Case C-276/24

Request for a preliminary ruling

Date lodged:

19 April 2024

Referring court:

Nejvyšší správní soud (Czech Republic)

Date of decision to refer:

10 April 2024

Applicant:

KONREO, v. o. s., insolvenční správce úpadce FAU s.r.o.

Defendant:

Odvolací finanční ředitelství

ORDER

The Nejvyšší správní soud (Supreme Administrative Court, Czech Republic) […] has ruled in the case of the applicant: KONREO, v. o. s., […] the insolvency administrator of the insolvent corporation FAU s. r. o., […] v. the defendant: Odvolací finanční ředitelství (Appellate Tax Directorate, Czech Republic), […] challenging the defendant's decision of 26 May 2020, […] in proceedings concerning the defendant's appeal in cassation against the judgment of the Krajský soud v Brně (Brno Regional Court) of 10 February 2023, ref. no. 29 Af 48/2020-276,

As follows:

[…] The following question is hereby **submitted** to the Court of Justice of the European Union for a preliminary ruling:

Does Article 205 of Council Directive 2006/112/EC on the common system of value added tax, in conjunction with the proportionality principle, preclude a national practice whereby the liability for the payment of value added tax by a supplier of a taxable transaction may be applied to the recipient of that

transaction, even though the recipient of the taxable transaction has already been denied a right to a tax deduction due to its involvement in tax fraud?

[…]

Grounds:

I. Background of the case

1 The applicant is the insolvency administrator of the insolvent party – the Czech corporation FAU s. r. o. ('FAU'). All of the facts referred to below, and the decisions issued, pertain to the tax periods from May to October 2013. FAU purchased fuel from the Czech corporation VERAMI International Company s.r.o. ('VERAMI'). Both companies were value-added tax ('VAT') payers. The Finanční správa České republiky (Financial Administration of the Czech Republic) conducted a tax audit of both companies and found that the chain of trade of which both VERAMI and FAU were part was involved in tax fraud. A tax loss occurred with entities that preceded VERAMI and FAU in the chain and that were not direct suppliers of fuel to VERAMI. Despite this, given the non-standard circumstances concerning the trading, both of the companies were in a position to know that the business transactions involved tax fraud. Nevertheless, they did not adopt any measures to prevent their involvement in the fraud.

2 Given the outcome of the tax audit, the Financial Administration issued subsequent payment assessments against VERAMI on 5 January 2015 and 2 February 2015, assessing VERAMI with additional VAT, as it denied its right to a tax deduction on the acquisition of fuel that was supplied by VERAMI to FAU. By decision of 27 February 2015, the Brno Regional Court found VERAMI insolvent and declared insolvency in respect of its assets. The insolvency is still ongoing.

3 On 14 December 2016 the Krajský soud v Ostravě (Ostrava Regional Court) found FAU insolvent and declared insolvency with respect to its assets. That insolvency too is still ongoing. Subsequently, on 7 February 2017, the Financial Administration assessed FAU with additional VAT, as it denied its right to a tax deduction. FAU's appeal challenging the subsequent payment assessments was rejected by the Odvolací finanční ředitelství (Appellate Tax Directorate) on 25 September 2017. An action against that decision was dismissed by the Brno Regional Court by judgment of 1 July 2022. Proceedings concerning the applicant's appeal in cassation challenging the judgment are being conducted before the Supreme Administrative Court ('the SAC') under file No. 6 Afs 255/2022. FAU failed to pay the subsequently assessed tax and the Financial Administration registered its receivable in the insolvency proceedings.

4 Before the Financial Administration assessed FAU with additional tax, due to the fact that it had denied its right to a tax deduction, it asked that corporation, as a guarantor, to pay the VAT that VERAMI had failed to pay to the public treasury. This was done in the form of six notices to the guarantor dated 22 April 2015 and

7 August 2015. FAU appealed the guarantor notices; its appeals were first rejected by the defendant's decisions of 22 September 2016. Those decisions of the defendant were annulled by the Brno Regional Court by judgment of 9 May 2019 as the defendant had failed to interpret the conditions for the application of liability for the supplier's unpaid tax in line with the case-law of the Court of Justice of the European Union ('the Court of Justice') and of the SAC. The cases were returned to the defendant for fresh consideration. Subsequently, by decisions of 26 May 2020, the defendant again rejected the appeals. Those second decisions of the defendant constitute the subject of the review in the present case.

5 What is decisive for the judicial review of an administrative decision is the factual and legal state of affairs as of the date of issuance of the administrative decision (Paragraph 75(1) of zákon č. 150/2002 Sb., soudní řád správní (Law 150/2002, the Code of Administrative Procedure) […]). That day is 26 May 2020. In summary, as of that day, additional VAT was validly assessed (due to the denial of the right to a tax deduction) both on VERAMI and on FAU. That is not affected by the fact that the applicant lodged an action and subsequently also an appeal in cassation challenging the subsequent assessment of tax on FAU. As of the decisive date, there was a final decision on a subsequent tax assessment on FAU. At the time when the defendant decided for the second time about the appeals against the notices to the guarantor, asking FAU to pay the tax not paid by VERAMI, a final decision of the Financial Administration denying FAU the right to a tax deduction on identical business transactions already existed. Hence, FAU was called upon to pay tax to the public treasury in the place of VERAMI, which it had already paid to that company once before, when paying its invoices. The tax with respect to which FAU is the guarantor, was calculated in the invoices issued by VERAMI, as the supplier, for FAU, as the customer. FAU paid the invoiced amounts to its supplier, VERAMI. FAU was denied the right to a tax deduction on those invoices, due to the fact that there was VAT fraud in the chain of trade.

6 The Brno Regional Court annulled the defendant's decision of 26 May 2020 and returned the case to it for fresh consideration on the grounds of disproportionate steps taken by the Financial Administration in deciding whether to apply the liability. Essentially, that amounts to the double taxation of a single commercial transaction. FAU's liability de facto doubles FAU's own tax obligation, based on the denial of its right to a deduction. The purpose of the liability, however, is to ensure that the public treasury does not suffer prejudice, rather than to punish a taxable person.

7 The defendant filed an appeal in cassation challenging the judgment of the Regional Court, claiming that the purpose of the VAT deduction mechanism is to uphold the principle of tax neutrality. That principle, however, cannot be invoked by a person who deliberately participated in tax fraud. In such cases, the Financial Administration is obliged to deny the deduction claimed. The purpose of the denial of the tax deduction is not to collect the missing tax but, rather, it preserves the purpose and meaning of Council Directive 2006/112/EC on the common system of value added tax. The Financial Administration is entitled to deny the

right to a deduction to all members of a chain of trade if they knew or could have and should have known that tax fraud is involved. It is not limited to collecting the missing tax. Furthermore, involvement in tax fraud cannot be rectified by a subsequent payment of the missing tax. It is necessary to distinguish between FAU's tax obligation and its guarantor obligation that secures the payment of the tax by its supplier. The essence of the liability obligation lies in securing the payment of the tax due from another entity. The outcome of the application of liability is the satisfaction of a treasury claim from the debtor (the guarantor's supplier) who has failed to pay the tax. Denial of a tax deduction results in preventing unjust enrichment on the part of a taxable person involved in tax fraud. Denial of a right to a deduction is not a special rule in relation to liability. Hence, nothing prevents both rules being applied with respect to a single taxable person, that is to say, the denial of a claim to a tax deduction on a taxable transaction received that was affected by tax fraud and liability for the payment of tax by the supplier with respect to the same taxable transaction. The application of both rules is based on similar assumptions (fraudulent conduct in a chain of trade and the absence of good faith of the taxable person in respect of the legality of its transactions). Their coinciding is therefore a logical consequence. It would be paradoxical if liability were to concern only those entities that claim a tax deduction in good faith in respect of the legality of transactions undertaken by them.

8 In its statement concerning the appeal in cassation, the applicant stated that denial of the right to a deduction and liability must be understood as alternative procedures. Their simultaneous application breaches the principle of tax neutrality and the equal treatment of tax entities. On the basis of the defendant's decisions challenged by the action, FAU is to pay VAT on the same transaction three times – first it paid it to its supplier, second it 'paid it' due to the denial of the right to a deduction of the tax, and now it is to pay it for a third time in the form of liability for the payment of tax by its supplier. The purpose of the denial of the right to a deduction and of liability is to protect the public treasury. However, it suffices to apply only one of the rules. The objective of the Financial Administration's actions cannot be the maximum possible taxation of a transaction but, rather, an effort to reach the approximate situation that would have existed for the public treasury had the tax entities proceeded in line with the law. Had the tax entities proceeded legally, the tax would have been paid to the public treasury only once. There is no reason for the public treasury to enrich itself with a tax that has been assessed twice. The proportionality principle is an integral component of European Union legal principles. The Regional Court applied it because that principle overrides the express text of a law.

II. Applicable European Union and national legislation

9 Article 205 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax ('Directive 2006/112/EC') stipulates that:

In the situations referred to in Articles 193 to 200 and Articles 202, 203 and 204, Member States may provide that a person other than the person liable for payment of VAT is to be held jointly and severally liable for payment of VAT.

10 In national legislation, the general regulation of tax liability is set out in Paragraphs 171 and 172 of zákon č. 280/2009 Sb., daňový řád (Law 280/2009, the Tax Code):

Paragraph 171

1. The guarantor shall also be obliged to pay the arrears ***if the law imposes liability on it*** *and if the tax administrator informs it in a notice of the assessed tax for which it is liable and, at the same time, calls on it to pay the arrears within a specified period of time; a copy of the decision assessing the tax is attached to the notice.*

2. A notice to a guarantor may be issued if the arrears have not been paid by the tax subject, although the tax subject has been reminded to pay them without success, and the arrears have not been paid even when it is being enforced against the taxable person, unless it is clear that the enforcement would be demonstrably unsuccessful; a notice to the guarantor may also be issued after insolvency proceedings have been opened against the taxable person.

11 The liability of a taxable person for VAT is regulated in Paragraph 109 of zákon č. 235/2004 Sb., o dani z přidané hodnoty (Law 235/2004 on value-added tax:

Paragraph 109

Liability of the recipient in a taxable transaction

(1) A taxable person who is the recipient in a taxable transaction with a place of performance in this country that is provided by another taxable person or who makes a payment in exchange for such a transaction ('recipient in a taxable transaction') shall be liable for any tax unpaid on that transaction provided it knew or should have and could have known at the time of the transaction that:

(a) The tax stated in the tax document will not be intentionally paid;

(b) The taxable person carrying out that taxable transaction or receiving a payment for the transaction ('the supplier in a taxable transaction') has deliberately placed itself or finds itself in a position when it is unable to pay the tax; or

(c) There is tax evasion or the obtaining of a tax advantage involved.

(2) ***The recipient in a taxable transaction shall also be liable for unpaid tax on the transaction if the payment for the transaction***

(a) *Manifestly deviates from the normal price without economic justification;*

(b) ***Was provided in part or in full by means of a cashless transfer to an account held by a payment services provider outside of the country;*** *or*

(c) *Was provided in part or in full by means of a cashless transfer to an account other than the account of the supplier in the taxable transaction that is published by the tax administrator in a manner permitting remote access.*

12 In the present case, the Financial Administration applied liability pursuant to Paragraph 109(2)(b) of the Law on value-added tax. The SAC interpreted that provision in its judgment of 15 February 2018, ref. no. 5 Afs 78/2017-33, *KOVÁŘ plus*, CZ:SAC:2018:5.Afs.78.2017.33. It emphasised the obligation to interpret the provision in a manner conform with European norms, that is, in line with the requirements set out by the Court of Justice in respect of the conditions for the application of joint and several liability under Article 205 of Directive 2006/112/EC. A condition for liability pursuant to that provision therefore is that there must be other circumstances, in addition to the making of a payment to an account maintained by a payment services provider outside of the country, which will clearly indicate that the taxable person who made the payment to the account outside of the country knew, or could have known, that the purpose of the payment being directed outside of the country is to avoid paying tax.

13 The defendant in its second set of decisions examined whether there were other circumstances from which it could be inferred that FAU knew, or could have known, that its supplier, VERAMI, would not pay the VAT specified in the invoices.

14 The concept of liability applied in national tax law is based on the general private-law foundations of the rule. Hence, the SAC has inferred in its case-law that liability is a security instrument and exists in addition to the principal obligation. It is of an ancillary nature and, hence, the existence of a liability is linked to the secured principal obligation and follows its outcome. The scope of the liability is derived from the principal obligation and, unless the law stipulates otherwise, it ceases to exist with the termination of the principal obligation. Another aspect of the liability is its subsidiary nature, due to the fact that it can be claimed from the guarantor only once the debtor fails to perform its principal obligation (or part thereof) that is secured by the liability (see, for example, judgment of the SAC in *KOVÁŘ plus*). If the guarantor has indeed paid the debtor's principal obligation, on behalf of the debtor, the guarantor has a recourse claim against the debtor (subrogation). Hence, the guarantor has a right to claim compensation from the

debtor for payments made by the guarantor, on the debtor's behalf, for the creditor, towards the principal obligation. This guarantor also has this private-law right in the event of statutory liability for unpaid tax (judgment of the Grand Chamber of the Supreme Court of the Czech Republic of 8 September 2010, file no. 31 Cdo 1693/2008, CZ:NS:2010:31.CDO.1693.2008.1, in relation to civil law applicable until 31 December 2013; for the legal regulation in effect from 1 January 2014 see Paragraphs 1937 and 1938 of zákon č. 89/2012 Sb., občanský zákoník (Law 89/2012, the Civil Code).

15 In view of the conditions in which liability may be applied in tax law (see Paragraph 171(3) of the Tax Code, referred to above), however, the guarantor's recourse claim may be considered as difficult to enforce. The Financial Administration can call on the guarantor to pay the debt only if the administration has failed to enforce the debt from the debtor (namely, in enforcement proceedings). The only case where collection of the debt in enforcement proceedings is not required is if it would be demonstrably unsuccessful or if the debtor is insolvent. In the present case, VERAMI was insolvent at the time of the issuance of the notice to the guarantor, and its insolvency was being dealt with by means of insolvency. The yield in insolvency is generally very low in the Czech Republic. Hence, it cannot be assumed that, had the guarantor (FAU in this case) paid the arrears of VERAMI to the Financial Administration in this situation, it would have been successful in making its recourse claim against the company. Hence, it must be assumed that a guarantor generally cannot obtain from the principal debtor (its supplier) compensation for amounts paid by it to the Financial Administration as payment of the principal debtor's tax arrears.

III. Analysis of the question in the preliminary reference

16 The SAC deems it useful to observe that two levels of the application of value-added tax are intertwined in the question referred. The first is the denial of a tax deduction, and the second is the application of liability for the payment of tax on the performance of a taxable transaction by the supplier.

Denial of the right to a tax deduction

17 The first level is the determination of the tax obligation of FAU, which reflects the making of a claim to a tax deduction on supplies received in transactions with VERAMI. On the level of national tax law, the proceedings are proceedings for a finding based on the Tax Code. The outcome was an assessment of additional tax on FAU for each of the taxable periods. FAU was denied the right to a tax deduction under Article 168 of Directive 2006/112/EC because the supply received, which gave rise to the right to a deduction, was part of a chain of trading affected by tax evasion. That level is not the subject of the review in the present case. It must not, however, be disregarded, as it forms the context of the question referred.

18 Both FAU and its supplier, VERAMI, were assessed with an additional tax obligation: the obligation to pay tax on a taxable transaction was set for them (output tax) but they were denied the right to a deduction of the input tax. The reason behind that was the fact that the acquisition of the taxable supply by VERAMI, and the acquisition of the same taxable supply by FAU, were part of a single chain of trade which, in its previous links, was affected by a loss of tax due to evasion. The Financial Administration inferred that both VERAMI and FAU knew or could have and should have known that the taxable supply obtained by them was affected by tax evasion. They did not, however, take any preventive measures that would make it possible to avoid taking part in that evasion.

19 In its judgment of 24 November 2022 in *Finanzamt M*, C-596/21, EU:C:2022:921, the Court of Justice stated that, not being aware of tax evasion is an implied material condition for the right to a deduction. A person who does not meet that condition must be denied the right to a deduction in its entirety. The principal object of the obligation of the Financial Administration and of the court to deny the right to a deduction is to impose an obligation of due care on taxable persons. The obligation of due care means the requirement that they make sure, in respect to every economic performance, that the supplies made by them will not participate in tax evasion. That objective could not be effectively achieved if the denial of the right to a deduction were proportionately restricted only to part of the amounts paid as due VAT that corresponds to the amount that is the subject of tax evasion. Otherwise, that would encourage taxable persons to adopt appropriate measures in order to limit the consequences of tax evasion, but not necessarily to take measures that enable them to make sure that they will not take part in or facilitate tax evasion through the transactions in which they become involved. The fact that a taxable person has obtained goods or services, even though it knew or should have known that, by doing so, it was taking part in a transaction that involves tax evasion committed on input, suffices to conclude that the taxable person took part in that evasion. That is sufficient grounds for denying that person its right to a deduction, without it being necessary to prove that there is a risk of a loss of tax revenue.

20 It follows from the case-law of the Court of Justice that the principle of tax neutrality for the purpose of a deduction cannot be relied upon by a taxable person who has participated in tax evasion (order of 14 April 2021, *Finanzamt Wilmersdorf*, C-108/20, EU:C:2021:266).

21 The SAC infers from that current case-law of the Court of Justice that the purpose of denying the right to a tax deduction on the grounds that a chain of trading was affected by tax evasion is not to compensate for tax that has not entered into the public budget, but to protect the VAT system from fraud. That measure is aimed primarily at the prevention of tax evasion, which implies that it is of a somewhat deterrent nature. Prevention would not be effective if the missing tax could be assessed on only one member of a fraudulent chain. Hence, it is necessary to proceed on the assumption that the right to a deduction does not arise for any entity that knowingly engaged in tax evasion. If the Financial Administration were

to restrict the denial of a deduction solely to the collection of the missing tax, it would be discriminatory both against the entity that is assessed with the additional tax (the entity will be liable for being involved in evasion without other members of the chain which could have been aware of the evasion being affected), and against honest entities that would thereby be placed at an undue disadvantage compared to dishonest entities. It follows from the above that the Financial Administration is entitled to deny a tax deduction to all the members of a fraudulent chain (see the SAC's judgment of 19 January 2023, ref. no. 1 Afs 101/2021-42, *Trimet Prag*, CZ:SAC:2023:1.Afs.101.2021.42; judgment of 26 January 2023, ref. no. 1 Afs 164/2021-52, *Z + M servis*, CZ:SAC:2023:1.Afs.164.2021.52; judgment of 29 March 2023, ref. no. 2 Afs 298/2021-69, *LAKUM – AP*, CZ:SAC:2023:2.Afs.298.2021.69; judgment of 27 April 2023, ref. no. 7 Afs 160/2021-89, *T R I O D O N*, CZ:SAC:2023:7.Afs.160.2021.89; judgment of 25 October 2023, ref. no. 1 Afs 1/2023-71, *FEPO – europalety*, CZ:SAC:2023:1.Afs.1.2023.71; or judgment of 7 September 2021, ref. no. 6 Afs 158/2019-63, *ANAFRA*, CZ:SAC:2021:6.Afs.158.2019.63).

22 In view of the above conclusions of the case-law of the Court of Justice and the related case-law of the SAC, it is evident that a permissible disruption of tax neutrality occurred in the present case, by denying the right to a tax deduction not only to FAU but also to its supplier, VERAMI. That occurred due to the involvement of the two companies in tax evasion. That level of comprehensive relationship has therefore been sufficiently addressed by the case-law of the Court of Justice and does not necessitate a request for a preliminary ruling. That would moreover not be possible since this level concerning the findings part of the tax procedure is not the subject of the judicial review in this case.

Liability for tax not paid by the provider in a taxable transaction

23 Article 205 of Directive 2006/112/EC gives Member States the option to introduce joint and several liability for the payment of tax, without setting conditions for that liability. To a certain extent, the Court of Justice has pronounced on them, first in relation to an article with similar content – Article 21(3) of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (77/388/EEC).

24 The judgment of 11 May 2006, *Federation of Technological Industries and others*, C-384/04, EU:C:2006:309 should be regarded as fundamental. In it, the Court of Justice emphasised that, in exercising the powers conferred on them by a European Union directive, Member States are obliged to respect general legal principles embodied in the European Union's legal order, in particular the principle of legal certainty and the principle of proportionality. As for the principle of proportionality, it is legitimate that the measures adopted by the Member State pursuant to Article 21(3) of Council Directive 77/388/EEC strive to achieve the most effective protection of payments to the public treasury possible;

nevertheless, they must not exceed the framework of what is required for attaining that purpose. Article 21(3) of Council Directive 77/388/EEC makes it possible to consider a person concerned liable jointly and severally for the payment of tax, if, at the time of a transaction made for its benefit, it knew or should have known that the tax due for the transaction or for a previous or subsequent transaction would remain unpaid. In this regard, the state may proceed on the basis of a certain presumption which, however, must not be practically impossible or unduly onerous for the person concerned to refute, by presenting evidence to the contrary. The use of presumption cannot result in establishing a *de facto* system of liability without guilt that would go beyond what is necessary for the protection of payments to the public budget. The persons who take any and all measures that may be reasonably required of them to ensure that their transactions not be part of a chain of supplies involving a transaction soiled by tax evasion must be able to trust in the legality of the said transactions without risking that they will bear joint and several liability for paying a tax payable by another taxable person.

25 Those conclusions were upheld by the Court of Justice in its judgment of 21 December 2011, *Vlaamse Oliemaatschappij NV*, C-499/10, EU:C:2011:871.

26 The Court interpreted Article 205 of Directive 2006/112/EC in its judgment of 20 May 2021, *'ALTI' OOD*, C-4/20, EU:C:2021:397, stating that the provision does not specify the persons whom Member States can designate as joint and several debtors, or the situations in which such designations can be made. Hence, it is at the discretion of the Member States to set the conditions and methods of exercising joint and several liability. In view of the principles of legal certainty and the principle of proportionality, interpreted as in the previously cited judgments, Member States are free to designate a joint and several debtor other than the person liable for the tax, in order to ensure the effective collection of the tax. That designation must be justified by the factual or legal relationship between the two joint and several debtors. Member States have the discretion to specify special circumstances in which the recipient in a taxable transaction must be considered jointly and severally liable for the payment of a tax owed by its contractual partner, even though it has paid the tax in the price of the transaction. Furthermore, it reiterated the above conclusions of the judgment in *Federation of Technological Industries and Others*, adding that in the case of abuse in the sphere of VAT, the Financial Administration must be able, in the interest of efficiency, to enforce outstanding tax and all its accessories from each of the contractual partners who took part in the abuse.

27 Hence it follows from the case-law of the Court of Justice that the determination of the conditions for the application of joint and several liability for the payment of tax is at the discretion of the Member States; however, those conditions must respect the principle of legal certainty and the principle of proportionality. It is impossible to apply a system of objective liability that would not allow liability to be discharged in the event of the existence of good faith, based on the application of all the measures which may legitimately be required to be taken, to avoid the person concerned taking part in evasion.

28 The SAC understands that the Court of Justice is also due to deal with the interpretation of Article 205 of Directive 2006/112/EC in Case C-331/23, *Dranken Van Eetvelde NV*. It is not evident from the information that is publicly available about that case, in particular from the formulation of the questions referred, that the Court of Justice should express its opinion on an issue that is essential in the evaluation of the case being heard by the SAC.

29 The Court of Justice has thus far not examined the question whether it is consistent with the principle of proportionality for a supplier to be held jointly and severally liable for unpaid tax while being denied the right to a deduction on the ground of participation in tax evasion in the same commercial transactions. Moreover, that being in a situation where the taxable person against which both measures are being applied simultaneously knew or at least could have and should have known that it has become involved in tax evasion by accepting the taxable supply, and that its supplier will not pay tax on the taxable supplies it accepted from it. Hence, that question cannot be deemed an *acte éclairé* or, given its ambiguity, as an *acte clair*.

30 In that regard, the SAC states that the simultaneous application of the denial of the right to deduct tax and of liability for the payment of tax by the supplier is not expressly provided for in national law. That is the outcome of the administrative practice of the Financial Administration, the legality of which has not yet been examined by the SAC. In terms of a systematic interpretation of national law, it appears that the simultaneous application of those instruments is not ruled out. The denial of the right to deduct tax is an instrument in the determination of tax in the context of the findings phase of tax proceedings. Furthermore, in the present case, that concerns FAU's own tax liability. On the other hand, liability for the supplier's unpaid tax is an instrument of the phase of the payment of tax that follows the findings part of the tax procedure (see SAC judgment of 18 December 2018, ref. no. 7 Afs 8/2018-56, *ARMOSTAV MÍSTEK*, CZ:SAC:2018:7.Afs.8.2018.56, and judgment of 24 January 2022, ref. no. 10 Afs 57/2021-65, *EKO Logistics*, CZ:SAC:2022:10.Afs.57.2021.65). The liability requirement does not concern FAU's own tax obligation but, rather, the output tax on taxable supply received, which was calculated by VERAMI (that is, FAU's supplier) in an invoice and which VERAMI is obliged to pay to the public budget. Hence, although both liability and the denial of the right to a deduction concern the same business transaction (taxable supply), they pertain to the tax obligations of different taxable persons. The liability pertains to the tax obligation of VERAMI (output tax), while the denial of the right to a deduction pertains to FAU's tax obligation (input tax).

31 The only question which raises doubts as to the permissibility of the simultaneous application of both measures to FAU is the appropriateness of the application of liability in a situation where FAU has already been denied, by a final decision, the right to deduct tax on the same taxable supplies. In the context of Article 205 of Directive 2006/112/EC, the principle of proportionality is interpreted as meaning that measures whereby a Member State seeks to ensure the most effective

protection of payments to the public treasury must not go beyond what is necessary to achieve that purpose. To assess the present case, it is essential to answer the question whether the denial of FAU's right to deduct tax, on the grounds that the taxable transaction is part of a chain of trades affected by tax evasion, constitutes a measure sufficient to ensure protection for payments to the public budget and an adequate tool for combatting tax evasion. If the denial of FAU's right to a tax deduction did not suffice to protect those public interests and it was therefore necessary to use all means to collect the unpaid tax of VERAMI, in order to achieve the aforementioned legitimate objectives, there must be an assessment of whether the application of the rule of liability against FAU is compliant with the principle of proportionality (given the circumstances of the present case).

32 The SAC does not consider that FAU may rely on the rule arising from the case-law of the Court of Justice, according to which the risk caused by fraudulent conduct of a third party should be distributed between the supplier and the revenue administrator in line with the principle of proportionality (judgment of 21 February 2008, *Netto Supermarkt*, C-271/06, EU:C:2008:105). FAU at least could have and should have known that it had become involved in tax evasion by accepting the taxable supply from VERAMI.

33 Two facts that have already been mentioned above may be essential for the evaluation by the Court of Justice of the question referred; nevertheless, it is appropriate to state them again explicitly. The first fact is that the Financial Administration did indeed deny FAU's right to a tax deduction on the supplies received from VERAMI, but that occurred only subsequently, after the tax audit during the assessment procedure. Due to this, FAU was assessed with additional tax which it failed to pay due to its insolvency. This means that FAU has failed to settle its liabilities to the public treasury that are directly linked to the denial of the tax deduction. This is pointed out by the defendant in its appeal in cassation. It must, however, also be added that the tax arrears of FAU can, in general, be enforced against the company; nevertheless, it must be added that in the present case, that is only pursuant to the rules governing insolvency proceedings.

34 The second fact is that if FAU had paid the tax obligation of its supplier due to its guarantee liability, it is not very likely, in view of the national legal regulation of the subsidiarity of the liability for the tax arrears, that it would have subsequently actually been able to obtain compensation from its supplier (see above for more details).

[…] [the question referred restated]

[…] [national proceedings]

[…]