right to deduct VAT, holding that the transaction had been conducted under false pretences within the meaning of Article 83 of the Civil Code.
- 9 Article 83 of the Civil Code governs the effects of declarations of intent made under false pretences in the sphere of private civil law.
- 10 Article 88(3a)(4)(c) of the VAT Law deprives a taxable person of the right to deduct VAT where a tax authority finds that the taxable person conducted a legal transaction that was void within the meaning of Article 58 or 83 of the Civil Code.
- 11 On the other hand, the VAT Directive does not contain any provisions that would make it possible to deny the right to deduct tax as a result of a transaction not being compliant with the requirements of national civil law. According to the Court's case-law, the right to deduct tax is an integral part of the VAT system and in principle may not be limited. Thus, the possible invalidity of a legal transaction under civil law should not result in an automatic exclusion of the right to deduct VAT. This is supported by the argument that VAT is autonomous in relation to civil law norms and is neutral from the point of view of entities participating in business transactions.
- 12 It follows from the Court's case-law that it is not the invalidity of the taxable person's transaction under civil law that may result in the buyer being deprived of the right to deduct VAT, but rather the finding that the result sought was a tax advantage, the granting of which would be contrary to one or more of the objectives of the directive, and that it constituted the principal aim of the contractual approach adopted, which would indicate an abuse of law.
- 13 An abusive practice can be found to exist only if, first, the transactions concerned, notwithstanding formal compliance with the conditions laid down by the relevant provisions of the directive and the national legislation transposing it, result in the accrual of a tax advantage, the granting of which would be contrary to the purpose of those provisions.
- 14 Second, it must also be apparent from a number of objective factors that the essential aim of the transactions concerned is to obtain a tax advantage. In order to assess whether the purpose of the transactions at issue was to obtain a tax advantage, the actual content and meaning of those transactions must be determined.
- 15 The prohibition of abuse is not relevant where the transactions in question carried out may have some explanation other than the mere attainment of tax advantages

(judgment of 21 February 2006, *Halifax*, C-255/02, EU:C:2006:121, paragraph 75).

- 16 In its judgment of 21 February 2008, *Ministero dell'Economia e delle Finanze v Part Service* (C-425/06, EU:C:2008:108, paragraph 58), the Court held that in order to assess whether the transactions in question can be held to constitute an abusive practice, 'the national court must verify, first, whether the result sought is a tax advantage, the granting of which would be contrary to one or more of the objectives of the Sixth Directive and, then, whether that constituted the principal aim of the contractual approach adopted'.
- 17 In the VAT Law, provisions relating to the concept of abuse of law have been in force since 1 July 2016.
- 18 Article 5(4) of the VAT Law provides that in the case of an abuse of law, the actions referred to in Article 5(1) only produce such tax effects as would occur if the situation were to be recreated in the absence of the actions constituting that abuse.
- 19 On the other hand, Article 5(5) of the VAT Law provides that an abuse of law is construed as engaging in the actions referred to in Article 5(1) within the framework of a transaction which, despite meeting the formal conditions stipulated in statutory provisions, is in principle aimed at obtaining a tax advantage, the granting of which would be contrary to the objective served by those provisions.
- 20 The provisions in question generally correspond to the concept of abuse of tax law as defined in the Court's case-law.
- 21 The point is, however, that the definition of the notion of abuse of law in Article 5(5) of the VAT Law has not resulted in any amendment to the national provisions governing cases where a taxable person is deprived of the right to deduct tax. None of the standards stipulated in Article 88 of the VAT Law refers to Article 5(5) of the VAT Law and the consequences in terms of VAT of actions constituting an abuse of tax law. It has become accepted in domestic tax practice that the consequences arising from the abuse of tax law should be derived from Article 88(3a)(4)(c) of the VAT Law. However, in that regard, it must be borne in mind that, as the Court has repeatedly held, the right to deduct 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. In particular, that right is exercisable immediately in respect of all the taxes charged on transactions relating to inputs (see, inter alia, judgments of 21 March 2001, *Gabalfrisa and Others*, C-110/98 to C-147/98, EU:C:2000:145, paragraph 43, and of 6 June 2006, *Axel Kittel and Recolta Recycling*, C-439/04 and C-440/04, EU:C:2006:446, paragraph 47).
- 22 That is because the deduction system is intended to relieve the trader entirely of the burden of the VAT payable or paid in the course of all his economic activities. The common system of VAT consequently ensures complete neutrality of taxation

of all economic activities, whatever their purpose or results, provided that they are themselves subject in principle to VAT (see, inter alia, judgments of 21 February 2006, *Halifax and Others*, C-255/02, EU:C:2006:121, paragraph 78, and of 6 July 2006, *Axel Kittel and Recolta Recycling*, C-439/04 and C-440/04, EU:C:2006:446, paragraph 48).

- 23 It follows that, in so far as the taxable person, acting as such at the time when he acquires goods or receives services, uses those goods or services for the purposes of his taxed transactions, he is entitled to deduct the VAT paid or payable in respect of those goods or services (see judgment of 14 September 2017, *Iberdrola Inmobiliaria Real Estate Investments*, C-132/16, EU:C:2017:683, paragraph 27 and the case-law cited).
- 24 It also follows from the case-law of the Court that derogations from the right to deduct VAT are permitted only in the cases expressly provided for in the directives governing that tax (see, inter alia, judgment of 19 September 2000, *Ampafrance and Sanofi*, C-177/99 and C-181/99, EU:C:2000:470, paragraph 34) and are to be interpreted strictly (judgment of 22 December 2008, *Magoora*, C-414/07, EU:C:2008:766, paragraph 28).
- 25 Furthermore, the Court points out that preventing possible tax evasion, avoidance and abuse is an objective recognised and encouraged by the VAT Directive (see, inter alia, judgments of 21 February 2006, *Halifax and Others*, C-255/02, EU:C:2006:121, paragraph 71, and of 7 December 2010, *R.*, C-285/09, EU:C:2010:742, paragraph 36). On that point, the Court has held that Community law cannot be relied on for abusive or fraudulent ends (see, in particular, judgment of 3 March 2005, *Fini H.*, C-32/03, EU:C:2005:128, paragraph 32).
- 26 Therefore, it is a matter for the national authorities and courts to refuse to allow the right to deduct where it is established, on the basis of objective evidence, that that right is being relied on for fraudulent or abusive ends (see, inter alia, judgment of 29 March 2012, *Véleclair*, C-414/10, EU:C:2012:183, paragraph 32).
- 27 Under Article 273 of the VAT Directive, the Member States may adopt measures to ensure the correct collection of VAT and to prevent evasion. In particular, in the absence of provisions of EU law on that matter, the Member States have the power to choose the sanctions which seem to them to be appropriate in the event that conditions laid down by EU legislation for the exercise of the right to deduct VAT are not observed (judgment of 8 September 2019, *EN.SA.*, C-712/17, EU:C:2019:374, paragraph 38 and the case-law cited).
- 28 Nevertheless, the Member States must exercise that power in accordance with EU law and its general principles and, consequently, in accordance with the principles of neutrality and proportionality (see the judgment of 26 April 2017, *Splithoff's Bevrachtingskantoor v Commission*, C-564/15, EU:C:2017:302, paragraph 59 and the case-law cited).

- 29 In that context, it would appear that depriving a taxable person of the right to deduct VAT on the basis of Article 273 of the VAT Directive would require that the national legal order lay down, with due regard to Articles 167, 168 and 178, and to the principles of neutrality and proportionality, an unequivocal standard stipulating that invoices and customs documents cannot be the basis for a reduction of input tax or a refund of the tax difference if the invoices, correcting invoices or customs documents issued document transactions which involve criminal offences or abuse of tax law within the meaning of Article 5(5) of the VAT Law.
- 30 A standard such as Article 88(3a)(4)(c) of the VAT Law, referring in that respect to ‘transactions to which the provisions of Articles 58 and 83 of the Civil Code apply’, cannot be regarded as identical to the standard referring to the concept of abuse of tax law, including within the meaning of Article 5(5) of the VAT Law.
- 31 As has already been stated, Articles 58 and 83 of the Civil Code indicate where transactions are void from the civil law point of view rather than from the abuse of tax law point of view. The issue of invalidity of civil law transactions due to their being conducted under false pretences is irrelevant for VAT purposes where the transactions in question may have some explanation other than the mere attainment of tax advantages.
- 32 The effects of such a regulation are visible in the case at hand, where the tax authority has focused on demonstrating the invalidity of the civil law transaction due to its being conducted under false pretences, only briefly referring to the issue of abuse of tax law.
- 33 If, in principle, a taxable person for VAT purposes has the right to deduct the input tax shown in invoices documenting the acquisition of goods or services, and that right is not a relief or exemption but a fundamental structural feature of VAT which ensures the neutrality of that tax for taxable persons, then any limitation of that right – including that arising from the application of Article 273 of the VAT Directive – must be clearly defined for taxable persons in normative terms and interpreted strictly in accordance with those norms, rather than in a manner which is not apparent from the content of the provisions enacted. Only such an approach will provide certainty to the taxable person who engages in business activity as to the scope of his legitimate activities, engaging in which will not expose that taxable person to adverse tax consequences (legal certainty). The disputed provision in the VAT Law makes the taxable person’s situation uncertain, because a tax authority, guided by the invalidity criteria arising from civil law, may deprive the taxable person of the right to deduct tax, claiming that any such invalidity has tax consequences, as indicated by the practice of domestic tax authorities in that regard.
- 34 It is clear that, in applying national law, a national court is required to interpret that law, as far as possible, in the light of the wording and purpose of the directive in order to achieve the aim of the directive. However, it appears that remedying

that state of affairs through the case-law of the national courts, which would entail a provision such as Article 88(3a)(4)(c) of the VAT Law being interpreted through the prism of abuse of tax law, runs counter to the principle of legal certainty understood as a system of clear and explicit rules which make it possible for the addressees to determine their legal position and the legal consequences of their actions, since, with respect to a structural element of VAT such as the right to deduct VAT in connection with the principle of neutrality, the remedy in question would require that right to be limited on the basis of a criterion which does not follow from the provision in question. That would imply reliance on the direct effect of the directive vis-à-vis natural and legal persons (taxable persons) – by providing an interpretation consistent with the objectives of the directive – in a situation where the relevant criterion for a significant limitation of the taxable person's rights which would be in accordance with the VAT Directive is not mentioned at all in the wording of the interpreted provision.

- 35 It would therefore appear that an interpretation of the provision in question that is consistent with the objectives of the directive goes beyond the possible limits of interpretation within which the national court may rule without undermining the taxable person's guarantee of legal certainty.