Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 5 May 2022 [1]

Case C-227/21

'HA.EN.' UAB
v
Valstybinė mokesčių inspekcija

(Request for a preliminary ruling by the Lietuvos vyriausiasis administracinis teismas (Supreme Administrative Court of Lithuania))

(Request for a preliminary ruling – Tax law – Value added tax (VAT) – Directive 2006/112/EC – Right to deduct input VAT – Scope of the case-law on fraud – Existence of an abuse of rights – Refusal of the right to deduct input VAT because the recipient of the supply knew or should have known that the supplier would not be able to pay the VAT incurred to the tax authorities due to his or her financial situation – VAT burden where the price is set off against existing debts)

I. Introduction

1. This preliminary ruling procedure might lead one to think of a passage from '*The Sorcerer's Apprentice*' by Johann Wolfgang von Goethe: 'Sir, my need is sore. Spirits that I've cited
My commands ignore.' Indeed, this preliminary ruling procedure once again highlights the uncertainties and problems that arise when value added tax (VAT) law is understood less conventionally, but rather is also used to combat fraud and abuse in the case-law.

2. According to that line of case-law, the tax authorities should be entitled or even obliged to deny a taxable person the right to deduct input tax if he or she knew or should have known that a transaction before or after him or her in a chain of supplies was involved in VAT fraud. [2] The penalising of fraud through tax law, outside the framework of the criminal law actually intended for that purpose, already raises questions with regard to the (fundamental) rights of taxpayers. That is all the more true [3] if it is to be sufficient in that regard that the taxpayer knew or should have known that the contracting partner would not pay the VAT owed by him or her. On the one

1 Original language: German.

2 See, in that regard, the detailed references in footnote 15 et seq.

3 Critical in that regard: Opinion of Advocate General Cruz Villalón in *R.* (C-285/09, EU:C:2010:381, points 58 et seq. and 104 et seq.); likewise critical in that regard, for example, the President of one of the two turnover tax chambers of the Bundesfinanzhof (Federal Finance Court, Germany; 'BFH'), Wäger, C., *Der Kampf gegen die Steuerhinterziehung*, UR 2015, p. 81 et seq.

hand, the mere possibility of non-payment of a tax does not constitute tax fraud; on the other hand, that makes it practically impossible to do business with undertakings in financial difficulties (that is to say, those that are in or are close to insolvency).

3. An undertaking that takes over goods from its debtor, who is heavily indebted to it, to cover part of the debt, could always be accused to the effect that it should have known that the debtor might not (or might not be able to) pay the VAT incurred from the sale of the goods. That now seems to have become the established practice of the tax authorities in Lithuania. In that country, the acquisition of goods from an undertaking experiencing financial difficulties is regarded as an abuse of rights and, therefore, the right to deduct input VAT is denied.

4. Thus, the present case gives the Court the opportunity to shed light on the limits of its case-law on fraud.

II. Legal framework

A. European Union law

5. The legal framework is formed by Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax ('the VAT Directive').[4]

6. Article 168(a) of the VAT Directive regulates the substantive scope of the right of deduction:

'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 carries out these transactions, to deduct the following from the VAT which 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.'

7. Article 199(1)(g) of the VAT Directive allows Member States to provide for a reverse charge to the recipient of the supply:

'1. Member States may provide that the person liable for payment of VAT is the taxable person to whom any of the following supplies are made:

…

(g) the supply of immovable property sold by a judgment debtor in a compulsory sale procedure.'

8. Article 273 of the VAT Directive, on the other hand, provides for options for the Member States inter alia to combat evasion:

'Member States may impose other obligations which they deem necessary to ensure the correct collection of VAT and to prevent evasion, subject to the requirement of equal treatment as between domestic transactions and transactions carried out between Member States by taxable

[4] (OJ 2006 L 347, p. 1; in the version applicable in the year at issue (2016)).

persons and provided that such obligations do not, in trade between Member States, give rise to formalities connected with the crossing of frontiers. …'

B. Lithuanian law

9. Article 58(1), point 1, of the Lietuvos Respublikos pridėtinės vertės mokesčio įstatymas (Law on value added tax of the Republic of Lithuania) (in the version of Law No IX-751 of 5 March 2020) provides:

'A VAT payer shall have the right to deduct input and/or import VAT in respect of goods and/or services acquired and/or imported, if those goods and/or services are intended to be used for the following activities of that VAT payer: … the supply of goods and/or services on which VAT is chargeable …'

10. Article 719(1) of the Lietuvos Respublikos civilinio proceso kodeksas (Code of Civil Procedure of the Republic of Lithuania) (as amended by Law No XII-889 of 15 May 2014) reads:

'If an auction is declared void due to the absence of any bidder …, the property shall be transferred to the person seeking enforcement, for the initial price of sale of the property at the auction.'

III. Facts and preliminary ruling procedure

11. By a credit agreement of 21 September 2007, 'Medicinos bankas' UAB ('the bank') granted a loan to 'Sostinės būstai' UAB ('the seller') to carry out real estate development activities. For the purpose of securing due performance of the agreement, the seller granted the bank a contractual mortgage over a plot of land in the city of Vilnius (Lithuania) together with a building under construction located on it.

12. By an assignment of claim agreement of 27 November 2015, 'HA.EN.' UAB ('the applicant') acquired from the bank for consideration all the financial claims arising from that credit agreement, together with all the rights established to secure the performance of obligations, including the aforementioned contractual mortgage. By entering into that arrangement, the applicant, inter alia, confirmed that it had become acquainted with the seller's economic and financial situation and legal status and was aware that the seller was insolvent and subject to restructuring proceedings.

13. By order of a bailiff of 23 May 2016, the auction of a part of the seller's immovable property was announced but no purchaser showed an interest in that immovable property. Following the auction's failure to take place, the offer to take over that property of the seller ('the immovable property') was made to the applicant in the sale procedure, thereby meeting a part of the latter's claims. The Court is unaware of whether that took place for the net amount (that is to say, the value without VAT) or the gross amount (that is to say, the value including VAT). The applicant exercised the right and took over the property.

14. For this purpose, an instrument for the transfer of property to a person seeking enforcement was drawn up on 21 July 2016, whereby the bailiff transferred to the applicant the immovable property for a price of EUR 5 468 000.

15. On 5 August 2016, the seller drew up a VAT invoice, stating that the immovable property was being transferred for EUR 4 519 008.26 and VAT of EUR 948 991.74. The applicant entered the VAT invoice in its accounts and deducted the input VAT indicated in that invoice in the VAT declaration for November 2016. The seller also entered the VAT invoice in its accounts and declared the output VAT that was indicated in the VAT invoice in the VAT declaration for August 2016, but did not pay it. On 1 October 2016, the seller acquired the status of a company subject to insolvency proceedings.

16. On 20 December 2016, the applicant submitted a request to the Valstybinė mokesčių inspekcija (State Tax Inspectorate, Lithuania; 'the tax authority') for refund of the overpaid amount of VAT that resulted from the declared deductible input VAT. After conducting a tax inspection in respect of the applicant, the tax authority found that the applicant – in that it entered into transactions for the acquisition of the immovable property and knew or should have known that the seller would not pay VAT for such a transaction – acted dishonestly and abused rights, and therefore did not acquire the right to deduct VAT. For this reason, by decision of 12 July 2017, the applicant was refused the right to the VAT deduction of EUR 948 980, was charged interest of EUR 38 148.46 for late payment of VAT, and a VAT fine of EUR 284 694 was imposed upon it.

17. The applicant brought a complaint against that decision of the tax authority before the Mokestinių ginčų komisija prie Lietuvos Respublikos Vyriausybės (Tax Disputes Commission under the Government of the Republic of Lithuania; 'the Tax Disputes Commission') which, by decision of 22 January 2018, set aside the parts of the decision of the tax authority in respect of the interest for late payment and the fine, but, after stating that the applicant abused rights, upheld the decision in that respect.

18. The applicant brought an action against the latter part of the decision of the Tax Disputes Commission before the Vilniaus apygardos administracinis teismas (Regional Administrative Court, Vilnius, Lithuania), which dismissed the action as unfounded by judgment of 14 November 2018.

19. The Lietuvos vyriausiasis administracinis teismas (Supreme Administrative Court of Lithuania) partially upheld the applicant's appeal by order of 13 May 2020, stating, inter alia, that it was necessary for the court of first instance to assess the conditions for, and indications of, the presence of abuse of rights in the case in point.

20. The Vilniaus apygardos administracinis teismas (Regional Administrative Court, Vilnius) after re-examining the tax dispute, found by judgment of 3 September 2020 that the applicant abused rights, and therefore the tax authority was justified in refusing its right to deduct input VAT. The applicant again appealed to the Lietuvos vyriausiasis administracinis teismas (Supreme Administrative Court of Lithuania). That court stayed the proceedings and referred the following question to the Court of Justice for a preliminary ruling under Article 267 TFEU:

'Is Council Directive [2006/112], in conjunction with the principle of fiscal neutrality, to be interpreted as prohibiting or not prohibiting a practice of national authorities under which the right of a taxable person to deduct input VAT is denied where that person, when acquiring items of immovable property, knew (or should have known) that the supplier, due to his [or her] insolvency, would not pay (or would not be able to pay) the output VAT into the State budget?'

21. In the proceedings before the Court, the applicant, Lithuania, the Czech Republic and the European Commission submitted written observations. In accordance with Article 76(2) of the Rules of Procedure of the Court of Justice, the Court did not consider it necessary to hold a hearing.

IV. Legal assessment

A. The question referred and the course of the investigation

22. The question referred concerns, in essence, the handling of transactions carried out by a supplying taxable person in payment difficulties. In this specific case, that question arises in relation to the situation where the right of a recipient of a supply to deduct input VAT is denied (Article 168 of the VAT Directive).

23. The VAT treatment of transactions between undertakings in the case where one of them is experiencing payment difficulties seems to be generally problematic for tax authorities. Such difficulties also exist in the case of transactions vis-à-vis a *recipient* of a supply which is experiencing payment difficulties. The Court has already delivered a number of judgments on that situation. Those judgments are considered first in order to achieve a consistent solution (Section B).

24. It will then be examined whether the Court's case-law on fraud – on which the Czech Republic relies, in essence – applies at all in the present case (Section C) or whether – in line with the view taken by Lithuania – abusive conduct on the part of the recipient of the supply is to be assumed (Section D). Lastly, it may then be possible to deny the right of deduction on the basis of Article 273 of the VAT Directive (Section E).

25. That must be distinguished from the question of whether the conditions for a deduction of input VAT under Article 168(a) of the VAT Directive are met at all where the entire value of the supply received is not paid for but is used *in full to satisfy existing debts that the supplier has with the recipient of the supply*. Even though the referring court does not expressly ask about this, fulfilment of the conditions for deducting input VAT is a prerequisite for even considering a refusal of the right to deduct input VAT. Therefore, an answer to that logical preliminary question will be helpful for the purpose of resolving the dispute in the main proceedings (Section F).

B. Influence of a taxable person's payment difficulties on VAT revenue

26. From a substantive perspective, the aim of VAT as a general tax on the consumption of goods is to impose a tax not on the supplier, but on consumer capacity, which is demonstrated by consumers' expenditure of assets to procure a consumable benefit.[5] This is particularly clear from the provisions of Article 73 of the VAT Directive. According to that article, the taxable amount consists of everything which constitutes the consideration which 'has been or is to be obtained' by the supplier (that is to say, the service provider).

[5] See, for example, judgments of 3 March 2020, *Vodafone Magyarország* (C-75/18, EU:C:2020:139, paragraph 62); of 11 October 2007, *KÖGÁZ and Others* (C-283/06 and C-312/06, EU:C:2007:598) paragraph 37 – 'it is proportional to the price charged by the taxable person in return for the goods and services which he or she has supplied'; and of 18 December 1997, *Landboden-Agrardienste* (C-384/95, EU:C:1997:627, paragraphs 20 and 23).

27. Consequently, the Court has explicitly ruled on several occasions [6] that 'the taxable amount serving as a basis for the VAT to be collected by the tax authorities cannot exceed the consideration actually paid by the final consumer which is the basis for calculating the VAT ultimately borne by him [or her]'.

28. The VAT Directive proceeds on the assumption that the default of the recipient of a supply due to its insolvency also entails the default of the corresponding tax revenue of an indirect tax on consumption, which would otherwise have arisen had the intended payment been made. Consequently, with regard to the tax revenue, the tax authorities bear the risk of insolvency of the private party involved in the collection of tax. The Court has already expressly clarified this with regard to the case where the recipient of a supply becomes insolvent. [7]

29. The question to be decided in the present case is whether that changes if it is not the recipient of a supply but the *supplier* who experiences payment difficulties. As a taxable person, the latter is also only an accessory of the State in the collection of tax. As a result, the question here is also whether the State or the taxable business partner of a taxable person is liable for defaults due to insolvency. However, in the present case, that question does not arise at the level of tax liability, but at the level of the deduction of input VAT under Article 168 of the VAT Directive, which is intended to relieve undertakings of the burden of VAT. Therefore, the principle of neutrality of VAT must additionally be taken into account for the answer in the present case.

30. The principle of neutrality represents a fundamental principle [8] of VAT. It requires, inter alia, that the undertaking, acting as tax collector on behalf of the State, should be relieved of the final burden of VAT, [9] in so far as the economic activity carried on by the undertaking is itself geared towards the realisation of taxable transactions. [10]

31. In accordance with the Court's settled case-law, the question of whether the VAT payable on the prior or subsequent sales of the goods concerned has or has not been paid to the public purse [11] is irrelevant to the right of the taxable person to deduct input VAT, where the recipient of the supply has sustained a charge to that VAT.

32. As a result, the right of deduction of input VAT by the recipient of the supply continues to exist, in principle, even if the supplier does not use the amount received to pay his or her VAT liability and, due to a lack of assets, the tax authorities cannot successfully enforce that tax liability.

6 Judgments of 15 October 2020, *E. (VAT – Reduction of the taxable amount* (C-335/19, EU:C:2020:829, paragraph 21), and of 24 October 1996, *Elida Gibbs* (C-317/94, EU:C:1996:400, paragraph 19); similarly the judgments of 16 January 2003, *Yorkshire Co-operatives* (C-398/99, EU:C:2003:20, paragraph 19), and of 15 October 2002, *Commission* v *Germany* (C-427/98, EU:C:2002:581, paragraph 30); likewise the Opinion of Advocate General Léger in *MyTravel* (C-291/03, EU:C:2005:283, point 69).

7 Judgment of 15 October 2020, *E. (VAT – Reduction of the taxable amount* (C-335/19, EU:C:2020:829, paragraph 53, read in conjunction with paragraphs 48 and 50).

8 The Court refers in its judgment of 13 March 2014, *Malburg* (C-204/13, EU:C:2014:147, paragraph 43), to the principle of interpretation.

9 Judgments of 13 March 2008, *Securenta* (C-437/06, EU:C:2008:166, paragraph 25), and of 1 April 2004, *Bockemühl* (C-90/02, EU:C:2004:206, paragraph 39).

10 Judgments of 13 March 2014, *Malburg* (C-204/13, EU:C:2014:147, paragraph 41); of 15 December 2005, *Centralan Property* (C-63/04, EU:C:2005:773, paragraph 51); and of 21 April 2005, *HE* (C-25/03, EU:C:2005:241, paragraph 57); and my Opinion in *Centralan Property* (C-63/04, EU:C:2005:185, point 25).

11 Judgments of 11 November 2021, *Ferimet* (C-281/20, EU:C:2021:910, paragraph 56); of 9 November 2017, *Wind Inovation 1* (C-552/16, EU:C:2017:849, paragraph 44); of 6 December 2012, *Bonik* (C-285/11, EU:C:2012:774, paragraph 28); and of 12 January 2006, *Optigen and Others* (C-354/03, C-355/03 and C-484/03, EU:C:2006:16, paragraph 54).

C. Court's case-law on combating tax fraud

33. However, the outcome may be different if the Court's case-law on combating tax fraud in VAT law – as advocated by the Czech Republic – can be applied. This is because, as the Court has repeated time and time again, the prevention of tax evasion, avoidance and abuse is an objective recognised and encouraged by the VAT Directive. [12]

34. For the purpose of combating tax evasion, it is sufficient – in contrast [13] to combating abuse (Section D) – if the taxable person does not evade the tax himself or herself. [14] Rather, it is sufficient if the taxable person knew or should have known [15] that he or she was participating in a transaction connected to VAT fraud. In that case, he or she must, for the purposes of the VAT Directive, be regarded as a participant in that fraud. [16] This *requires* the Member States to refuse the taxable person deduction of VAT (where, as in this case, he or she is the recipient). [17]

35. However, that situation – participation in a transaction connected to VAT fraud – is not present here, as the Commission also states. The mere late payment or non-payment of declared VAT cannot be regarded as tax evasion or VAT fraud within the meaning of the abovementioned case-law.

36. As the Grand Chamber of the Court has already ruled in *Scialdone*, a distinction must be drawn between mere non-payment and non-declaration of VAT by the person liable for payment of VAT. [18] Failure to pay declared VAT within the time limit prescribed by law does not give the taxable person a benefit since the tax is still payable. The Court went on to say [19] therefore, that that such failures to pay declared VAT do not present the same degree of seriousness as VAT fraud.

37. Consequently, there is no tax fraud if – as in the present case – a taxable person in financial difficulties sells goods in order to pay off his or her debts and declares the VAT incurred in that context, but subsequently fails to pay it or to pay it in full. Therefore, it cannot be said, to the applicant's detriment, that it knew or should have known that it was involved in VAT fraud.

[12] Judgment of 24 February 2022, *SC Cridar Cons* (C-582/20, EU:C:2022:114, paragraph 33), order of 3 September 2020, *Vikingo Fővállalkozó* (C-610/19, EU:C:2020:673, paragraph 50), and judgments of 16 October 2019, *Glencore Agriculture Hungary* (C-189/18, EU:C:2019:861, paragraph 34), and of 6 December 2012, *Bonik* (C-285/11, EU:C:2012:774, paragraph 35 and the case-law cited).

[13] See, expressly in relation to that separation, judgment of 11 November 2021, *Ferimet* (C-281/20, EU:C:2021:910, paragraph 46 on the one hand, and paragraph 54 on the other); see also order of 14 April 2021, *Finanzamt Wilmersdorf* (C-108/20, EU:C:2021:266, paragraph 35).

[14] Judgments of 24 February 2022, *SC Cridar Cons* (C-582/20, EU:C:2022:114, paragraph 34); of 16 October 2019, *Glencore Agriculture Hungary* (C-189/18, EU:C:2019:861, paragraph 35); and of 6 December 2012, *Bonik* (C-285/11, EU:C:2012:774, paragraph 38 and the case-law cited).

[15] In some earlier decisions the Court still used the wording 'could not know' (see, for example, judgment of 6 July 2006, *Kittel and Recolta Recycling* (C-439/04 and C-440/04, EU:C:2006:446, paragraph 60). However, this excessively broad wording, stemming solely from the question referred, now seems to have been rightly abandoned.

[16] Judgments of 20 June 2018, *Enteco Baltic* (C-108/17, EU:C:2018:473, paragraph 94); of 22 October 2015, *PPUH Stehcemp* (C-277/14, EU:C:2015:719, paragraph 48); of 13 February 2014, *Maks Pen* (C-18/13, EU:C:2014:69, paragraph 27); of 6 September 2012, *Mecsek-Gabona* (C-273/11, EU:C:2012:547, paragraph 54); of 6 December 2012, *Bonik* (C-285/11, EU:C:2012:774, paragraph 39); and of 6 July 2006, *Kittel* (C-439/04 and C-440/04, EU:C:2006:446, paragraph 56).

[17] See judgments of 16 October 2019, *Glencore Agriculture Hungary* (C-189/18, EU:C:2019:861, paragraph 34); of 22 October 2015, *PPUH Stehcemp* (C-277/14, EU:C:2015:719, paragraph 47); of 18 December 2014, *'Schoenimport 'Italmoda' Mariano Previti and Others* (C-131/13, C-163/13 and C-164/13, EU:C:2014:2455, paragraph 62); of 13 March 2014, *FIRIN* (C-107/13, EU:C:2014:151, paragraph 40); of 13 February 2014, *Maks Pen* (C-18/13, EU:C:2014:69, paragraph 26); of 6 December 2012, *Bonik* (C-285/11, EU:C:2012:774, paragraph 37); of 21 June 2012, *Mahagében and Dávid* (C-80/11 and C-142/11, EU:C:2012:373, paragraph 42); and of 6 July 2006, *Kittel and Recolta Recycling* (C-439/04 and C-440/04, EU:C:2006:446, paragraphs 59 and 61).

[18] Judgment of 2 May 2018, *Scialdone* (C-574/15, EU:C:2018:295, paragraphs 39 and 40).

[19] Judgment of 2 May 2018, *Scialdone* (C-574/15, EU:C:2018:295, paragraphs 41 and 42).

D. Existence of abuse in the acquisition of assets of an undertaking experiencing payment difficulties

38. Therefore, the question arises as to whether the applicant can be accused of an abuse of rights. The abuse could consist in the fact that the applicant took over the immovable property in the course of enforcement even though it knew that the seller was experiencing payment difficulties and therefore might not be able to pay the resulting tax debt in full.

39. In accordance with the Court's case-law, two conditions must be met for a finding of an abuse of rights. First, the transactions concerned must result in the accrual of a tax advantage the grant of which would be contrary to the purpose of the VAT Directive, and, second, it must also be apparent from a number of objective factors that the essential aim [20] of the transactions concerned is to obtain that tax advantage. [21]

1. Wording and principles of the VAT Directive

40. In the present case, only the applicant's deduction of VAT and the simultaneous tax liability of the insolvent seller could be considered an 'advantage'. The very wording of the VAT Directive clearly militates against that tax advantage being contrary to the purpose of the VAT Directive. This is shown in particular by Article 199(1)(g) of the VAT Directive, which allows Member States to provide for a shift of tax liability to the recipient of the supply in the case of a compulsory sale of immovable property. This is because three statements can be derived from that legislative decision.

41. First, unlike the Lithuanian tax authorities, the EU legislature does not regard the acquisition of goods from a company whose assets are being compulsorily auctioned (that is to say from an undertaking in financial difficulties) as an abuse of rights. Otherwise, the EU legislature would not offer Member States that possibility to shift the tax liability.

42. Second, the EU legislature has recognised that the tax authorities experience difficulties in establishing and enforcing the tax liability of a taxable person in respect of whom a compulsory sale procedure has been initiated. This is the reason why provision is made for an optional shifting of tax liability. The law does not contain an unintended loophole that gives rise to a special risk of default for tax authorities.

43. Third, the EU legislature provided for the possibility to shift tax liability only in respect of the compulsory sale of immovable property. It follows, by *a contrario* reasoning, that the normal regime (tax liability of the supplier) applies to other goods acquired in a compulsory sale procedure. However, if the EU legislature proceeds on the assumption that the party against whom enforcement is sought remains the taxable person in the case of a compulsory sale, the acquisition of goods in a compulsory sale procedure from an undertaking (which will usually be insolvent in such cases) can hardly constitute an abuse of rights. The Commission also emphasises this.

[20] See also, in detail in that regard, the Opinion of Advocate General Pitruzzella in *W (VAT deduction linked to a shareholder contribution)* (C-98/21, EU:C:2022:160, points 68 and 78 et seq.).

[21] Judgment of 11 November 2021, *Ferimet* (C-281/20, EU:C:2021:910, paragraph 54); See, inter alia, judgments of 18 June 2020, *KrakVet Marek Batko* (C-276/18, EU:C:2020:485, paragraph 85); of 17 December 2015, *WebMindLicenses* (C-419/14, EU:C:2015:832, paragraph 36); and of 21 February 2006, *Halifax and Others* (C-255/02, EU:C:2006:121, paragraphs 74 and 75).

44. That is not altered by the fact that the purchaser of goods in a compulsory sale procedure knows positively that the party against whom enforcement is sought (that is to say the supplier) is so over-indebted that he or she is more likely to be unable to pay his or her tax debt. The assumption of an abuse of rights in that situation would counteract the intention of the legislature.

2. Application of the statements in the ALTI case?

45. That is not altered by the far-reaching statements recently made by the Court in *ALTI*.[22] In that case, the Court stated in the reasoning for its decision that a 'party [to a contract] – which is deemed, as a result of its voluntary participation in VAT abuse, to have subscribed from the outset to the unlawful intention not to pay the tax on the part of the person liable for payment – [is obliged] to remedy the effects of the late payment of that tax, for which it is also answerable in part'.

46. However, on the one hand, that statement concerned 'only' the question of the scope of liability under Article 205 of the VAT Directive, which is not at issue in the present case. On the other hand, it is scarcely possible to speak of an 'unlawful intention not to pay the tax' in the case of an undertaking experiencing payment difficulties. Nor can a 'VAT abuse' be assumed if it is merely a case of legal transactions being carried out with economic operators experiencing payment difficulties. That applies all the more so where – as in the present case – the acquisition takes place in or after the conclusion of a State-organised compulsory sale procedure.

47. If the Court's statement from *ALTI* were to be taken as the basis, the purpose of the compulsory sale procedure would be reduced to absurdity. The realisation of the assets of a commercial undertaking against whom enforcement is sought would be de facto possible only for private individuals (and undertakings that do not carry out any transactions in respect of which VAT is deductible), since their deduction could not be reduced. This would considerably restrict the circle of potential purchasers and would thus run counter to the purpose of the compulsory sale procedure. The latter consists in trying to realise the assets in the best possible way in order to satisfy the creditors to the greatest degree possible.

3. Wholly artificial arrangement?

48. For the existence of abuse, the Court also requires purely formal or artificial transactions devoid of any economic and commercial justification, carried out with the essential aim of benefiting from an improper advantage.[23] The acceptance of an offer provided for in the public compulsory sale procedure is not artificial.

49. Nor is an assumption of abuse appropriate on the basis of the legal consequence. In tax law, where an abusive practice exists, the transactions involved must be redefined so as to re-establish the situation that would have prevailed in the absence of the transactions constituting that abusive practice.[24]

[22] Judgment of 20 May 2021 (C-4/20, EU:C:2021:397, paragraph 43).

[23] Judgment of 26 February 2019, *T Danmark and Y Denmark* (C-116/16 and C-117/16, EU:C:2019:135, paragraph 98), Opinion of Advocate General Pitruzzella in *W (VAT deduction linked to a shareholder contribution)* (C-98/21, EU:C:2022:160, point 67), and judgment of 22 May 2008, *Ampliscientifica and Amplifin* (C-162/07, EU:C:2008:301, paragraph 28), even use the word 'sole'.

[24] Judgment of 22 November 2017, *Cussens and Others* (C-251/16, EU:C:2017:881, paragraph 46).

50. In the present case, however, there is no alternative for the recipient of the supply by which it would have avoided an abuse of rights and which could then be relied upon. It cannot pay the net price only and then pay the VAT itself if it is not the person liable to pay the tax. It cannot seriously be accused of having taken over the debtor's asset in order to settle the debt instead of acquiring a similar asset from a third party which might then have been able to pay the tax.

4. Prohibitions on trade through VAT law?

51. Lastly, a finding of abuse in the situation in the present case would be tantamount to a prohibition on trade with certain (non-criminal) persons, which is even more alien to VAT than the penalising of criminal conduct or of knowledge of criminal conduct of other persons.[25] An undertaking in financial difficulties also carries out a (legal) economic activity within the meaning of Article 9 of the VAT Directive, therefore owes VAT and must state that VAT separately (see point 10 of Article 226 of the VAT Directive) in an invoice (see Article 220 of the VAT Directive).

52. To deny the recipient of a supply its right of deduction in that respect simply because it knew that its contracting partner was in financial difficulties and therefore might not (be able to) pay the VAT debt would cut those taxable persons off from a large part of the market and thus constitute a barrier to market access. That would run counter to the rationale behind the principle of neutrality, which, as is the case with VAT law as a whole, does not distinguish between undertakings that are successful or less successful, those that are already established or are in the process of being founded, or those that are financially strong or are over-indebted.

53. Moreover, the Court's case-law[26] under discussion in the present case was developed in the light of VAT's particular susceptibility to fraud. However, the present case does not concern that particular susceptibility to fraud, which, in accordance with the case-law of the Court, obliges the undertakings involved to exercise increased due diligence. Rather, the issue is the allocation of the risk of insolvency (with regard to VAT) in transactions with undertakings in financial difficulties.

54. That risk of insolvency, which is borne by the State, could be reduced by the EU legislature at any time. Over 10 years ago, there were already corresponding initiatives by individual Member States to move to a system of direct taxation for business-to-business transactions (reverse charge), but the EU legislature did not further pursue them.[27] The EU legislature made that decision deliberately, because there are good reasons for the collection of indirect tax on a

[25] See, similarly, but in the sense of a prohibition on trade in goods: order of 14 April 2021, *Finanzamt Wilmersdorf* (C-108/20, EU:C:2021:266, paragraphs 36 and 37).

[26] See, expressly, judgment of 18 December 2014, *Schoenimport 'Italmoda' Mariano Previti and Others* (C-131/13, C-163/13 and C-164/13, EU:C:2014:2455, paragraph 62).

[27] The requests of Austria and Germany under Article 27 of 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 (OJ 1977 L 145, p. 1) for authorisation to introduce a provision derogating from Article 21 of the Sixth VAT Directive, namely to introduce a general reverse charge from the previous taxable person (= supplier) to the recipient of the supply, were refused by the Commission on 19 July 2006.
Subsequently, in 2007, the Council invited the Commission to consider the creation of the possibility of applying the generalised reverse charge on an optional basis, but the Commission was not convinced; see Communication from the Commission to the Council and the European Parliament on measures to change the VAT system to fight fraud (SEC(2008) 249) of 22 February 2008 – COM(2008) 109 final, in particular point 5.1.

fractional basis. The Commission also stated the following in 2008: 'A generalised reverse-charge system would clearly be a new concept that could generate both positive and negative consequences.'[28] There was clearly no desire to accept those negative consequences.

55. However, if the EU legislature opts not to take such measures to combat risks of insolvency, a taxable person who carries out transactions with undertakings in financial difficulties cannot be accused of an abuse of rights simply because he or she should have known (or even knew) that the existing risk of insolvency might materialise.

56. Moreover, the EU legislature has in any case granted the Member States the option to implement the reverse charge procedure. Lithuania could have made use of the possibility in Article 199(1)(g) of the VAT Directive. In that case, the tax revenue from the immovable property transaction would not have been lost and the right of deduction of VAT would have been granted to the applicant automatically.

5. Conclusion

57. The extension of the abovementioned case-law to cover an accusation of an abuse of rights where transactions are carried out with undertakings in financial difficulties is therefore, in my view, not reconcilable with the VAT Directive.

E. Existence of a measure to ensure the correct collection of VAT

58. If, therefore, refusal of the right of deduction of VAT is ruled out due to the lack of fraud on the part of the supplier and due to the lack of an abuse of rights on the part of the recipient of the supply, Article 273 of the VAT Directive could at most still allow the Member State (*in casu*, Lithuania) to refuse that right.

59. That provision allows measures to ensure the correct collection of VAT and to prevent evasion. No tax evasion has been already committed. It is the same concerning the correct collection of VAT. The tax owed by the supplier must be levied on him or her if, as in the present case, it is not a reverse charge situation. Therefore, denying the recipient of the supply his or her right of deduction of VAT does also not ensure the correct collection of VAT.

60. Furthermore, the measures based on Article 273 must not go further than is necessary to attain those objectives and must not undermine the neutrality of VAT.[29] This would be the case, however, if the recipient of the supply remained liable for the VAT simply because he or she knew (or should have known) of his or her contracting partner's financial difficulties. This is because he or she has no influence on whether the taxable person will nevertheless pay the tax incurred or whether the tax authorities will successfully assess and enforce it.

[28] Communication from the Commission to the Council and the European Parliament on measures to change the VAT system to fight fraud (SEC(2008) 249) of 22 February 2008 – COM(2008) 109 final, point 4.3.

[29] See, inter alia, judgment of 9 July 2015, *Salomie and Oltean* (C-183/14, EU:C:2015:454, paragraph 62 and the case-law cited).

F. Logical preliminary question: are the requirements for the deduction of VAT met?

61. Thus, the VAT Directive, in conjunction with the principle of fiscal neutrality, is to be interpreted as prohibiting a practice of national authorities under which the right of a taxable person to deduct input VAT is denied where that person, when acquiring items of immovable property, knew (or should have known) that the supplier, due to his or her insolvency, would not pay (or would not be able to pay) the output VAT into the State budget.

62. However, this does not mean that the requirements for the deduction of VAT under Article 168(a) of the VAT Directive are also met in the present case. Even though the referring court did not expressly ask about that point, a closer look at it might be helpful for the purposes of providing a useful answer. That is because fulfilment of the requirements for the deduction of VAT is a logical condition for the question posed by the referring court in relation to denial of the right of deduction of VAT. However, in my view, it is unclear whether the requirements for the deduction of VAT by the applicant are met at all in the present case – as the referring court apparently assumes.

63. The deduction of VAT is only intended to relieve the recipient of the supply of a VAT burden.[30] Therefore, in principle, the deduction system allows the deduction of only the sums actually *paid* by each taxable person to his or her own suppliers (or into the State budget in a reverse charge procedure) in respect of VAT on the corresponding transaction.[31] In the present case, however, there was only a set-off against existing debts with the applicant (as the recipient of the supply). That might be regarded as a sufficient VAT charge; after all, the claims have been extinguished to the corresponding extent.

64. However, such an approach conflicts with the scheme of the VAT Directive and the function of the supplying undertaking in VAT law, as emphasised by the Court in settled case-law. Accordingly, supplying undertakings (*in casu*, the seller) simply act 'as tax collectors for the State and in the interest of the public exchequer'.[32]

65. If the applicant had paid the seller the price as stated in the invoice (EUR 4 519 008.26 plus VAT in the amount of EUR 948 991.74), then the seller could have used that amount to settle its debts to the applicant in the amount of EUR 4 519 008.26 only if it had fulfilled its obligation as tax collector for State. The seller should have used the amount of EUR 948 991.74 to settle the VAT debt incurred.

66. The outcome would be the same if Lithuania had made use of Article 199(1)(g) of the VAT Directive and provided for a reverse charge to the applicant. In that scenario too, payment of the debt would have been possible only in the amount of the net amount (EUR 4 519 008.26), since the applicant would have had to use the amount of EUR 948 991.74 to pay its own tax debt.

[30] See my Opinion in *Biosafe – Indústria de Reciclagens* (C-8/17, EU:C:2017:927, point 44 et seq.); see also the Opinion of Advocate General Campos Sánchez-Bordona in *Volkswagen* (C-533/16, EU:C:2017:823, point 64).

[31] For example, judgment of 22 February 2018, *T – 2* (C-396/16, EU:C:2018:109, paragraph 24 and the case-law cited). See also judgment of 29 April 2004, *Terra Baubedarf-Handel* (C-152/02, EU:C:2004:268, end of paragraph 35). It is true that in the German version of that judgment the Court uses the wording 'abgeführt' ('paid' in the English version). However, since it is referring to the recipient of the supply who pays that VAT not to the tax office but to the service provider, it is clearly the latter that is meant. The French version also uses the phrase 'avoir été acquittée', which can also be naturally translated correctly as 'gezahlt wurde' ('has been paid'). This becomes particularly clear in paragraph 36 – in which it is also correctly translated.

[32] Judgments of 21 February 2008, *Netto Supermarkt* (C-271/06, EU:C:2008:105, paragraph 21), and of 20 October 1993, *Balocchi* (C-10/92, EU:C:1993:846, paragraph 25).

67. Consequently, in the present transaction, only debts of the seller in the amount of the net amount would have been paid to the applicant. Can that outcome be different if the agreed consideration is immediately used to satisfy the supplier's debt with the recipient of the supply?

68. I do not think so. The way the tax is collected – indirect taxation with the supplier as the tax debtor or direct taxation where the tax debt is reverse charged to the recipient of the supply – is merely a question of the taxation technique. It does not change the fact that it is only the net amount that is always available for the payment of the supplier's debt with the recipient of the supply. In both cases, the VAT incurred is intended from the outset to be paid to the State – as Lithuania rightly emphasises. In a system of indirect taxation such as that in the present case, it is ultimately paid only in trust to the supplier – as tax collector on behalf of the State.

69. If that fiduciary concept is taken as the basis, a deduction of VAT by the applicant can be considered only if the applicant has paid to the supplier the VAT incurred *in addition to* the (net) amount intended for payment of the debt. Only in that case is VAT charged to the recipient of the supply. However, VAT can also be deducted if the recipient of the supply assumed or had to assume that the supplier would not use that amount to pay the VAT debt but, for example, to pay off other debts. That is because, even in that case, deduction of VAT cannot be denied to the recipient of the supply either because of abuse or because of knowledge of fraud or the like.

V. Conclusion

70. I therefore propose that the Court answer the question referred for a preliminary ruling by the Lietuvos vyriausiasis administracinis teismas (Supreme Administrative Court of Lithuania) as follows:

(1) Article 168(a) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, in conjunction with the principle of fiscal neutrality, is to be interpreted as prohibiting a practice of national authorities under which the right of a taxable person to deduct input value added tax (VAT) is denied where that person, when acquiring items of immovable property, knew (or should have known) that the supplier, due to his or her insolvency, would not pay (or would not be able to pay) the output VAT into the State budget.

(2) However, it is for the referring court to decide whether the taxable person (recipient of the supply) in the present case is really charged with VAT collected from it by the supplier. This is not possible if the recipient of the supply has never made the funds available to the tax debtor for the payment of the VAT debt.