Feudi di San Gregorio Aziende Agricole. Threshold for status of taxable person. VAT deduction.

H&I 2024/88

Feudi di San Gregorio Aziende Agricole. Threshold for status of taxable person. VAT deduction. Court of Justice

CJ 07-03-2024, C-341/22 (Uitspraak), m.nt. Madeleine Merkx (Feudi di San Gregorio Aziende Agricole)

Instantie	Court of Justice of the European Union
Datum	7 maart 2024
Magistraten	K. Jürimäe, K. Lenaerts, N. Piçarra, N. Jääskinen, M. Gavalec
Zaaknummer	C-341/22
Conclusie	Collins
Noot	Madeleine Merkx
Roepnaam	Feudi di San Gregorio Aziende Agricole
JCDI	JCDI:ADS957383:1
Vakgebied(en)	Omzetbelasting / Aftrek en teruggaaf Omzetbelasting / Belastingplichtige en -schuldige Europees belastingrecht / Belastingen EU
Brondocumenten	Uitspraak, Court of Justice of the European Union, 07-03-2024 Conclusie, Court of Justice of the European Union, 28-09-2023 Beroepschrift, Court of Justice of the European Union, 25-05-2022
Wetingang	Council Directive 2006/112/EC Article 9 paragraph 1, Article 167

Essentie

Judgment of the Court of Justice in the case Feudi di San Gregorio Aziende Agricole. Article 9(1) of Council Directive 2006/112/EC must be interpreted as meaning that it may not lead to a person being denied the status of taxable person for VAT where that person, during a given tax period, carries out transactions that are subject to VAT and the economic value of which does not reach the threshold prescribed by national legislation, which corresponds to the return that can reasonably be expected from the assets held by that person. Article 167 of Directive 2006/112 and the principles of VAT neutrality and of proportionality must be interpreted as precluding national legislation under which the taxable person is denied the right to deduct input VAT on account of the transactions subject to output VAT carried out by that taxable person being considered insufficient.

Samenvatting

The company, Vigna, received a tax assessment from the Italian Tax Administration as a non-operating company, because the value of its taxable activities was below a threshold applicable under Article 30 of Law No. 724/1994. Because this threshold had not been reached over three consecutive years (2006, 2007, 2008), Vigna was refused a deduction of a VAT credit of EUR 42,108 for the year 2009. Vigna appealed the assessment, questioning the admissibility of the legislation at hand that stipulates a threshold to determine whether a company is to be regarded as a non-operating company. The consequence of this is that no VAT

credit would be refunded, but instead, it would be transferred to the next tax period. If the threshold has not been met for three consecutive tax periods, the right to the VAT credit will be lost entirely.

According to the Court of Justice of the European Union (hereinafter: 'CJ'), the status of taxable person cannot be denied to a person whose turnover does not exceed a certain threshold set by an EU Member State in its national legislation. There is also no provision in Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (hereinafter: 'the VAT Directive') that grants the right to deduct VAT dependent on the condition that the turnover from output transactions is above a certain threshold. Last but not least, the CJ also ruled that the provision thereof under Italian tax legislation cannot be justified as an anti-fraud or anti-abuse measure. The presumption in the legislation at play is based not on the assessment of whether the transactions subject to VAT were actually carried out during a given taxable period or whether they were used in the strict sense in order to carry out output transactions but only on the assessment of their volume. Entitlement to the right of deduction can be refused only if the facts relied on to demonstrate such fraud or abuse have been established to the requisite legal standard, otherwise than by assumptions.

Uitspraak

JUDGMENT OF THE COURT (Third Chamber)

7 March 2024[1]

(Reference for a preliminary ruling - Taxation - Common system of value added tax (VAT) - Directive 2006/112/EC - Right to deduct VAT - Concept of taxable person - Principle of fiscal neutrality - Principle of proportionality - Non-operating company - National legislation denying the right of deduction, refund or offsetting of input VAT)

In Case C-341/22, ECLI:EU:C:2024:210,

REQUEST for a preliminary ruling under Article 267 TFEU from the Corte suprema di cassazione (Supreme Court of Cassation, Italy), made by decision of 19 May 2022, received at the Court on 25 May 2022, in the proceedings

Feudi di San Gregorio Aziende Agricole SpA

v

Agenzia delle Entrate,

THE COURT (Third Chamber)

composed of K. Jürimäe, President of the Chamber, K. Lenaerts, President of the Court, acting as Judge of the Third Chamber, N. Piçarra, N. Jääskinen (Rapporteur) and M. Gavalec, Judges,

Advocate General: A.M. Collins,

Registrar: C. Di Bella, Administrator,

having regard to the written procedure and further to the hearing on 14 June 2023,

after considering the observations submitted on behalf of:

- Feudi di San Gregorio Aziende Agricole SpA, by R. Nicastro, avvocata,
- the Italian Government, by G. Palmieri, acting as Agent, and by D.G. Pintus, P. Pucciariello and F. Urbani Neri, avvocati dello Stato,
- the European Commission, by A. Armenia, F. Moro and P. Rossi, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 28 September 2023,

gives the following

Judgment

1

This request for a preliminary ruling concerns the interpretation of Article 9(1) and Article 167 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1) (‘the VAT Directive’) and the principles of neutrality of value added tax (VAT), proportionality, protection of legitimate expectations and legal certainty.

2

The request has been made in proceedings between Feudi di San Gregorio Aziende Agricole Spa (‘the company Feudi’) and the Agenzia delle Entrate (Revenue Agency, Italy) (‘the tax authority’) concerning the exercise of the right to deduct VAT.

Legal context

European Union law

3
Under Article 9(1) of the VAT Directive:
‘‘Taxable person’ shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity.

Any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions, shall be regarded as ‘economic activity’. The exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as an economic activity.’

4
Article 63 of that directive provides:
‘The chargeable event shall occur and VAT shall become chargeable when the goods or the services are supplied.’

5
Article 167 of that directive provides:
‘A right of deduction shall arise at the time the deductible tax becomes chargeable.’

6
Article 168(a) of that directive is worded as follows:
‘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
Under Article 273 of the VAT Directive:

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

…’

Italian law

8
Article 30 of the legge n. 724 - Misure di razionalizzazione della finanza pubblica (Law No 724 - Measures to rationalise public finances), of 23 December 1994 (Ordinary Supplement to the GURI No 174 of 30 December 1994) (‘Law No 724/1994), entitled ‘Shell companies. Valuation of securities’, in the version applicable to the dispute in the main proceedings, provides:

‘

1. For the purposes of this article, public limited companies, partnerships limited by shares, limited liability companies, general partnerships and limited partnerships, as well as non-resident companies and entities of any kind, with a permanent establishment in State territory, shall be deemed non-operational if the total amount of revenues, increase in inventories and income, excluding extraordinary income as evidenced by the income statement, where required, is below the sum of the amounts obtained by applying the following percentages:

…

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

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

…’

The dispute in the main proceedings and the questions referred for a preliminary ruling

9

Vigna Ottieri Srl (‘the company Vigna’) was a company incorporated under Italian law that carried on an economic activity of producing and marketing wine in the Campania region (Italy).

10

On 22 December 2010, the tax authority issued a tax assessment notice to the company Vigna, by which it was indicated, in particular, that the company Vigna was considered to be a non-operating company (a ‘shell company’) for the 2008 tax period on the ground that the amount of the output transactions subject to VAT which the company Vigna had declared was below the threshold under which, for the purposes of Article 30 of Law No 724/1994, companies are presumed to be non-operational. It was also apparent from that tax assessment notice that such a threshold had not been reached by the company Vigna over three consecutive tax periods, namely those of 2006, 2007 and 2008. Consequently, the tax authority refused the deduction of

the VAT credit of EUR 42 108, claimed by the company Vigna for the 2009 tax period.

11

The company Vigna brought an action against that tax assessment notice before the Commissione tributaria provinciale di Avellino (Provincial Tax Court, Avellino, Italy). By judgment of 18 April 2012, that court dismissed that action.

12

The company Feudi, which took over the company Vigna as from 27 September 2012, brought an appeal against that judgment before the Commissione tributaria regionale della Campania, sezione distaccata di Salerno (Regional Tax Court, Separate Salerno Chamber, Campania, Italy), which dismissed that appeal.

13

On 27 March 2014, the company Feudi brought an appeal on a point of law before the Corte suprema di cassazione (Supreme Court of Cassation, Italy), which is the referring court. In essence, the company Feudi submits that the refusal to grant it the right to deduct VAT is incompatible with EU law.

14

The referring court states, in essence, that the Italian legislation at issue seeks to discourage the formation of shell companies and, thus, to prevent legal persons which formally carry on an economic activity, although they are in reality non-operational, from obtaining tax advantages. To that end, Article 30 of Law No 724/1994 provides for a deterrent mechanism that is based on the presumption that the non-operational nature of a company may be deduced from the fact that the return which may reasonably be expected from the assets that it holds is lower than an income threshold specified by that provision. A company could however rebut that presumption by demonstrating that that income threshold could not have been reached during a given period due to objective circumstances.

15

It is apparent from the request for a preliminary ruling that, under that provision, non-operating companies cannot be refunded a VAT credit set out on their declaration that arises in particular from an amount of deductible VAT that is higher than the VAT collected. Nor can that credit be offset or transferred. That credit can therefore be applied towards the VAT due in respect of subsequent tax periods. However, where, over three consecutive tax periods, a non-operating company does not carry out transactions for VAT purposes that are of an amount at least equal to the amount resulting from that income threshold, that credit can no longer be carried forward. That company accordingly loses the right to deduct VAT.

16

In those circumstances, the referring court asks, in the first place, whether the status of taxable person and, consequently, the right to deduct input VAT paid may be denied to a company that carries out transactions subject to VAT while not reaching the income threshold provided for by the Italian legislation at issue, where that company does not demonstrate that objective circumstances rendered it impossible to achieve income higher than that threshold. In that regard, the referring court is uncertain whether such a practice is compatible with Article 9(1) of the VAT Directive from which it is apparent, in essence, that the status of taxable person derives from the exercise, by the entity which is relying on that status, of an economic activity.

17

In the second place, that court asks whether the Italian legislation at issue is compatible with Article 167 of the VAT Directive and with the principle of VAT neutrality and the principle of proportionality. That court states that, while the prevention of possible tax evasion, avoidance and abuse is an objective recognised and encouraged by the VAT Directive, the measures adopted by the Member States must not, however, go beyond what is necessary to attain that objective and, in particular, those measures cannot be used in such a way that they would systematically call into question the principle of VAT neutrality.

18

In the third place, the referring court asks whether the limitations of the right to deduct VAT provided for by Article 30 of Law No 724/1994 must be regarded as being contrary to the principles of legal certainty and the protection of legitimate expectations. The referring court considers that a taxable person, where he or she carries out an economic transaction, is likely to be uncertain as to whether that transaction may give rise to a right to deduct, or to obtain a refund of VAT, since the exercise of those rights will be conditional on that taxable person having received a level of income in excess of the threshold provided for by the Italian legislation at issue in a given tax year.

19

In those circumstances, the Corte suprema di cassazione (Supreme Court of Cassation) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

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

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

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

The first question

20

By its first question, the referring court asks, in essence, whether Article 9(1) of the VAT Directive must be interpreted as meaning that it may lead to a person being denied the status of taxable person for VAT purposes where that person, during a given tax period, carries out transactions that are subject to VAT and the economic value of which does not reach the threshold prescribed by national legislation, which corresponds to the return that can reasonably be expected from the assets held by that person, unless the latter shows that objective circumstances prevented that threshold from being reached.

21

The first subparagraph of Article 9(1) of the VAT Directive provides that a ‘taxable person’ means any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity. The concept of ‘economic activity’ is defined in the second subparagraph of Article 9(1) of that directive as covering any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions. It is further specified that ‘the exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis’ must be regarded as an economic activity.

22

Thus, analysis of the wording of Article 9(1) of the VAT Directive not only demonstrates that the scope of the concept of ‘economic activity’ is very wide but also clarifies the objective character of that concept, in the sense that the activity is considered per se and without regard to its purpose or results (judgment of 25 February 2021, *Gmina WrocÅ‚aw (Transformation of the right of usufruct)* C-604/19, EU:C:2021:132, paragraph 69 and the case-law cited).

23

It follows that the status of taxable person is not subject to the satisfaction of the requirement related to a person carrying out transactions that are subject to VAT and the economic value of which exceeds an income threshold set in advance, which corresponds to the return that can reasonably be expected from the assets held by that person. The only relevant question in that regard is whether that person actually carries out an economic activity and, as stated in paragraph 21 of the present judgment, that that person exploits tangible or intangible property for the purposes of obtaining income on a continuing basis.

24

In the present case, it is for the referring court to determine whether, during the taxable periods at issue, namely the taxable period 2008 and the two preceding taxable periods, in respect of which the tax authority considered that the company Vigna was not operational, that company carried out such an economic activity, within the meaning of the first subparagraph of Article 9(1) of the VAT Directive, as interpreted by the case-law referred to in paragraph 22 of the present judgement.

25

Having regard to the foregoing considerations, the answer to the first question is that Article 9(1) of the VAT Directive must be interpreted as meaning that it may not lead to a person being denied the status of taxable person for VAT purposes where that person, during a given tax period, carries out transactions that are subject to VAT and the economic value of which does not reach the threshold prescribed by national legislation, which corresponds to the return that can reasonably be expected from the assets held by that person.

The second question

26

By its second question, the referring court asks, in essence, whether Article 167 of the VAT Directive and the principles of VAT neutrality and of proportionality must be interpreted as precluding national legislation under which the taxable person is denied the right to deduct input VAT on account of the transactions subject to output VAT carried out by that taxable person being considered insufficient.

27

In that regard, it must be borne in mind that, in the first place, in accordance with the settled case-law of the Court, the right of taxable persons to deduct the VAT due or already paid on goods purchased and services received as inputs from the VAT which they are liable to pay is a fundamental principle of the common system of VAT. The right of deduction provided for in Article 167 et seq. of the VAT Directive is therefore an integral part of the VAT scheme and may not, in principle, be limited. That right is exercisable immediately in respect of all the VAT charged on input transactions. The deduction system is intended to relieve the taxable person entirely of the burden of the VAT due or paid in the course of all his or her economic activities. Thus, the common system of VAT ensures complete neutrality of taxation of all economic activities, whatever the purpose or results of those activities, provided that they are themselves subject in principle to VAT. In so far as the taxable person, acting as such at the time when he or she acquires goods or receives services, uses those goods or services for the purposes of his or her taxed transactions, he or she is entitled to deduct the VAT due or paid in respect of those goods or services (see, to that effect, judgments of 25 November 2021, *Amper Metal*, C-334/20, EU:C:2021:961, paragraph 23 and the case-law cited, and of 25 May 2023, *Dyrektor Izby Administracji Skarbowej w Warszawie (VAT - Fictitious acquisition)*, C-114/22, EU:C:2023:430, paragraphs 27 and 28 and the case-law cited).

28

More specifically, it is apparent from Article 168 of the VAT Directive that, in order to enjoy a right of deduction, two conditions must be met. First, the person concerned must be a ‘taxable person’ within the meaning of the directive. Secondly, the goods or services relied on to confer entitlement to that right must be used by the taxable person for the purposes of his or her own taxed output transactions and, as inputs, those goods or services must be supplied by another taxable person (see, to that effect, judgment of 8 September 2022, *Finanzamt R (Deduction of VAT linked to a shareholder contribution)*, C-98/21, EU:C:2022:645, paragraph 39 and the case-law cited).

29

Regarding the second condition, which is the only condition concerned by the present question, it should be borne in mind that, before the taxable person is entitled to deduct input VAT, the existence of a direct and immediate link between a particular input transaction and a particular output transaction or transactions giving rise to the right to deduct is, in principle, necessary. The right to deduct VAT charged on the acquisition of input goods or services presupposes that the expenditure incurred in acquiring them is a component of the price of the output transactions giving rise to the right to deduct (judgment of 8 September 2022, *Finanzamt R (Deduction of VAT linked to a shareholder contribution)*, C-98/21, EU:C:2022:645, paragraph 45 and the case-law cited).

30

However, a taxable person also has a right to deduct even where there is no direct and immediate link between a particular input transaction and an output transaction or transactions giving rise to the right to deduct where the costs of the goods and services in question are part of his or her general costs and are, as

such, components of the price of the goods or services which he or she supplies. Such costs do have a direct and immediate link with the taxable person's economic activity as a whole (see, to that effect, judgment of 12 November 2020, *Sonaecom*, C-42/19, EU:C:2020:913, paragraph 42 and the case-law cited).

31

It follows from the foregoing considerations that no provision of the VAT Directive makes the right of deduction conditional on a requirement that the amount of output transactions subject to VAT, carried out by a taxable person during a given period, must reach a certain threshold. On the contrary, it follows from the case-law cited in paragraph 27 of the present judgment, that the right to deduct VAT is ensured, subject to satisfaction of the necessary conditions which it is for the referring court to ascertain, irrespective of the results of the economic activities of the taxable person concerned.

32

In the second place, it should, however, be observed that the taxable person may be refused the right to deduct VAT if it is established, in the light of objective evidence, that that right is being relied on for fraudulent or abusive ends.

33

It must be noted that the prevention of possible tax evasion, avoidance and abuse is an objective recognised and encouraged by the VAT Directive and that the Court has repeatedly held that EU law cannot be relied on for fraudulent or abusive ends. Therefore, even if the substantive conditions for the right of deduction are met, it is for the national authorities and courts to refuse that right if it is established, in the light of objective evidence, that that right is being invoked fraudulently or abusively (see, to that effect, judgments of 3 March 2005, *Fini H*, C-32/03, EU:C:2005:128, paragraphs 34 and 35, and of 25 May 2023, *Dyrektor Izby Administracji Skarbowej w Warszawie (VAT - Fictitious acquisition)*, C-114/22, EU:C:2023:430, paragraph 41 and the case-law cited).

34

Since the refusal of the right of deduction is an exception to the application of the fundamental principle constituted by that right, it is incumbent on the tax authorities to establish, to the requisite legal standard, the objective evidence from which it may be concluded that the taxable person committed VAT fraud or knew or ought to have known that the transaction relied on as a basis for the right of deduction was connected with such a fraud. It is for the national courts subsequently to determine whether the tax authorities concerned have established the existence of such objective evidence (judgment of 25 May 2023, *Dyrektor Izby Administracji Skarbowej w Warszawie (VAT - Fictitious acquisition)*, C-114/22, EU:C:2023:430, paragraph 43 and the case-law cited).

35

As regards the abuse of rights, it follows from settled case-law that, in the sphere of VAT, an abusive practice can be found to exist only if, first, the transactions concerned, notwithstanding formal application of the conditions laid down by the relevant provisions of the VAT Directive and the national legislation transposing it, result in the accrual of a tax advantage the grant of which would be contrary to the purpose of those provisions. Second, it must be apparent from a number of objective factors that the essential aim of those transactions is solely to obtain that tax advantage (judgments of 21 February 2006, *Halifax and Others*, C-255/02, EU:C:2006:121, paragraphs 74 and 75, and of 25 May 2023, *Dyrektor Izby Administracji Skarbowej w Warszawie (VAT - Fictitious acquisition)*, C-114/22, EU:C:2023:430, paragraph 44 and the case-law cited).

36

It follows accordingly from the case-law of the Court that the principle that abusive practices are prohibited, which applies to the sphere of VAT, bars wholly artificial arrangements which do not reflect economic reality and are set up with the sole aim of obtaining a tax advantage the grant of which would be contrary to the purposes of the VAT Directive (judgments of 16 July 1998, *ICI*, C-264/96, EU:C:1998:370, paragraph 26, and of 25 May 2023, *Dyrektor Izby Administracji Skarbowej w Warszawie (VAT - Fictitious acquisition)*, C-114/22, EU:C:2023:430, paragraph 46 and the case-law cited).

37

It must also be noted that the measures which the Member States may adopt under Article 273 of the VAT Directive, in order to ensure the correct collection of VAT and to prevent evasion, must not go beyond what is necessary to achieve the objectives pursued. 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 (judgments of 9 December 2021, *Kemwater ProChemie*, C-154/20, EU:C:2021:989, paragraph 28, and of 25 May 2023, *Dyrektor Izby Administracji Skarbowej w Warszawie (VAT - Fictitious acquisition)*, C-114/22, EU:C:2023:430, paragraph 47 and the case-law cited).

38

In the present case, the referring court explains that Article 30 of Law No 724/1994 seeks to prevent fraud by discouraging the formation of shell companies. Thus, the mechanism established by that article is based on the presumption that, where the amount of output transactions carried out by a company during a given taxable period does not reach a threshold calculated by following the criteria laid down in that article, that company is not an operational company unless it succeeds in demonstrating that objective circumstances justify that it could not have reached that threshold. In the event of a company being considered a non-operating company, it may no longer exercise its right to deduct VAT for the output transactions that it carried out during the taxable period at issue.

39

Such a presumption is based on a criterion, that of an income threshold, which is unconnected to the criteria required for the purposes of demonstrating fraud or abuse, as is apparent from the case-law cited in paragraphs 33 to 36 of the present judgment. That presumption is based not on the assessment of whether the transactions subject to VAT were actually carried out during a given taxable period or whether they were used in the strict sense in order to carry out output transactions, but only on the assessment of their volume. It cannot, therefore, having regard to the case-law cited in paragraph 34 of the present judgment, be regarded as being capable of demonstrating that the right to deduct VAT was relied on fraudulently or abusively.

40

Entitlement to the right of deduction can be refused only if the facts relied on to demonstrate such fraud or abuse have been established to the requisite legal standard, otherwise than by assumptions (see, to that effect, judgment of 11 November 2021, *Ferimet*, C-281/20, EU:C:2021:910, paragraph 52 and the case-law cited).

41

Furthermore, the Court has already held that a general presumption of fraud and abuse cannot justify a fiscal measure which compromises the objectives of a directive (see, to that effect, judgment of 7 September 2017, *Eqiom and Enka*, C-6/16, EU:C:2017:641, paragraph 31 and the case-law cited). In the same way, it cannot be accepted that such a presumption, even a rebuttable presumption, leads to the right to deduct input VAT paid being refused for reasons unconnected to the finding of a fraudulent or abusive reliance on that right.

42

It follows that a presumption such as that described in paragraph 38 of the present judgment goes beyond what is necessary to achieve the objective consisting in the prevention of fraud and abuse.

43

Having regard to the foregoing considerations, the answer to the second question is that Article 167 of the VAT Directive and the principles of VAT neutrality and of proportionality must be interpreted as precluding national legislation under which the taxable person is denied the right to deduct input VAT on account of the transactions subject to output VAT carried out by that taxable person being considered insufficient.

The third question

44

In view of the answer given to the second question, and in so far as the third question is asked only in the event of the second question being answered in the negative, there is no need to answer that third question.

Costs

45

Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

1. *Article 9(1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax*

   must be interpreted as meaning that it may not lead to a person being denied the status of taxable person for value added tax (VAT) where that person, during a given tax period, carries out transactions that are subject to VAT and the economic value of which does not reach the threshold prescribed by national legislation, which corresponds to the return that can reasonably be expected from the assets held by that person.

2. *Article 167 of Directive 2006/112 and the principles of VAT neutrality and of proportionality*

   must be interpreted as precluding national legislation under which the taxable person is denied the right to deduct input VAT on account of the transactions subject to output VAT carried out by that taxable person being considered insufficient.

[Signatures]

Noot

Auteur: Madeleine Merkx
The present case deals with a specific Italian legislative provision. Under this provision, companies that are established in Italy either through their main seat of business or a fixed establishment are regarded as shell companies or non-operational companies when the total amount of revenues, increase in inventories and

income, excluding extraordinary income, is below the sum of the amounts obtained by applying certain fixed percentages. Of these percentages, none are mentioned in the referral by the Italian Supreme Court (*Corte Suprema di Cassazione*) or the Court of Justice of the European Union (hereinafter: 'CJ') in its judgment. In the Opinion of Advocate General (AG) Collins (AG Opinion of 28 September 2023, C-341/22, ECLI:EU:C:2023:719), only one of these percentages is mentioned: sub c: 15% of the value of the other fixed assets, including leasing contracts. Subs a and b of the Italian provision at play also mention a percentage of the assets but refer to different legal provisions. The complexity of the reference to other provisions is perhaps the reason that the other percentages are not mentioned in the referral, the AG Opinion and the judgment. If the provision applies, the shell company or non-operating company is deprived of its right to be granted a refund of a VAT credit resulting from the amount of deductible VAT being higher than the VAT due in a certain tax period. Instead, the shell or non-operating company can transfer it to the next tax period. In case the threshold mentioned above is not met in three consecutive tax periods/years, the right to a refund of the VAT credit is lost entirely. Where objective circumstances have rendered it impossible to achieve the revenues or have made it impossible to carry out the relevant transaction for VAT, the company concerned may request that the provision be disapplied. The purpose of the Italian legislation is to discourage the formation of shell companies and to prevent those companies from obtaining undue tax advantages.

The CJ’s judgment

Referring to Article 9(1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (hereinafter: 'the VAT Directive') that a person that carries out an economic activity, whatever the purpose or results of that activity is to be regarded as a taxable person, the CJ ruled that the status of taxable person is not dependent on that person obtaining an income above a certain threshold that is determined by a certain (fixed) percentage of its assets. The only relevant question is whether that person actually carries out an economic activity. In the same vein, the CJ also ruled that no provision of the VAT Directive makes the right of deduction conditional on the requirement that the output transactions exceed a certain (fixed) threshold. The provision can also not be justified as an instrument to combat fraud or abuse. The CJ mentioned that the right to deduct VAT can be refused only if the facts relied on to demonstrate such fraud or abuse have been established to the requisite legal standard, otherwise than by assumptions. Because the CJ answered the second question on the right to deduct VAT in the positive, it did not address the third question of the referring judge dealing with the principles of legal certainty and of the protection of legitimate expectations, which could preclude the Italian legislation under which the right to deduct VAT is denied to taxpayers not meeting the threshold in three consecutive tax periods.

Status of taxable person

The CJ’s answer to the first question seems rather straightforward. The status of taxable person can be granted whatever the purpose or results of the activity. *Gmina L* (CJ 30 March 2023, C-616/21 *Gmina L*, ECLI:EU:C:2023:280) and *Gmina O* (CJ 30 March 2023, C-612/21 *Gmina O*, ECLI:EU:C:2023:279) have, however, demonstrated that that answer is not always so straightforward. Instead, it is relevant to compare the activities of the person at hand with the typical conduct of an active entrepreneur in the field concerned. Being in a continuous loss-making position is not typical for a business and, therefore, relevant in this regard. However, I agree with AG Kokott in her Opinion in *Latvijas Informacijas un komunikacijas tehnologijas asociacija* (AG Opinion of 7 March 2024, C-87/23 *Latvijas Informacijas un komunikacijas tehnologijas asociacija*, ECLI:EU:C:2024:222) that this is just one of the circumstances relevant to determine whether a person has a status as taxable person. A typical holding company, for that matter, may incur more costs than it receives in management fees because, e.g., it intends to recover the money lost from dividend payments or from later income from management fees, for example, after the start-up phase of a new subsidiary. In the *Gmina* cases, the CJ also referred to the fact that the Gminas did not employ staff for the activity at play, did not seek customers and that the activity was not of a recurrent nature, while there was also an unusual

uncertainty of whether and to what extent the costs would be reimbursed via subsidies. The mere fact that the income is not above a certain threshold as such, as is the case in the Italian tax legislation at play, is thus not sufficient to regard a person as a non-taxable person. Because we only know for a fact in the present case that the income of Vigna is below the threshold and no other facts and circumstances are given, it is impossible to determine whether Vigna as such can be regarded a taxable person. With this in mind, it makes sense that the CJ plainly regards the Italian legislation as unacceptable from the general point of view that when a company's income is below a certain threshold, this cannot, as a general rule, result in a non-taxable person status.

The last thing I noted when reading the CJ's answer to the first question is, that the CJ refers in paragraph 23 to the fact that the only relevant question is whether a person actually carries out an economic activity and 'that that person exploits tangible or intangible property for the purposes of obtaining income on a continuing basis'. From the AG Opinion, it becomes clear that Vigna leased its tangible and intangible assets (production facilities, equipment and a trademark) to Feudi. This type of activity qualifies as an exploitation of tangible or intangible property. The reference to *Gmina Wroclaw* (CJ 25 February 2021, C-604/19 *Gmina Wroclaw*, ECLI:EU:C:2021:132) is interesting, too, because that case demonstrates that for an exploitation of a property to be considered an economic activity, is it sufficient that the property is exploited and that an income is received for a certain period of time. No active steps similar to producers, traders or service suppliers need to be taken. The simple acquisition and the mere sale of an asset, on the other hand, cannot, however, amount to the exploitation of an asset intended to produce income on a continuing basis because the only consideration for those transactions consists of a possible profit on the sale of that asset. The CJ, in that situation, requires that a person has taken active steps to market property by mobilising resources similar to those deployed by producers, traders or persons supplying services (CJ 15 September 2011, C-180/10 and C-181/10 *Slaby and others*, ECLI:EU:C:2011:589). If those active steps have not been taken, there is no economic activity and no taxable person status (This difference is also explained by M.M.W.D. Merkx & N.P. Arzini, ' *Handelen als vastgoedondernemer of als beheerder van privévermogen?*' (*Acting as a real estate entrepreneur or as a manager of private assets?*), *MBB* 2023/34, section 3.2). The threshold of being a taxable person for the exploitation of property, therefore, is lower compared to other activities. This is also demonstrated when we compare *Gemeente Borsele* (CJ 12 May 2016, C-520/14 *Gemeente Borsele*, ECLI:EU:C:2016:334) with *Lajvèr* (CJ 2 June 2016, C-263/15 *Lajvèr*, ECLI:EU:C:2016:392). Where, in *Gemeente Borsele* (C-520/14), the fact that only 3% of the costs made by the municipality were covered by parent's contribution to pupil transport resulted in no economic activity, in *Lajvèr* (C-263/15), the fact that the investments of the latter were largely financed by aids granted by Hungary and the European Union did not have a bearing on whether or not its activity could qualify as an economic activity (see in particular paragraph 38 of that judgment). The low threshold for the exploitation of a property to be regarded as an economic activity renders the Italian legislation even more disputable in the case at hand.

VAT deduction and abuse of law

If a person has the status of a taxable person and uses goods and services purchased for their taxed output, that person has a right to deduct. There is no rule stating that in order to deduct VAT, the income must exceed a certain threshold, as the CJ confirms in the present judgment. As a second step in the answer to the second question, the CJ addressed whether the provision could be justified because it prevents possible tax evasion, avoidance and abuse.

The CJ's ruling in this respect, in my view, simply basically needs to be understood in the sense that the income criterion used by Italy is unsuitable to demonstrate an abusive practice. In my view, the CJ rightfully comes to this conclusion. From the facts of the case, it does not become entirely clear what the tax advantage from a VAT standpoint would be. Rather, what becomes clear from the AG Opinion in the present case is that the provision deals with situations with the sole purpose of obtaining advantageous tax conditions for the management of shareholders' assets. If the group company to which the assets are leased (in this case, Feudi) has a full right to deduct VAT, I do not see any tax benefit - from a VAT perspective - from charging low fees for services provided. There may be other benefits for the shareholders of Feudi, benefiting from a higher

profit because of low costs. However, these other benefits cannot result in the conclusion that there is an abusive practice for VAT (cf. CJ 11 November 2021, C-281/20 *Ferimet*, ECLI:EU:C:2021:910, paragraph 59). In my view, the mere fact that the costs exceed the turnover achieved, even if viewed over a longer period of time or even the entire lifespan of a person, does not, by definition, mean that there is an abusive situation. The VAT Directive even demonstrates this implicitly. For example, companies that use subsidies to finance their activities, are in such a position on a permanent basis. Article 174(1) of the VAT Directive demonstrates that such a person is still to be regarded as a taxable person since the Member States can determine that subsidies that are not directly linked to the price of goods or services need to be included in the denominator of the deductible proportion. Next to the fact that, in my view, the costs being greater than the turnover of the output transactions is not by definition a tax advantage the grant of which would be contrary to the purpose of the VAT Directive, this fact also does not demonstrate by definition that the essential aim is to obtain that tax advantage.

Different from the CJ, AG Collins concluded that the Italian legislation is in line with Article 273 of the VAT Directive and does not infringe the principles of neutrality and proportionality because of the adequate possibility for the taxable person to provide proof to displace the presumption. This applies under the condition that the standard of proof required to displace the presumption is not excessively high. AG Collins referred to *Fontana* (CJ 21 November 2018, C-648/16, *Fontana,*ECLI:EU:C:2018:932). In this case, a sector study was used to determine turnover. According to the CJ, this was allowed if the sector study was correct, reliable and up to date. The difference between the turnover determined based on the study and the turnover reported by the taxable person can only give rise to a rebuttable presumption. The taxable person must be able to challenge both the accuracy of the sector study and/or the relevance of that study for the purposes of the assessment of his specific situation. Adjustment of the VAT due based on the sector study was done only in the case of significant differences between the turnover declared and the study. The CJ, on the other hand, referred to *Ferimet* (C-281/20) in which it stated that entitlement to the right to deduct VAT can only be refused if the facts have been established to the requisite legal standard, otherwise than by assumptions. First of all, it must be noted that different from *erimet* (C-281/20) and the present case, *Fontana* (C-648/16) deals with taxable turnover. Secondly, in the *Fontana* (C-648/16), a comparison is made with an average turnover in a certain sector, which is much more concrete than the situation where, more generally, the income does not exceed a certain percentage of the value of the assets. As mentioned above, the Italian legislation, in my view, does not cover situations where a tax advantage contrary to the purpose of the VAT Directive is obvious and also does not necessarily cover cases where the essential aim is to obtain that tax advantage. In my view, the burden of proof that these conditions have been met should be on the tax administration. Since the mere fact that costs are greater than the turnover does not demonstrate that these two conditions are met, the burden of proof should not be put on the taxable person to demonstrate that there are objective reasons why his turnover does not exceed a certain threshold (*contra* Opinion of AG Collins in the case at hand, paragraphs 43-45).

Holding companies

Even though the case at hand does not deal with holding companies, I wish to address them specifically because their position could be affected by the Italian legislation at play. Advocate General Kokott pointed out in her Opinion in *Ryanair* (AG Opinion of 3 May 2018, C-249/17, *Ryanair*, ECLI:EU:C:2018:301) that it is completely irrelevant to what extent management services are provided by a holding company to its subsidiaries. This could create a discrepancy between deductible VAT (on costs made by the holding company) and VAT due on output transactions. AG Kokott even speaks about artificial constructions where holding companies claim a substantial amount of VAT deduction because of management services that are provided against consideration regardless of the amount of that consideration (Opinion of 3 May 2018, C-249/17 *Ryanair*, ECLI:EU:C:2018:301, paragraphs 28 and 29).

In my view, it can be questioned whether the situation addressed by AG Kokott is undesirable. In this respect, it is important to note that a holding company has a certain function within a group of companies, and for that reason, in my view, the CJ applies a wide interpretation of the taxable person status for holding companies, where each type of service supplied to a subsidiary provides that status (CJ 5 July 2018, C-320/17 *Marle*

Participations, ECLI:EU:C:2018:537). Even though there is a wide interpretation of the CJ in this regard, there are limitations. In case no open market value is applied, and the subsidiary does not have a full right to deduct VAT, Article 80 of the VAT Directive allows Member States to apply the open market value to the services because of management, ownership, membership, financial and/or legal ties in that situation. As becomes clear from *Finanzamt R* (CJ 8 September 2022, C-98/21 *Finanzamt R*, ECLI:EU:C:2022:645), a holding company cannot deduct VAT on costs that do not have a direct and immediate link with its own activities but instead, with those of its subsidiary. Where a group company, e.g., a holding company, decides to provide some of its services for free while others against a value that is in conformity with the open market value, it will, in principle, be faced with a limitation of deduction for providing services free of charge (*Hong Kong* (CJ 1 April 1982, C-89/81 *Hong Kong*, ECLI:EU:C:1982:121) and *Securenta* (CJ 13 March 2008, C-437/06 *Securenta*, ECLI:EU:C:2008:166)). Where a holding company decides not to provide services at all, with the exception of a small service against a consideration in conformity with the open market value, I am of the view that the position of a holding company within a group of companies justifies the right to deduct VAT, even though it may be able to deduct more VAT than it is due.

Last but not least, I should like to note that a similar issue arose in the Netherlands, where a company was providing services for an amount of 1,000 Dutch guilders, while it deducted 40,733 Dutch guilders in VAT. The Dutch Supreme Court ruled that in order to establish that the consideration is of a symbolic value which results in no economic activities taking place, the Court of Appeal should have established what services were provided to the participation and whether the consideration paid for those services was of a symbolic nature or not. The circumstance that the difference between the total costs incurred by it and the consideration it receives is extremely large, both absolutely and relatively, is not relevant according to the Dutch Supreme Court (Dutch Supreme Court, Decision No. 43927 of 11 July 2008, ECLI:NL:HR:2008:BD6833).

Transfer of going concern

As a final note, I wish to address the fact that becomes clear from paragraph 5 of the AG Opinion in the case at hand that the Italian tax authorities have taken the position that the lease of the property by Vigna to Feudi is to be regarded as the transfer of part of a business and, therefore, falls outside the scope of VAT. The CJ, however, ruled in *Mailat* (CJ 19 December 2018, C-17/18, *Mailat*, ECLI:EU:C:2018:1038) that the transaction by which an immovable property which was used for commercial purposes is let with all capital equipment and inventory items necessary for that use, even if the lessee pursues the activity of the lessor under the same name, cannot be regarded as the transfer of a going concern which is out of scope of VAT under Articles 19 and 29 of the VAT Directive.

Footnotes

[1] Language of the case: Italian.