Reports of Cases

OPINION OF ADVOCATE GENERAL
BOBEK
delivered on 5 June 2019 [1]

Case C-189/18

Glencore Agriculture Hungary Kft.
v
Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága

(Request for a preliminary ruling from the Fővárosi Közigazgatási és Munkaügyi Bíróság (Budapest Administrative and Labour Court, Hungary))

(Common system of value added tax — Directive 2006/112/EC — Article 167 — Article 168 — Right of deduction — Tax evasion or fraud — National procedures — Burden of proof — Access to the file — Right of defence — Equality of arms — Judicial review)

I. Introduction

1. Glencore Agriculture Hungary Kft. (Glencore) challenges two decisions of the Nemzeti Adó- és Vámhivatal (National Tax and Customs Administration, Hungary) ('the NTCA') which refused deduction of value added tax (VAT) paid on certain supplies on the ground that Glencore was aware or should have been aware of tax evasion or fraud committed by its suppliers. In the main proceedings, Glencore questions the lawfulness of the tax procedures before the NTCA. It complains, in particular, of a lack of fairness and of a breach of its rights of defence.

2. The national court seised of that challenge, the Fővárosi Közigazgatási és Munkaügyi Bíróság (Budapest Administrative and Labour Court, Hungary), entertains doubts as to the compatibility with EU law of certain national provisions and practices. In particular, the referring court asks for clarifications on the principles governing the burden of proof placed upon tax authorities to prove the involvement of a taxable person in tax evasion perpetrated by its suppliers; the right of the taxable person to be granted access to the documents which are relevant to its defence; and the scope of the review to be carried out by the national court of the findings of the tax authorities and the manner in which those authorities collected evidence.

II. Legal framework

A. EU law

3. In accordance with Article 167 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax ('the VAT Directive'), [2] 'a right of deduction shall arise at the time the deductible tax becomes chargeable'.

1 Original language: English.

2 OJ 2006 L 347, p. 1.

4. Article 168 of the VAT Directive provides:

'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;

…'

5. Article 273 of the VAT Directive provides that: '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 persons …'

B. National law

6. Section 1(3a) of the adózás rendjéről szóló 2003. évi XCII. törvény (Law XCII of 2003 on taxation rules, 'the Law on taxation rules') provides:

'In the process of inspection of the parties to a relationship (contract, transaction) that creates any tax liability, the tax authority shall treat any relationship that has already been examined and classified the same with respect to each taxpayer and must automatically apply its findings made as regards one of the parties in connection with the inspection of the other party.'

7. According to Section 12(1) and (3) of the Law on taxation rules, taxable persons are entitled to review documents pertaining to their taxation matters. That entitlement includes 'the right to make or request copies of all of the documents that are necessary for the enforcement of their rights and for the fulfilment of their obligations'. However, taxable persons may not inspect, inter alia, 'any part of a document that contains tax secrets pertaining to another person, the knowledge of which is in breach of the law'.

8. Section 97(4) and (5) of the Law on taxation rules provides:

'(4) The tax authority shall ascertain the relevant facts of the case and prove its findings at the conclusion of the inspection, unless the burden of proof is placed on the taxpayer by law.

(5) Documents, expert opinions, statements made by the taxpayer, his representative or employee and also those made by other taxpayers, testimonial evidence, onsite inspections, sample purchases, covert or otherwise, trial production, checking inventory and data provided by other taxpayers, findings of other related inspections, the contents of disclosed data, data from the records of other authorities or electronic data and information made available to the public shall, in particular, be construed as admissible proof and evidence.'

9. Section 100(4) of the Law on taxation rules reads:

'If the tax authority attaches the findings from the inspection of another taxpayer or the information and evidence obtained during any related inquiry to support the results of an inspection, the report and the decision on such inspection, or the information and evidence obtained during that related inquiry, shall be conveyed to the taxpayer to the extent to which he is concerned.'

10. Section 69(1) of the Nemzeti Adó és Vámhivatalról szóló 2010. évi CXXII. törvény (Law CXXII of 2010 on the National Tax and Customs Authority, 'the Law on the tax authority') provides:

'The data gathered and processed by the [NTCA] pursuant to Subparagraph (a) of Paragraph (7) of Section 13 for the purposes of law enforcement activities … as well as special data may only be used for the purposes of law enforcement activities, unless otherwise provided for by law.'

11. Section 76(2)(g) of the Law on the tax authority states:

'(2) In addition to those mentioned in Paragraph (1), the following may request data and information from the [NTCA] law enforcement data processing systems to the extent required for discharging their respective duties provided for by law, with the reason indicated:

…

(g) the [NTCA] branch vested with powers and competence as regards the responsibilities falling within the competence of the [NTCA] concerning tax and customs liabilities, tax and customs proceedings in accordance with [the Law on taxation rules], [the közösségi vámjog végrehajtásáról szóló 2003. évi CXXVI. törvény (Act CXXVI of 2003 on the implementation of Community Customs Law)] and other tax and customs regulations;'

III. Facts, procedure and the questions referred

12. As far as can be ascertained from the order for reference and the submissions of the parties, the relevant facts can be summarised as follows.

13. Glencore, the applicant in the main proceedings, is a company based in Hungary whose main business consists in the wholesale of cereals, oilseed and animal feed, along with raw materials. Glencore purchased cereals throughout Hungary, a large proportion of which were sold abroad. It also purchased large quantities of sunflower seed and rapeseed, a substantial proportion of which it arranged for a subcontractor to convert into crude oil and meal, and a smaller proportion of which it sold on without any processing.

14. The NTCA carried out inspections at Glencore's premises. Those inspections led to the adoption by the NTCA of two administrative decisions in 2015 and 2016, respectively ('the contested decisions'). The first decision concerned all taxes and subsidies relating to the 2010 and 2011 tax years (except for VAT for the months of September and October 2011). By that decision, Glencore was ordered to pay, inter alia, 1 951 418 000 Hungarian forint (HUF) with respect to unpaid VAT. The second decision concerned VAT owed for October 2011 and found that Glencore was liable to pay additional VAT of HUF 130 171 000.

15. The NTCA concluded in those decisions that Glencore had unlawfully deducted VAT in so far as it knew or should have known that some of its suppliers had issued fictitious invoices and were involved in tax evasion. In that respect, the NTCA referred to administrative decisions adopted against certain suppliers of Glencore, and to criminal proceedings against some of those suppliers (which were ongoing when the contested decisions were adopted).

16. According to the contested decisions, the tax inspectors who inspected Glencore were given access — directly or indirectly — to the documents contained in both the criminal files and the administrative files of the suppliers being prosecuted. The NTCA relied on some of the evidence gathered in those procedures to establish Glencore's (passive) involvement in tax evasion.

17. After its administrative appeals were dismissed, Glencore challenged the contested decisions before the Fővárosi Közigazgatási és Munkaügyi Bíróság (Budapest Administrative and Labour Court). In its submissions, Glencore questions the lawfulness of the administrative procedure that led to the adoption of the contested decisions and complains of a lack of fairness in the procedure and of a breach of its rights of defence.

18. In the context of those proceedings, the referring court wonders whether the relevant national provisions, as interpreted and applied by the tax authorities and the domestic courts alike, may make it excessively difficult for a taxable person such as Glencore to disprove its involvement in tax evasion perpetrated by its suppliers.

19. The referring court points out that the tax authorities take the view that they are relieved of the burden of proof, normally incumbent upon them, when they take the findings of related decisions into consideration in a subsequent tax procedure. That is so notwithstanding the fact that the taxpayer subject to the subsequent investigation was not a party to the previous procedures and may even have been unaware of the related decisions.

20. The referring court further observes that the tax authorities do not consider themselves obliged to disclose the file of the related procedures and the evidence used as the basis of the related decisions. For example, in the case at hand, during the administrative procedure, Glencore received only a description of the evidence relied on in the decisions adopted against its suppliers in the form of a summary report. Despite its multiple requests, Glencore was denied access to certain documents in the file, which it considered important for its defence. Only later, during the main proceedings, was Glencore eventually granted access to some of the requested documents, following an order of the referring court.

21. In the referring court's view, the alleged shortcomings in the administrative procedure cannot be fully remedied in the course of the judicial proceedings, in so far as the lawfulness of the decisions previously adopted by the tax authorities, and of the evidence gathered in the context of the related proceedings, cannot be reviewed.

22. In those circumstances, the Fővárosi Közigazgatási és Munkaügyi Bíróság (Budapest Administrative and Labour Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must the provisions of the VAT Directive and, in so far as they are concerned, the fundamental principle of respect for the rights of the defence and Article 47 of the Charter of Fundamental Rights [of the European Union ('the Charter')], be interpreted as precluding the legislation of a Member State and national practice based on that legislation, under which the findings, in the context of an inspection carried out of the parties to a legal relationship (contract, transaction) to which the tax liability relates, made by the tax authorities at the conclusion of a procedure instigated in respect of one of the parties to the legal relationship (the issuer of the invoices in the main proceedings) and entailing a reclassification of that legal relationship, must be taken into account as a matter of course by the tax authorities when carrying out an inspection of another party to the legal relationship (the recipient of the invoices in the main proceedings), it being understood that the other party to the legal relationship has no rights, in particular rights attaching to the status of a party, in the original inspection procedure?

(2) If the Court of Justice answers the first question in the negative, do the provisions of the VAT Directive and, in so far as they are concerned, the fundamental principle of respect for the rights of the defence and Article 47 of the [Charter], preclude national practice that allows a procedure such as that referred to in the first question whereby the other party to the legal relationship (the recipient of the invoices) does not have, in the original inspection procedure, rights attaching to the status of a party, and cannot therefore exercise any right of appeal with respect to an

inspection procedure the findings of which must be taken into account as a matter of course by the tax authorities in the inspection procedure concerning the other party's tax liability and may be adopted as evidence against that other party, it being understood that the tax authorities do not make available to the other party the relevant files concerning the inspection carried out in respect of the first party to the legal relationship (the issuer of the invoices), in particular documents underpinning the findings, the reports and administrative decisions, but discloses only part of them to that other party in the form of a summary, the tax authorities thus apprising the other party of the contents of the files only indirectly, making a selection according to their own criteria, over which the other party may not exercise any control?

(3) Must the provisions of the VAT directive and, in so far as they are concerned, the fundamental principle of respect for the rights of the defence and Article 47 of the [Charter], be interpreted as precluding national practice under which the findings, in the context of the inspection of the parties to a legal relationship to which the tax liability relates, made by the tax authorities at the conclusion of a procedure instigated in respect of the issuer of the invoices and including the finding that that issuer actively participated in tax evasion, must be taken into account as a matter of course by the tax authorities when carrying out an inspection in respect of the recipient of the invoices, it being understood that that recipient has no rights attaching to the status of a party in the inspection procedure carried out at the premises of the issuer of the invoices, and cannot therefore exercise any right of appeal in an inspection procedure the findings of which must be taken into account as a matter of course by the tax authorities in the inspection procedure concerning the tax liability of the recipient and may be adopted as evidence against that recipient, and that [the tax authorities] do not make available to the recipient the relevant files relating to the inspection carried out in respect of the issuer, in particular the documents underpinning the findings, the reports and administrative decisions, but disclose only part of them to the recipient in the form of a summary, the tax authorities thus apprising the recipient of the contents of the files only indirectly, making a selection according to their own criteria and over which the recipient may exercise no control?'

23. Written observations have been submitted by Glencore, the Hungarian Government and the European Commission, all of which also presented oral argument at the hearing on 20 March 2019.

IV. Analysis

A. Preliminary remarks

24. The referring court essentially asks whether the provisions of the VAT Directive, interpreted in the light of Article 47 and Article 48(2) of the Charter, preclude a provision or practice of a Member State according to which, when verifying the right of a taxable person to deduct VAT, the tax administration takes into account the findings of fact and the legal qualification of those facts ('the findings') made by the administration in related decisions taken against other taxable persons. While doing so, the administration discloses the documents relevant for those findings to the taxable person only partially and indirectly, by means of a summary of the documents considered to be relevant.

25. The order for reference is extremely succinct as far as the facts of the case are concerned. I consider it therefore necessary to set out my understanding of the facts, which will necessarily frame the answers to be given to the issues raised by the referring court. However, it ought to be added that the absence of any factual detail, together with the rather complex formulation of the questions referred, necessarily has an impact on the type of answer that can be provided. My suggestions in this regard thus cannot but remain at a relatively high level of abstraction.

26. In the main proceedings, Glencore challenges two decisions issued by the Hungarian tax authorities, by which the latter refused deduction of VAT paid on certain supplies on the ground that Glencore was aware or should have been aware of tax evasion or fraud committed by its suppliers.

27. The finding that there had been tax evasion with regard to certain transactions was first made in decisions previously adopted by the tax authorities against Glencore's suppliers, in procedures to which Glencore was not a party. That finding was then 'carried over' into the contested decisions, in accordance with Section 1(3a) of the Law on taxation rules. That provision — the precise meaning of which is, however, a subject of dispute between the parties — states that 'in the process of inspection of the parties to a relationship … that creates any tax liability, the tax authority shall treat any relationship that has already been examined and classified the same with respect to each taxpayer and must automatically apply its findings made as regards one of the parties in connection with the inspection of the other party'.

28. In the contested decisions, in order to prove Glencore's involvement in the tax evasion in question, I understand that the tax authorities essentially relied on *three sets of evidence*: (i) evidence collected in the context of the administrative procedure opened against Glencore, (ii) evidence collected during the administrative procedure carried out against Glencore's suppliers, and (iii) evidence collected during the criminal proceedings opened against Glencore's suppliers.

29. The tax procedures carried out against Glencore's suppliers had, at the time when the referring court submitted its request for a preliminary ruling, concluded with the adoption of administrative decisions that had become final. By contrast, the criminal proceedings against those suppliers were still ongoing, apparently at the investigation stage (that is, not yet brought before a criminal court).

30. This means that, in the case at hand, the doubts raised by the referring court regarding the possible breach of Glencore's rights stem from the 'transfer' of evidence between different branches of the national authorities, and from the 'carrying over' of findings made by those authorities in one or more administrative decisions into subsequent administrative decisions. By contrast, as the parties confirmed at the hearing, no findings in the contested decisions were made on the basis of a judgment given in criminal proceedings, because there was no such a judgment at that time. Certain information was, however, extracted from the documents collected by the authorities pursuing the criminal investigations.

31. In the light of the above, it seems to me that, by its questions, the referring court seeks to raise *three main issues*. The first issue concerns the manner in which the tax authorities are to discharge the burden, placed upon them, of proving that a taxable person was aware or should have been aware of tax evasion committed by its suppliers when relying on the findings made in previous decisions adopted against the suppliers. The second issue concerns the scope of the tax authorities' duty to grant access to the taxable person to the evidence necessary for its defence, including documents collected in related procedures against other taxable persons. The third issue concerns the powers that a national court ought to have when reviewing the findings made by the tax authorities in decisions adopted against a taxable person's suppliers, and the lawfulness of the collection of evidence in the proceedings against those suppliers.

32. Finally, with regard to the applicable EU law, it should be recalled that national rules laying down procedures and penalties to combat fraud or tax evasion constitute implementation of EU law, for the purposes of Article 51(1) of the Charter. [3] As emphasised by the referring court, the right to an effective remedy and to a fair trial and the rights of the defence, set out in Article 47 and Article 48(2) of the Charter respectively, are of particular relevance in the present proceedings.

3 See, in particular, judgment of 26 February 2013, *Åkerberg Fransson* (C-617/10, EU:C:2013:105, paragraph 27), as subsequently clarified in the judgments of 5 December 2017, *M.A.S. and M.B.* (C-42/17, EU:C:2017:936), and of 2 May 2018, *Scialdone* (C-574/15, EU:C:2018:295).

B. The burden of proof placed upon the tax authority

33. The first issue raised by the referring court concerns the manner in which the tax authorities are to discharge the burden, placed upon them, of proving that a taxable person was aware or should have been aware of tax evasion committed by its suppliers, when those authorities wish to rely on the findings made in previous decisions adopted against the suppliers.

34. At the outset, it must be emphasised that the deduction system is meant to relieve the trader entirely of the burden of the VAT payable or paid in the course of all his economic activities.[4] The Court has consistently held that the right to deduction of VAT is a *key element* of the system of VAT and, consequently, it may not, in principle, be limited.[5]

35. It is also trite law that EU law cannot be relied upon for abusive or fraudulent ends, and that the prevention of tax evasion, avoidance and abuse is an objective expressly recognised and encouraged by the VAT Directive.[6] It follows from Articles 2 and 273 of the VAT Directive, read in conjunction with Article 4(3) TEU, that Member States are obliged to take all legislative and administrative measures appropriate for ensuring collection of all the VAT due on their territory and for preventing fraud.[7] However, the measures which the Member States may adopt to that end must not go further than is necessary to attain such objectives. Therefore, they cannot be used in such a way that they would have the effect of systematically undermining the right to deduct VAT and, consequently, the neutrality of VAT.[8]

36. It is thus incompatible with the provisions of the VAT Directive to refuse that right to a taxable person who did not know, and could not have known, that the transaction concerned was connected with fraud committed by the supplier or by another trader acting upstream or downstream in the chain of supply.[9] In order for the right of deduction of a taxpayer to be refused, it is for the tax administration to establish, in the light of objective factors and without requiring that taxpayer to carry out checks which are not his responsibility, that the latter knew or should have known that his counterparty was involved in VAT fraud.[10]

37. In the absence of EU rules regarding the taking of evidence, participation of a taxable person in VAT fraud must be proved in accordance with the rules of evidence under national law.[11] However, as the Court has repeatedly stated, the rules on the collection of evidence must not undermine the effectiveness of EU law and must respect the rights guaranteed by the Charter.[12]

38. It further follows from *WebMindLicenses* that neither the provisions of the VAT Directive nor the principle of respect for the rights of the defence preclude, in principle, the tax authorities from being able, in order to establish the existence of tax evasion, to use evidence obtained in the context of a parallel criminal procedure against the same person that has not yet been concluded.[13]

4 See, for example, judgment of 5 July 2018, *Marle Participations* (C-320/17, EU:C:2018:537, paragraph 25 and the case-law cited).

5 See, among many, judgment of 15 September 2016, *Senatex* (C-518/14, EU:C:2016:691, paragraph 37 and the case-law cited).

6 See, inter alia, judgments of 28 July 2016, *Astone* (C-332/15, EU:C:2016:614, paragraph 50), and of 22 November 2017, *Cussens and Others* (C-251/16, EU:C:2017:881, paragraph 28).

7 See, to that effect, judgments of 26 February 2013, *Åkerberg Fransson* (C-617/10, EU:C:2013:105, paragraph 25), and of 2 May 2018, *Scialdone* (C-574/15, EU:C:2018:295, paragraph 26).

8 See, notably, judgment of 28 July 2016, *Astone* (C-332/15, EU:C:2016:614, paragraph 49 and the case-law cited).

9 See judgments of 6 December 2012, *Bonik* (C-285/11, EU:C:2012:774, paragraphs 35 to 38 and 41), and of 13 March 2014, *FIRIN* (C-107/13, EU:C:2014:151, paragraphs 40 to 42).

10 See, to that effect, order of 10 November 2016, *Signum Alfa Sped* (C-446/15, EU:C:2016:869, paragraph 39 and the case-law cited).

11 See, for instance, my Opinion in *Dzivev and Others* (C-310/16, EU:C:2018:623, point 24 et seq. and the case-law cited).

12 See, to that effect, judgment of 17 December 2015, *WebMindLicense*s (C-419/14, EU:C:2015:832, paragraphs 65 and 68).

13 Ibid., paragraphs 68 and 90.

39. I do not see any reason why that principle should not hold true also with regard to a situation, such as that in the main proceedings, where the evidence is obtained in the context of administrative or criminal procedures carried out against the company's suppliers. As the Commission has pointed out, it is a common — and entirely legitimate — practice of tax administrations that, when an inspection of a taxable person gives rise to suspicion with regard to the lawfulness of certain transactions, additional checks may be carried out on taxable persons upstream or downstream in the supply chain. Those inspections may lead to the opening of parallel procedures (of a criminal and/or administrative nature) against various taxable persons, arising from the same facts and based on the same set of evidence. [14]

40. Therefore, the fact that certain documents are transferred from one procedure to another does not, per se, result in a breach of the rights of defence of the taxable person being investigated in the latter procedure.

41. To such a general possibility, however, important strings are attached. If the tax administration intends to rely on such documents in support of its findings in any subsequent decision, it must: (i) grant access to those documents to the taxable person with regard to which those documents may be used as evidence in the subsequent decision; (ii) give that taxable person the possibility to be heard with regard to those documents and to submit evidence in support of his arguments; (iii) expressly reconcile the relevant documents and their pertinence in its decision, incorporating, responding to, or refuting the taxable person's relevant arguments in its decision. That is so regardless of whether those documents already formed the basis of a previous decision that has become definitive in the meantime.

42. The fact that findings are considered to have been established in previous decisions cannot relieve the tax authorities of their duty to properly explain their reasoning, and provide supporting evidence, in subsequent decisions adopted against other taxable persons. Any decision of the tax authorities to refuse a taxable person deduction of VAT must, as a matter of principle, be a self-standing decision in which the authorities' conclusions are adequately and independently justified and substantiated.

43. Any other approach would seriously impair the rights of defence of taxable persons that are subject to subsequent procedures, which would fall between two stools. On the one hand, a taxable person could not challenge certain findings in the previous decisions because they were not party to those procedures and, on the other hand, they could not challenge those findings in their own procedure since the authorities are bound by their previous decisions.

44. In extreme scenarios, this could also mean there being no defence at all, especially in those cases (which are not infrequent in the case of large-scale frauds) in which proceedings are brought against companies that are being liquidated, that no longer exist, or that simply have no interest in defending themselves. In the latter type of cases, the tax administration would establish, with a kind of *erga omnes* effect, facts and their legal qualification, without those statements being ever actually contested.

45. These considerations lead me to the heart of the matter, which concerns the assessment of the compatibility with EU law of a national provision such as Section 1(3a) of the Law on taxation rules. As mentioned in point 27 above, the manner in which that provision should be interpreted and applied is a matter of dispute between the parties. It is not for this Court to interpret national law. I will thus refrain from taking any firm stance on that specific provision, and confine my observations to just a few general statements.

14 See, for example, judgments of 21 June 2012, *Mahagében and Dávid* (C-80/11 and C-142/11, EU:C:2012:373, paragraphs 17 and 25), and of 6 December 2012, *Bonik* (C-285/11, EU:C:2012:774, paragraph 14). See also order of 15 July 2015, *Itales* (C-123/14, not published, EU:C:2015:511, paragraphs 14 and 15).

46. The fact that the tax authorities are, in principle, required by law to be consistent when assessing the same facts or legal relationships is naturally not at all problematic. On the contrary, as argued by the Hungarian Government, it promotes legal certainty and ensures equality among taxpayers. However, two significant caveats must be added.

47. First, the interpretation of a provision such as Section 1(3a) of the Law on taxation rules must respect the logic and structure of the VAT system. Individual taxpayers cannot be held responsible for the unlawful conduct of other taxpayers solely because they were party to the relationship that gave rise to the tax liability in question. Any such responsibility must be established on an individual level, with regard to each taxpayer in the supply chain.[15]

48. Second, such a provision of national law may only go as far as imposing upon the tax authorities a duty to adopt the same approach in all related cases *absent cogent reasons to the contrary*. In other words, such a provision is only acceptable to the extent that it does not prevent the tax authorities, *de jure* or de facto, from reaching a different conclusion, in the context of a different procedure, when presented with new arguments or new evidence.

49. For these reasons, a national provision or practice according to which the tax authorities are, in law or in fact, bound by the findings made in related decisions could, if interpreted and applied in a manner different from that just outlined, conflict with a number of relevant key principles. However, any such interpretation can neither 'water down' the burden of proof placed upon the tax authorities, nor a fortiori in fact shift it to the taxpayer, thus eventually undermining the right to deduct and thus the neutrality of VAT, while also breaching the rights of defence of taxable persons.

C. The scope of the taxable person's right of access to the file

50. The second issue raised in the present proceedings concerns the duty of the tax authorities to grant the taxable person access to the evidence relating to tax proceedings carried out with regard to that person. In particular, similar to the national court in *Ispas*,[16] in the present case the referring court seeks clarifications of the *when*, *what* and *how* of that disclosure.

51. With regard to the first aspect, it must be borne in mind that the right to access the file is instrumental to the exercise of the rights of defence of persons whose interests may be affected by the adoption of a decision of the public authorities.

52. The principle of respect for the rights of the defence requires that the addressee of an adverse decision is placed in a position to submit his observations before the decision is adopted, so that the competent authority is able to take into account all relevant information. The purpose of that rule is, in the first place, to enable the addressee to correct an error or submit such information relating to their personal circumstances that will argue in favour of the adoption or non-adoption of the decision, or in favour of its having a specific content.[17]

53. Access to the file must be granted at some point during the administrative procedure, but certainly *before* the authorities take their final decision. The taxable person must have sufficient time to become acquainted with the documents held by the authorities and be able to prepare its defence accordingly.

15 See, *supra*, point 36 of this Opinion.

16 See my Opinion in *Ispas* (C-298/16, EU:C:2017:650, point 99).

17 See, to that effect, judgment of 3 July 2014, *Kamino International Logistics and Datema Hellmann Worldwide Logistics* (C-129/13 and C-130/13, EU:C:2014:2041, paragraph 38 and the case-law cited).

54. A taxable person should be granted access to the file prior to the commencement of any judicial proceedings. Access to the file also permits the taxable person to take an informed decision as to whether he wishes to challenge the decision taken by the administration before the competent court or tribunal. [18]

55. Therefore, disclosure at a later stage — taking place only in the context of judicial proceedings brought against the decision adopted by the administrative authorities — cannot, as a rule, remedy the infringement of the party's rights of defence that crystallised during the administrative stage of the procedure. [19]

56. With regard, then, to the types of documents which the authorities must disclose to the taxable person subject to an investigation, I would stress that the right of access to the file implies that the taxable person must be able to examine *all* the documents in the investigation file that are relevant for the exercise of his defence.

57. More specifically, those documents include, first, the elements of the file which the authorities intend to rely on in their decision against the taxable person. [20] This means that, in the case of Glencore, that company should have been granted access to all of the evidence that has been referred to in order to establish that it knew or should have known of the tax evasion in question.

58. In that connection, it is worth pointing out that a right of access exists regardless of the origin of the document, and the context in which that document was collected (for example, during a parallel administrative or criminal procedure carried out against another taxable person) unless, obviously, some exception applies. [21] It is not relevant whether the documents that the authorities relied on have been physically transferred from one case file to another: in so far as those documents are intended to be used as evidence in a subsequent case, they must be disclosed to the taxable person concerned by that subsequent case. Whether this is done by providing a copy of the requested documents, or by allowing the taxable person to have (if necessary partial) access to the file of the related procedure, is for the Member State to decide. What matters is that the taxable person has a real opportunity to have access to the original evidence.

59. Second, the right of access necessarily extends to the other documents which, although perhaps not directly relied on by the authorities in the statement of reasons of their decision, concern the taxable person's conduct that is the subject of the investigation. As the European Court of Human Rights ('the ECtHR') has consistently held, under Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR'), persons under investigation should be able to access not only 'evidence *directly relevant* to the facts of the case', but also '*other evidence* that might relate to the admissibility, reliability and completeness of the former'. [22]

18 See, to that effect, judgment of 15 October 1987, *Heylens and Others* (222/86, EU:C:1987:442, paragraph 15).

19 It may be different, however, where the proceedings brought against the decision issued by the administration 'have the effect of automatically suspending the implementation of the adverse decision, rendering it immediately inoperable'. See, to that effect, judgment of 3 July 2014, *Kamino International Logistics and Datema Hellmann Worldwide Logistics* (C-129/13 and C-130/13, EU:C:2014:2041, paragraph 54 et seq.).

20 See, for example, judgment of 9 November 2017, *Ispas* (C-298/16, EU:C:2017:843, paragraph 32).

21 See *infra*, points 63 and 64 of this Opinion.

22 See judgment of the ECtHR of 11 December 2008, *Mirilashvili v. Russia* (CE:ECHR:2008:1211JUD000629304, § 200 and the case-law cited). Emphasis added. While naturally Article 6(1) ECHR has primarily a civil and a criminal limb, the ECtHR has applied the provisions of Article 6(1) ECHR to certain types of tax procedures. Therefore, the principles developed by the ECtHR may very well serve as a general inspiration for the standard to be applied to a procedure such as that at issue in the main proceedings, irrespective of the (separate) examination whether or not in the individual case, the fine imposed could in fact be considered to be 'criminal' in nature.

60. Third, the right of access encompasses not only incriminating evidence, but also *exculpatory* evidence which may have been collected by the tax authorities.[23] This means that the taxable person should have access to documents and information which may be favourable to him, since they might exonerate him or, more generally, they might appear inconsistent with the inferences drawn by the tax authorities from the rest of the evidence in their possession.[24]

61. Conversely, as I suggested in *Ispas*, the right of access to the file cannot be interpreted as requiring the taxable person 'to see the complete file', if by that is meant 'the complete set of documents and information in the possession of the administrative authorities', including 'elements not directly relating to a decision adopted, such as some internal notes, drafts, auxiliary calculations, and all the information obtained from third parties'.[25]

62. A fortiori, I see no basis for claiming full access to files relating to parallel proceedings carried out against *other taxable persons*, of course provided that all the relevant documents that the tax authority wishes to rely on have been 'transferred' to the subsequent file and the access to them was granted there.[26]

63. Furthermore, according to settled case-law, the general principle of EU law of respect for the rights of the defence is not an unfettered prerogative but may be restricted, provided that the restrictions in fact correspond to objectives of public interest pursued by the measure in question and do not constitute, in the light of the objectives pursued, a disproportionate and intolerable interference which impairs the very substance of the rights guaranteed.[27] Thus, access to the file may be restricted in those cases where it appears strictly necessary to ensure that important public interests are protected (for example, the secrecy of ongoing criminal investigations) or that other persons' fundamental rights are not unduly affected (for example, the confidentiality of personal data or of business secrets).[28]

64. It is, however, for the authorities to prove that the requirements for those exceptions are met, subject to review by a court.[29] Nevertheless, the authorities are required to consider whether *partial* disclosure of the documents to which one of the exceptions applies may be granted: that requires, in particular, checking whether access limited to only certain parts of the documents is possible and does not require a disproportionate amount of work on the part of the authorities.[30] It must be borne in mind, in this context, that in the modern IT environment the handling of a large volume of documents and, where necessary, the editing of documents, has become significantly easier than in the past.

65. Finally, with regard to the manner in which access must be granted, I would stress that, for the reasons explained in point 58 above, a mere reference to past decisions in which the relevant documents were used as evidence does not suffice. Similarly, a description of the evidence in the possession of the tax authorities in the form of a summary report does not satisfy the right of access to the file of a taxable person, unless the latter is able to request an examination and, possibly, a copy of the specific documents. It is indeed of the utmost importance that the taxable person is able to 'lay his eyes' on the original documents, should he wish to do so.

23 See, by analogy, judgment of 13 September 2018, *UBS Europe and Others* (C-358/16, EU:C:2018:715, paragraph 66 and the case-law cited). See also judgment of the ECtHR of 5 April 2012, *Chambaz v. Switzerland* (CE:ECHR:2012:0405JUD001166304, § 61 and the case-law cited).

24 See judgment of 1 July 2010, *Knauf Gips* v *Commission* (C-407/08 P, EU:C:2010:389, paragraph 23 and the case-law cited).

25 See my Opinion in *Ispas* (C-298/16, EU:C:2017:650, points 100, 116 and 121).

26 Above, point 58 of this Opinion.

27 See, to that effect, judgments of 3 July 2014, *Kamino International Logistics and Datema Hellmann Worldwide Logistics* (C-129/13 and C-130/13, EU:C:2014:2041, paragraph 42), and of 9 November 2017, *Ispas* (C-298/16, EU:C:2017:843, paragraph 35).

28 See, to that effect, judgment of 9 November 2017, *Ispas* (C-298/16, EU:C:2017:843, paragraph 36).

29 See, to that effect, judgment of the ECtHR of 16 February 2000, *Jasper v. the United Kingdom* (CE:ECHR:2000:0216JUD002705295, § 56).

30 To that effect, see by analogy, judgment of 28 June 2012, *Commission* v *Agrofert Holding* (C-477/10 P, EU:C:2012:394, paragraph 79).

D. Judicial review

66. It is, finally, necessary to address briefly the scope of the review that the national court is to carry out of the tax authorities' decision to refuse certain deductions of VAT to a taxable person.

67. The competent court should conduct an overall assessment of all the relevant facts and circumstances of the case pending before it, in order to determine whether the taxable person in question had the right of deduction with regard to the supplies which gave rise to the tax evasion in question.

68. In its examination of the matter, the national court obviously cannot be bound by any findings made by the tax authorities, either in the contested decisions or in decisions adopted against other taxpayers, even where those have become final.

69. In accordance with Article 47 of the Charter, the jurisdiction of the national court must cover all matters of law and of fact that will determine the outcome of the proceedings. [31] In order to satisfy the requirements associated with the right to a fair trial, it is important, in that connection, that the parties are apprised of, and are able to debate and be heard on, all those matters. [32]

70. In the context of judicial proceedings, the national court must also be able to verify (if need be, in the context of interlocutory proceedings) the lawfulness, in the light of EU law, of the evidence used against the taxable person, including that 'transferred' from other proceedings. As the Court held in *WebMindLicenses*, in order for the judicial review guaranteed by Article 47 of the Charter to be effective, 'the court reviewing the legality of a decision implementing EU law must be able to verify whether the evidence on which that decision is founded has been obtained and used in breach of the rights guaranteed by EU law and, especially, by the Charter'. That requirement is satisfied 'if the court hearing an action challenging the decision of the tax authorities adjusting VAT is empowered to check that the evidence upon which that decision is founded, deriving from a parallel criminal procedure that has not yet been concluded, was obtained in that criminal procedure in accordance with the rights guaranteed by EU law or can at least satisfy itself, on the basis of a review already carried out by a criminal court in an *inter partes* procedure, that that evidence was obtained in accordance with EU law'. [33]

71. Importantly, in that judgment the Court added that 'if that requirement is not satisfied and, therefore, the right to a judicial remedy is not effective, or if another right guaranteed by EU law is infringed, the evidence obtained in the context of the criminal procedure and used in the administrative tax procedure must be disregarded and the contested decision which is founded on that evidence must be annulled if, as a result, the decision has no basis'. [34]

72. If the referring court were unable to review the tax authorities' findings, or the manner in which the evidence submitted by them was collected, that would also give rise to a breach of the principle of equality of arms, which is a corollary of the right to a fair trial set out in Article 47 of the Charter.

31 See, by analogy, judgment of 4 June 2013, *ZZ* (C-300/11, EU:C:2013:363, paragraph 62).

32 See, by analogy, judgment of 2 December 2009, *Commission* v *Ireland and Others* (C-89/08 P, EU:C:2009:742, paragraph 56).

33 Judgment of 17 December 2015 (C-419/14, EU:C:2015:832, paragraphs 87 and 88).

34 Ibid., paragraph 89.

73. Indeed, according to settled case-law, the principle of equality of arms implies that each party must be afforded a reasonable opportunity to present his case, including his evidence, under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent. The aim of that principle is to ensure a procedural balance between the parties to judicial proceedings, guaranteeing the equality of rights and obligations of those parties as regards, inter alia, the rules that govern the bringing of evidence and the adversarial hearing before the court.[35]

74. On a more general level, it must be emphasised that, with a few minor exceptions, statements and findings of administrative authorities do not and cannot bind courts, or prevent them from exercising judicial review in full. As the Court has again emphasised recently, the concept of independence presupposes, in particular, that the body concerned exercises its judicial functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body, be it directly (by taking orders or instructions from any source whatsoever[36]), or indirectly (by being bound as to the outcome of the assessment by another act or decision, particular by administrative acts effectively excluded from judicial review[37]).

75. For these reasons, a national court hearing proceedings brought by a taxable person against a decision adopted by the tax authorities must be able to review all elements of fact and of law in that decision, including the lawfulness of the manner in which the evidence was collected, irrespective of the origin of such evidence.

V. Conclusion

76. I propose that the Court answer the question referred for a preliminary ruling by the Fővárosi Közigazgatási és Munkaügyi Bíróság (Budapest Administrative and Labour Court, Hungary) as follows:

– The provisions of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, interpreted in the light of Article 47 and Article 48(2) of the Charter of Fundamental Rights of the European Union, do not preclude a provision or practice of a Member State according to which, when verifying the right of a taxable person to deduct value added tax (VAT), the tax administration is to take into account the findings that it has made in related decisions which have become final, provided that:

  – such a provision or practice, while respecting the logic and structure of the VAT system, does not prevent the tax authorities, *de jure* or de facto, from reaching different conclusions, in the context of different procedures, when presented with new arguments or new evidence;

  – the tax authorities are, in principle, required to grant access, before the adoption of their final decision, to all documents which are relevant for the exercise of the taxable person's rights of defence, including those that have been collected in the context of related administrative or criminal procedures. A description of the evidence in the form of a summary report does not suffice, unless the taxable person is able to request an examination and, possibly, a copy of the specific documents;

  – the national court hearing an action against a decision adopted by the tax authorities is able to review all elements of fact and of law in that decision, including the lawfulness of the manner in which the evidence was collected, irrespective of the origin of such evidence.

35 See, for example, judgment of 28 July 2016, *Ordre des barreaux francophones et germanophone and Others* (C-543/14, EU:C:2016:605, paragraphs 40 and 41 and the case-law cited).

36 See, to that effect, judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses* (C-64/16, EU:C:2018:117, paragraphs 42 and 44 and the case-law cited).

37 See my Opinion in *Torubarov* (C-556/17, EU:C:2019:339, points 50, 51 and 102).