Case C-341/22

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:

25 May 2022

Referring Court:

Corte suprema di cassazione (Italy)

Date of the decision to refer:

19 May 2022

Appellant:

Feudi di San Gregorio Aziende Agricole SpA

Respondent:

Agenzia delle Entrate

Subject matter of the main proceedings

Appeal against a tax assessment notice by which the Agenzia delle Entrate (the Revenue Authority) classified the appellant as a *società di comodo* (shell company or brass plate company) for the 2008 tax year and initiated the recovery of unpaid higher direct taxes. The contested tax assessment notice also ruled that the appellant could not use its VAT credit, amounting to EUR 42 108, in the following financial year because it had not carried out, over the course of three successive tax periods, relevant transactions for VAT purposes of such an amount as would enable it to pass the so-called operational test provided for by the Italian legislation governing such companies.

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

Having regard to Article 267 TFEU, the referring court seeks clarification regarding the compatibility with EU law of national rules relating to the operational test, in particular, regarding the consequences for the classification of taxable persons flowing from failure to pass that test and regarding the right to

deduct VAT, including with reference to the principles of legal certainty and the protection of legitimate expectations.

Questions referred for a preliminary ruling

‘1. Is Article 9(1) of Directive 2006/112 to be interpreted as meaning that the status of taxable person, and consequently the right to deduct input VAT paid or to be reimbursed input VAT paid, may be refused where, in three consecutive years, the relevant transactions for VAT purposes carried out are of a value which is not deemed commensurate – in that it is too low – with what may, according to criteria pre-determined by law, reasonably be expected from the available assets and the person or entity concerned is unable to demonstrate, as justification for that fact, the existence of objective circumstances which have caused that result?

2. In the event that the first question is answered in the negative, do Article 167 of Directive 2006/112, the general principle of VAT neutrality and the general principle that any restriction of the right to deduct VAT must be proportional preclude a provision of national law such as Article 30(4) of Law No 724 of 1994, under which the right to deduct input VAT paid on purchases or to be reimbursed such VAT or to use such VAT in a subsequent tax period may be refused where, in three consecutive tax periods, the relevant transactions for VAT purposes carried out are of a value which is not deemed commensurate – in that it is too low – with what may, according to criteria pre-determined by law, reasonably be expected from the available assets for three consecutive years and the taxable person concerned is unable to demonstrate, as justification for that fact, the existence of objective circumstances which have caused that result?

3. In the event that the second question is answered in the negative, do the EU-law principles of legal certainty and of the protection of legitimate expectations preclude a provision of national law such as Article 30(4) of Law No 724 of 1994, under which the right the deduct input VAT paid on purchases or to be reimbursed such VAT or to use such VAT in a subsequent tax period may be refused where, in three consecutive tax periods, the relevant transactions for VAT purposes carried out are of a value which is not deemed commensurate – in that it is too low – with what may, according to criteria pre-determined by law, reasonably be expected from the available assets for three consecutive years and the taxable person concerned is unable to demonstrate, as justification for that fact, the existence of objective circumstances which have caused that result?’

Provisions of EU law relied on

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax; in particular, Article 2(1)(a), Article 9(1), and Articles 167, 168 and 178

Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment; in particular: Article 18(4) and Article 27(1), (2), (3) and (4)

Case-law of the Court of Justice relied on

Judgments of 20 January 2021, *Administraţia Judeţeană a Finanţelor Publice Sibiu and Direcţia Generală Regională a Finanţelor Publice Braşov*, C-655/19, EU:C:2021:40, paragraphs 25 to 30; of 6 October 2009, *SPÖ Landesorganisation Kärnten*, C-267/08, EU:C:2009:619, paragraph 20; of 2 June 2016, *Lajvér*, C-263/15, EU:C:2016:392; of 15 September 2011, *Słaby and Others*, C-180/10 and C-181/10, EU:C:2011:589, paragraphs 36, 37 and 45; of 20 June 1991, *Polysar Investments Netherlands*, C-60/90, EU:C:1991:268, paragraph 13; of 9 July 2015, *Trgovina Prizma*, C-331/14, EU:C:2015:456, paragraph 23; of 13 June 2019, *IO* (VAT – Activity as a member of a Supervisory Board), C-420/18, EU:C:2019:490, paragraph 29; of 17 October 2019, *Paulo Nascimento Consulting*, C-692/17, EU:C:2019:867, paragraph 25; of 18 March 2021, *A.* (Exercise of the right to deduct), C-895/19, EU:C:2021:216, paragraphs 32 and 33; of 14 October 2021, *Finanzamt N* (Communication of the allocation decision), C-45/20, EU:C:2021:852, paragraphs 31, 32 and 34; of 21 March 2018, *Volkswagen*, C-533/16, EU:C:2018:204, paragraph 39; of 15 September 2016, *Barlis 06 –Investimentos Imobiliários e Turísticos*, C-516/14, EU:C:2016:690, paragraph 40; of 25 July 2018, *Gmina Ryjewo*, C-140/17, EU:C:2018:595, paragraph 34; of 14 September 2017, *Iberdrola Inmobiliaria Real Estate Investments*, C-132/16, EU:C:2017:683, paragraph 29; of 16 September 2020, *Mitteldeutsche Hartstein-Industrie*, C-528/19, EU:C:2020:712, paragraph 27; of 12 July 2012, *EMS-Bulgaria Transport*, C-284/11, EU:C:2012:458, paragraph 62; of 11 December 2014, *Idexx Laboratories Italia*, C-590/13, EU:C:2014:2429, paragraphs 38 and 40; of 17 October 2018, *Ryanair*, C-249/17, EU:C:2018:834; of 22 October 2015, *Sveda*, C-126/14, EU:C:2015:712; of 12 November 2020, *ITH Comercial Timişoara*, C-734/19, EU:C:2020:919, paragraphs 37, 38 and 39; of 28 February 2018, *Imofloresmira – Investimentos Imobiliários*, C-672/16, EU:C:2018:134, paragraphs 39 and 40; of 9 September 2021, *GE Auto Service Leasing GmbH*, C-294/20, EU:C:2021:723; of 28 July 2016, *Astone*, C-332/15, EU:C:2016:614, paragraph 50); of 21 October 2021, *Wilo Salmson France SAS*, C-80/20, EU:C:2021:870, paragraph 80; of 21 March 2018, *Volkswagen*, C-533/16, EU:C:2018:204, paragraph 48; of 18 November 2020, *Commission* v *Germany* (Refund of VAT – Invoices), C-371/19, EU:C:2020:936, paragraph 83; of 10 July 2019, *Kursu zeme*, C-273/18, EU:C:2019:588, paragraph 35; of 9 October 2014, *Traum*, C-492/13, EU:C:2014:2267, paragraph 28 and the case-law cited and paragraph 29

Provisions of national law relied on

Legge 23 dicembre 1994, n. 724, 'Misure di razionalizzazione della finanza pubblica (Law No 724 of 23 December 1994 on measures to rationalise public finances), in particular Article 30, entitled 'Shell companies. Valuation of securities':

'4. In the case of non-operating companies and entities, any credit resulting from a declaration submitted for the purposes of value added tax shall not eligible for reimbursement, nor may it be offset … or transferred … Where, for three consecutive tax periods, a non-operating company or entity does not carry out relevant transactions for value added tax purposes of a value not less than the amount resulting from the application of the relevant percentage referred to in paragraph 1, any such credit may not be carried forward for the purpose of offsetting the VAT payable in respect of subsequent tax periods.

4a. Where objective circumstances have rendered it impossible to achieve the revenues, increases in inventory or income determined in accordance with this article, or have made it impossible to carry out the relevant transactions for value added tax purposes referred to in paragraph 4, the company concerned may request that the relevant anti-avoidance provisions be disapplied …'.

Succinct presentation of the facts and procedure in the main proceedings

1 The Revenue Authority served on the company Vigna Ottieri S.r.l., which was subsequently taken over by Feudi di San Gregorio Aziende Agricole S.p.A., a notice of assessment by which, for the 2008 tax year, it classified the company as a shell company, on the ground that the value of the transactions which the company had recorded in its accounts was less than the revenue threshold below which companies are deemed, under national legislation, to be non-operating companies.

2 By the same notice of assessment, the Revenue Authority initiated the recovery of unpaid taxes and rejected the company's claim for a VAT credit of EUR 42 108 which the company had proposed to apply in the following financial year. As justification for its rejection of that claim, the Revenue Authority stated that the company had not carried out, over the course of three successive tax periods, relevant transactions for VAT purposes of such an amount as would satisfy the criteria of the so-called operational test.

3 The Revenue Authority also stated that, for the purposes of the operational test, the company's sale of fixed assets and of the right to use a trade mark could not be taken into consideration, since they amounted to the sale of part of the business and, as such, fell outside the scope of VAT.

4 The company appealed against that notice of assessment. In particular, it argued that there had been no transfer of part of its business, in that there was no proof

that the transferee was carrying on an activity which had previously been carried on by the transferor.

5 La Commissione tributaria provinciale di Avellino (Provincial Tax Court, Avellino) dismissed that appeal by judgment of 18 April 2012.

6 The company appealed against that judgment to the Commissione tributaria regionale della Campania (Regional Tax Court for Campania), which rejected that appeal by judgment of 15 October 2013. That court ruled that, as the Revenue Authority had asserted, the sale of fixed assets and of the right to use the trade mark constituted the sale by the company of part of its business, and for that reason those transactions had to be regarded as falling outside the scope of VAT.

7 The company brought an appeal on a point of law against that judgment before the referring court.

The essential arguments of the parties in the main proceedings

8 The appellant alleges infringement of Directive 77/388/EEC (in particular, Article 18(4) and Article 27(1), (2), (3) and (4)), in that the judgment under appeal prevented it from using in the following financial year the VAT credit which it had declared and thereby unduly restricted its right to deduct VAT and breached the principle of tax neutrality.

9 According to the appellant, a provision of national law (such as that applied in this case, the purpose of which is to prevent fraud and improper practices in connection with shell companies) which results in a restriction of this kind, not contemplated by the VAT directive, must first be authorised by the Council of the European Union, failing which it will be contrary to that directive and must not be applied.

10 The appellant therefore maintains that national courts must disapply that national legislation, on the ground that it is contrary to the VAT directive. It adds that the right to deduct the tax may be refused only where the tax authority demonstrates that the substantive requirements are not met or where the right to deduct is relied on for fraudulent or abusive ends.

11 The Revenue Authority maintains that the appellate court applied the national rules on shell companies correctly, since the conditions were met for holding that the company was not in a period of not normal activity. Indeed, in its view, the company had produced goods and supplied services which, while being instrumental to a subsequent activity, had, in themselves, an intrinsic and independent value that had enabled income to be generated.

12 It also points out that the objective of the national legislation governing shell companies is to avert the improper use of the corporate structure and the obtaining of tax advantages by persons or entities that only appear, from a formal

perspective, to be carrying on a business activity but are, in reality, non-operating entities. The refusal of the right to deduct VAT was thus based on the fact that, in this particular case, there was no person or entity that could be classified as a taxable person within the meaning of Article 9 of Directive 112/2006.

Succinct presentation of the grounds for the reference for a preliminary ruling

13 The referring court observes that the rule laid down in Article 30 of Law No 724 of 1994 is intended to discourage the establishment of shell companies, or in other words to discourage the use of the corporate structure to attain ends other than those permitted by law. In order to do so, it employs the legal presumption that the structure is not an operating company. Indeed, as a rule, there is no genuine business without some minimal continuity of revenue.

14 Accordingly, the legislature set a minimum revenue and income threshold correlated to the value of certain specific assets and the failure to reach that threshold constitutes an indication that the company is non-operating. There is, therefore, a presumption of a minimum income, that income being established on the basis of average profitability ratios for the said assets. That presumption may however be rebutted by the taxable person's demonstrating that objective circumstances existed which rendered it impossible to achieve a certain minimum level of revenue.

15 As regards VAT, by virtue of Article 30(4) of Law No 724 of 1994, it follows from the presumption that the structure is not an operating company that the taxable person loses the right to request the reimbursement of any credit resulting from a tax declaration and to use any such credit for the purpose of offsetting it against another liability or transferring it to a third party. The taxable person merely retains the right to carry it forward and deduct it from the VAT payable in subsequent tax periods.

16 By virtue of that same provision, however, the right to carry forward such a credit and deduct it from the VAT payable in respect of subsequent tax periods is also lost where, for three consecutive tax periods, the non-operating company does not carry out relevant transactions for VAT purposes of a value not less than the amount resulting from the application of the percentages stipulated for the operational test.

17 In such a case, the taxable person is definitively deprived of the right to deduct input VAT paid on purchases it has made. According to the Revenue Authority the appellant is in precisely that situation and may not, therefore, carry forward the VAT credit for 2008 to the following tax period.

18 The referring court identifies three aspects of the national legislation that are potentially incompatible with Directive 2006/112 and the case-law of the Court of Justice.

19 The first aspect concerns the concept of ‘taxable person’, within the meaning of Article 9(1) of Directive 2006/112, and whether that provision may be interpreted as meaning that the status of taxable person may be refused, and the right to deduct input VAT accordingly refused, where a company fails to pass the operational test laid down by the national legislation and is also unable to demonstrate, as justification therefor, the existence of objective circumstances which prevented it from doing so.

20 In this connection, the referring court observes that what such an interpretation of Article 9(1) of Directive 2006/112 would mean for the Italian tax system is that an entity which fails to pass the operational test for three consecutive years would be treated as not carrying on an economic activity for VAT purposes, and therefore not regarded as a taxable person for VAT purposes, while still remaining liable, under the general rules, to the taxation of its income in accordance with the rules applicable to trading entities, on the basis of its formal legal nature.

21 In a case such as that here at issue, because of the failure to pass the operational test, the status of taxable person would be refused on the presumption that no economic activity is being carried on, and thus on the basis of a given number, representing an insufficient volume of taxable transactions in relation to an entity’s assets.

22 That would not appear to be consistent with the principles identified in the case-law of the Court of Justice concerning the concept of ‘taxable person’, which is defined in relation to the concept of ‘economic activity’. The referring court notes, in particular, that, for the purposes of establishing whether an activity constitutes an ‘economic activity’, the number and volume of sales made cannot constitute a criterion for distinguishing between the activities of an operator acting in a private capacity, which do not fall within the scope of Directive 2006/112, and those of an operator whose transactions constitute an economic activity.

23 The referring court also observes that the tax authority may refuse the status of taxable person where it is able to demonstrate that a declaration of intent to commence a planned economic activity has not been made in good faith, the declarant merely having feigned an intention to engage in a specific economic activity while, in reality, seeking to incorporate into his own private assets property which might be the subject of deduction.

24 The referring court points out that, on the other hand, a failure to pass the operational test is relevant only as the basis for the legal presumption that no economic activity is being carried on. It does not, however, constitute proof of the lack of the status of taxable person. Indeed, the taxable person is free to demonstrate the existence of objective circumstances, beyond its control, which have prevented it from carrying out taxable transactions generating a turnover commensurate with the assets at its disposal.

25 The second potentially incompatible aspect concerns Article 167 of Directive 2006/112, the general principle of VAT neutrality and the general principle that any restriction of the right to deduct VAT must be proportional.

26 In so far as concerns the right of taxable persons to deduct VAT due or already paid on goods purchased and services received as inputs from the VAT which they are liable to pay, the referring court observes that that is a fundamental principle of the common system of VAT established by the relevant EU legislation, is an integral part of the VAT scheme and, in principle, may not be limited. The fundamental principle of the neutrality of VAT requires the deduction of input VAT to be allowed if certain substantive requirements are satisfied (that the person or entity concerned is a 'taxable person' within the meaning of Directive 2006/112, that the goods or services relied on to confer entitlement to that right be used by the taxable person for the purposes of its own taxed output transactions, and that those goods or services are supplied by another taxable person as inputs). A national tax authority may not, however, impose additional conditions which circumstances may have the effect of rendering that right ineffective for practical purposes.

27 In addition, if the final acceptance of VAT deductions were to be made dependent on the results of a taxable person's economic activity, that would create, as regards the tax treatment of identical investment activities, unjustified differences between undertakings with the same profile and carrying on the same activity.

28 In light of the foregoing, the referring court wonders whether the fact that national legislation precludes the deduction of input VAT paid on purchases, the refund of such VAT or the use of such VAT in a subsequent tax period, where, for three consecutive tax periods, a taxable person fails to pass the operational test (as laid down by Article 30(4) of Law No 724 of 1994), is compatible with Article 167 of Directive 2006/112, the general principle of VAT neutrality and the general principle that any restriction of the right to deduct VAT must be proportional.

29 The referring court also observes that the prevention of tax evasion, avoidance and abuse is an objective recognised and encouraged by the VAT directive, and for that reason EU law cannot be relied on for abusive or fraudulent ends. Consequently, the national authorities and courts must refuse the right of deduction where it is shown, in the light of objective factors, that that right is being relied on for fraudulent or abusive ends.

30 In this regard, the referring court has doubts as to whether the risk of abusive use of the corporate structure, in relation to which the Italian legislature introduced the provision at issue, and the consequent need to prevent companies from unduly benefitting from tax advantages associated with the corporate form adopted, can justify that national provision, in view of the violation of the right to deduct VAT.

31 The third aspect of potential incompatibility concerns the consistency of Article 30(4) of Law No 724 of 1994 with the EU-law principles of legal certainty

and the protection of legitimate expectations. The referring court notes that those principles are to be observed all the more strictly in the case of rules which are liable to entail financial consequences, in order that those concerned may know precisely the obligations which such rules impose on them. It follows that taxable persons must be able aware what their tax liabilities will be before concluding a transaction.

32 With regard to this aspect also the referring court expresses doubts as to the compatibility of the national rule with EU law. Indeed, the taxable person will meet with uncertainty when carrying out a taxable transaction as to whether that transaction is liable to give rise to a right to deduct VAT or to the refund of VAT, since those rights will be conditional on reaching a pre-determined level of income, calculated over a period of three years.