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DEDUCTION OF VAT AND SUPPLIER FACTICITY IN THE LIGHT OF THE DECISION-MAKING ACTIVITY OF THE CJEU[1]

Abstract

The topic of tax evasion is still very relevant even at the time of dealing with the lingering economic consequences of the COVID-19 pandemic, at the time of the war in Ukraine and dealing with other associated phenomena, such as high inflation, price increases and others. The fight against tax evasion is often accompanied by the fact that many taxpayers are denied their rights, and often unjustly. More and more, such situations can be encountered in the field of VAT, which is also confirmed by the relatively rich case law of the Court of Justice of the European Union in the given area. The aim of the presented paper is to identify the fundamental problems of VAT deduction in the process of proof in the tax administration, to analyse selected decisions of the Court of Justice of the European Union and to synthesize knowledge applicable to taxpayers in the procedural defence of their rights and interests protected by law. We used several methods of writing scientific papers of this kind in

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processing the mentioned issue, but mainly analysis, synthesis, and partially also the comparative method, which we applied in mutual contexts.

Key words: Tax Law, VAT, deduction of VAT, facticity of supplier.

JEL Classification: K34

1. Introduction

Nowadays, when states have to deal with the economic consequences after the peak of the COVID-19 pandemic, with the war conflict in Ukraine and with other associated phenomena (high inflation rate, price increases, etc.), the topic of tax evasion is slightly in the background and does not it receive so much attention, although it must be added that this problem still exists here. The economic consequences of the mentioned phenomena will inevitably be remedied by finding new sources of income for state budgets[2] and by streamlining tax collection (including prevention of tax evasion).

Tax evasion is a problem that has existed in society since time immemorial, and one might agree that tax evasion is as old as taxes themselves [Babčák 2015: 50 et seq.]. Individuals have always tried to do activities aimed at minimizing their tax liability, by actions that could be in accordance with the law or, on the contrary, by actions that are *contra legem*. Tax evasion that are contra legem are, of course, undesirable and there is a place for the initiatives of states or national organizations (especially the EU or OECD), which aim to prevent them. The situation is different in the case of legal tax evasion.

Some authors tend to refer to the right to minimize tax liability as a natural right of an individual [Čollák 2016: 39-58]. Others say that minimizing tax liability is a natural instinct of a taxpayer [Gomułowicz, Malecki 2008: 273]. Action aimed at reducing tax liability is only a kind of expression of the economic theory of rational behaviour of subjects [Čollák 2016: 39-58]. After all, everyone has the right to pay tax only in the amount in accordance with the relevant legal regulations while respecting procedural standards. Here, however, several conflicting situations occur in practice.

The protection of the fiscal interests of the state is natural within tax-legal relations, and they are superior to the personal-property interests of individuals, which are more economic than legal in nature. However, in application practice, it is possible to encounter more and more cases where the rights of individuals are denied under the guise of protecting the fiscal interests of the state, and it should be added that it is often unjustified, which is an

[2] Digital (Industrial) Revolution 4.0 brings many phenomena (digital services, crypto-assets, etc.) where potentially high tax revenues are located.

undesirable phenomenon that has a fundamentally negative impact, especially on the business environment.

Tax evasion affects both the area of direct and indirect taxes. It is therefore clear that the scope of the problem raised is very broad. In the article in question, we will limit our attention to VAT, namely from the point of view of taxpayers, what problems they face when deducting VAT in the process of proof in tax administration, and we will also point to selected decisions of the Court of Justice of the European Union (hereinafter also referred to as "CJEU"), which are applicable in their procedural defence.

The aim of the presented paper is to identify the fundamental problems of VAT deduction in the process of proof in the tax administration, to analyse selected decisions of the CJEU and to synthesize knowledge applicable to taxpayers in the procedural defence of their rights and interests protected by law.

We used several methods of writing scientific papers, but mainly analysis, synthesis, and partially also the comparative method, which we applied in mutual contexts.

2. Selected problems of the process of evidence in VAT deduction

The process of evidence is an integral part of all kinds of legal processes in an effort to find out the factual, or in some cases, the real state of affairs. This inseparable phase of the proceedings essentially creates a factual basis for a future decision, which usually completes legal processes. The above also applies to tax administration, which is a concept that includes all procedures, or activities (including tax proceedings) aimed at correct assessment of tax and ensuring its payment.[3]

In the field of taxes, the realization of the law is characteristic mainly in the form of the so-called **self-application**, which in practice means that individuals decide for themselves which legal norm they will apply in their tax situation and calculate their own tax liability, which they then declare and pay within the deadlines specified in the relevant tax-legal provisions regulating this and that tax [Štrkolec, Sábo 2016: 541-550]. In most cases, the implementation of tax-legal norms in real life takes place without power interference from the state [Sábo 2020: 12-14].

[3] This can be deduced from § 2 letter a) of Act no. 563/2009 Coll. on tax administration (Tax Procedure Code) and on the amendment of certain laws, as amended, which defines the term tax administration.

Evidence in the field of taxation can be understood as *"(...) a procedural institute regulated by tax procedural law, the aim of which is to obtain objective knowledge and facts decisive for the correct assessment of the tax* [Babčák 2019: 570]." This institute has certainly already been encountered by a number of VAT payers who have claimed for deduction of VAT in accordance with § 49 et seq. Act No. 222/2004 Coll. on value added tax, as amended (hereinafter referred to as the *"VAT Act"*).

The VAT deduction institute is the basic mechanism on which the VAT system is built, and which is supposed to differentiate it from the earlier turnover tax, which, according to earlier opinions, violated the realization of freedoms in the single internal market within the territory of the EU member states and was also supposed to contribute to the elimination of tax control and formalities at national borders.

Deduction of VAT is related to the characteristic features of VAT, namely **transparency**.[4] This characteristic of VAT is manifested not only in relation to entrepreneurs (VAT payers), but also in relation to consumers. *"This mechanism allows that at each stage of production / processing, disposal or sale, only that part of the value added by the taxpayer to the previous value is taxed* [Babčák 2019: 143]." Thus, this eliminates the negative effect that would be tax packing.

The essence of this mechanism is that the VAT payer can deduct the input tax from the output tax. Output tax represents the total tax amount of a specific VAT payer for the relevant tax period, and input tax is the amount of tax deducted for the relevant tax period.

According to § 49 par. 1 of the VAT Act states that: *"The right to deduct tax from a good or service arises for the payer on the day when the tax liability arose for this good or service* [VAT Act, § 49 par. 1]." The law therefore grants the right to deduct tax in relation to the good or service.

A VAT payer who wants to claim a VAT deduction must prove formal and material prerequisites/conditions, which also follows from case law. Specifically, it is possible to point to the example of the **Judgment of the CJEU in case C-324/11 Gábor Tóth** of 6th December 2012, ECLI:EU:C:2012:549, in which the existence of the relevant prerequisites for VAT deduction was confirmed. The formal assumption is fulfilled if the VAT payer has an invoice for the taxable transaction, delivery notes or other documents relating to the taxable transaction in question. On the contrary, the material assumption is given if the performance was actually carried out and it was also used by the VAT payer in his further business activity.

[4] Other characteristics characteristic of VAT includes its neutrality and preventive effect against tax evasion, although this characteristic should be understood relatively (see more: Babčák 2015: 142.).

In practice, there are more and more cases where, despite proving the prerequisites in question, the tax authorities do not admit the right to deduct VAT due to failure to prove the actual supplier of the taxable supply. These will be situations where the VAT payer (from a procedural point of view of tax payer) submits to the tax administrator during the tax control and during the performance of other procedural actions in the tax administration all the documents related to the taxable performance, at the same time proves that the taxable performance (e.g. work carried out on the basis of a contract) was actually carried out, but it does not prove who was its actual supplier (usually it is about other links in the chain and the direct supplier is an entity without the relevant material and personnel background / substrate).

In this context, it seems necessary to point out on example of Slovak Republic on the provisions regulating the **burden of proof**, which can be found in Act no. 563/2009 Coll. on tax administration (Tax Procedure Code) and on amendments to certain laws as amended (hereinafter referred to as *"Tax Procedure Code"*). According to § 24 par. 1 Tax Procedure Code, we quote: *"The taxpayer proves*

a) *facts that have an impact on the correct determination of the tax and facts that he is obliged to state in the tax return or other submissions that he is obliged to submit according to special regulations*,

b) *the facts, the proof of which was called upon by the tax authority during tax administration*,

c) *credibility, correctness and completeness of records and records that he is obliged to keep* [Tax Procedure Code, § 24 par. 1]."

It is the inquiry right of the cited provision of the Tax Procedure Code that appears to us to be dangerous in the matter of dividing the burden of proof between the taxpayer and the tax authority in the tax administration process. In practice, one may encounter its overuse, which as a result leads to a negative phenomenon, which is the delimitation of the burden of proof of the taxpayer, who is unable to prove more and more facts that have been called upon by the tax authority and which are outside his sphere of disposition (relationship between the suppliers of the taxpayer, the VAT payer paying the right to deduct VAT, and the so-called actual supplier who actually performed a taxable transaction for the benefit of the taxpayer).

Another tool that is overused in the fight against VAT evasion is the so-called **general anti-abuse rule** (also known as GAAR[5] to the scientific and professional community). There was no doubt about the existence of the given instrument even before its explicit enshrining in the Tax Procedure Code, which was confirmed not only by national[6] but also by European jurisprudence.[7] In the conditions of the Slovak Republic, we have been dealing with this "prohibition" rule since 2013, even though it has been slightly amended since its legal incorporation within the Tax Procedure Code.[8] The adoption of the statutory GAAR represented a kind of reaction to the absent judicial control over tax avoidance practices. Simply put, it was an expression of dissatisfaction with the exercise of judicial power in the given area [Bonk 2018: 52].

The current wording of § 3 par. 6, the second sentence of the Tax Procedure Code is as follows: *"For a legal act, several legal acts or other facts carried out without a proper business reason or another reason that reflects economic reality, and at least one of the purposes of which is to avoid tax obligations or to obtain such a tax advantage for which otherwise the taxpayer would not be entitled, it is not taken into account in tax administration* [Tax Procedure Code, § 3 par. 6]." The Slovak general rule against abuse shows several deviations from the European regulation, which have already received adequate attention from the scientific community [Bonk 2018: 52].

From the above-mentioned provision of the Tax Code Procedure, it basically follows that if even one of the purposes of a business transaction was obtaining an unauthorized tax advantage, then the tax authority should not take it into account, and it is necessary to add in one breath that in practice this often happens, even with the tax authority's reference to this provision as part of the justification for his decision. In some cases, this tool does not lead to the elimination of the abuse of the law in the field of taxation, but, on the contrary, is itself abused by the relevant tax authority.

Such a procedure by tax authorities (or other competent entities, e.g. decision-making within the corrective procedure) is not correct and leads, as we have already mentioned above, to the disruption of the business environment, when business entities are unable to assert their

[5] The abbreviation originates from the English designation of the measure in question, namely the General Anti Abuse Rule.
[6] See more: e.g. Judgment of the Supreme Court of the Slovak Republic, no. 5 Sžf/66/2011.
[7] The need to fight against actions that abuse the law was already emphasized in the Judgment of the CJEU in case C-255/02 Halifax et al. of 21st February 2006, ECLI:EU:C:2006:121 for the area of indirect taxation and in the Judgment of the CJEU in the case C-196/04 Cadburry Schweppes plc. and Cadbury Schweppes Overseas Ltd of 12th September 2006, ECLI:EU:C:2006:544 in the area of direct taxation.
[8] The changes were started by the adoption of the ATAP package (from the English words Anti-Tax Avoidance Package).

rights, which result from the relevant tax-legal regulations. Each situation needs to be assessed individually, including through the lens of certain limits that have been formulated by the jurisprudence of the CJEU and national courts. We will refer to selected decisions of the CJEU in the next text of this article.

3. The response of the CJEU to the activities of the tax authorities

The jurisprudence of the CJEU shows that the caution of tax authorities when it comes to deducting VAT in an effort to prevent tax evasion is a problem not only in the conditions of the Slovak Republic, but also in other EU member states, which resulted in several decisions creating certain limits on the issue of redistribution burden of proof when applying the institution in question. Due to the fact that several decisions have been devoted to the mentioned issue, in the following text we will point out selected ones that can be considered as key in judicial development and on which tax entities that are VAT payers can rely on their procedural defence in the process of proving tax administration.

Judgment of the CJEU in the joint cases C-354/03, C-355/03 and C-484/03 Optigen Ltd and others

The first of them is the **Judgment of the CJEU in the joint cases C-354/03, C-355/03 and C-484/03 Optigen Ltd and others** of 12th January 2006, ECLI:EU:C:2006:16. The business activity of Optigen Ltd and other affected entities in the subject proceedings consisted in the purchase and resale of microprocessors. They purchased the goods from a company based in the United Kingdom of Great Britain and Northern Ireland and sold to entities (buyers) located in another member state. The aforementioned companies subsequently claimed the right to deduct VAT in different amounts depending on the taxable transactions made and received. The claimed VAT deduction claimed by Optigen Ltd and others was not granted in the required amount due to the fact that some of the transactions were allegedly part of supply chains in which the defaulting entity was, and whose participation evoked the fraudulent nature of such a chain. In this context, the CJEU also used the term "carousel" to describe such a situation.

Optigen Ltd and other interested companies used national procedural means to protect their rights and legally protected interests, which were granted to them by the local legislation in the given situation. The national court also agreed with the argumentation of the relevant tax authority (Commissioners of Customs & Excise) and added that: *"Accordingly, the purchases were not supplies used or to be used for the purposes of any economic activity and the*

sales were not supplies made in the course of an economic activity for the purposes of VAT [Judgment of the CJEU in the joint cases C-354/03, C-355/03 and C-484/03 Optigen Ltd and others, point 14 in fine]." The decision of the court of first instance was subsequently challenged by an appeal, which was decided by the High Court of Justice, which subsequently asked the CJEU several preliminary questions.

The CJEU proceeded to a certain correction of the preliminary questions asked, and essentially by answering the first one, the other questions asked by the High Court of Justice were also answered. *"By the first question in both cases, the referring court seeks essentially to know whether, first, transactions such as those at issue in the main proceedings, which are not themselves vitiated by VAT fraud, but which form part of a chain of supply in which another prior or subsequent transaction is vitiated by such fraud, without the trader engaged in the first transactions knowing or having any means of knowing, constitute supplies of goods or services effected by a taxable person acting as such and an economic activity within the meaning of Articles 2(1), 4 and 5(1) of the Sixth Directive and, second, whether, in such circumstances, the right of that trader to deduct input VAT may be limited* [Judgment of the CJEU in the joint cases C-354/03, C-355/03 and C-484/03 Optigen Ltd and others, point 29]."

The CJEU answered the preliminary question in this way as follows: *"Transactions such as those at issue in the main proceedings, which are not themselves vitiated by value added tax fraud, constitute supplies of goods or services effected by a taxable person acting as such and an economic activity within the meaning of Articles 2(1), 4 and 5(1) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment, as amended by Council Directive 95/7/EC of 10 April 1995, where they fulfil the objective criteria on which the definitions of those terms are based, regardless of the intention of a trader other than the taxable person concerned involved in the same chain of supply and/or the possible fraudulent nature of another transaction in the chain, prior or subsequent to the transaction carried out by that taxable person, of which that taxable person had no knowledge and no means of knowledge. The right to deduct input value added tax of a taxable person who carries out such transactions cannot be affected by the fact that in the chain of supply of which those transactions form part another prior or subsequent transaction is vitiated by value added tax fraud, without that taxable person knowing or having any means of knowing* [Judgment of the CJEU in the joint cases C-354/03, C-355/03 and C-484/03 Optigen Ltd and others, point 57]."

The cited decision basically means that each transaction within a fraudulent chain must be assessed separately, with the fact that entities that are part of it unknowingly are not

responsible for a transaction of a fraudulent nature. Therefore, if the tax administrator (or other tax authority) is of the opinion that the controlled transactions are fraudulent, it is he who bears the burden of proof of this fact.

Judgment of the CJEU in the joined cases C-439/04 and C-440/04 Axel Kittel

The **Judgment of the CJEU in the joint cases C-439/04 and C-440/04 Axel Kittel** of 6th July 2006, ECLI:EU:C:2006:446, can be considered as a turning point, in which the so-called Axel Kittel test was formulated. This judgment is often cited not only by the scientific but also by the professional community in the tax field and given that it is referred to in other decision-making activities, especially by the CJEU, its conclusions went beyond the scope of just one proceeding. The factual side of these connected things is no less interesting.

The preliminary ruling in question concerned two national proceedings in Belgium. One of the companies involved was Ang Computime Belgium. This entity bought and resold computer components. The local tax authority concluded that this company *"(...) had knowingly participated in a VAT 'carousel' fraud intended to recover one or more times amounts of VAT invoiced by suppliers for the same goods and that the supplies effected to Computime were fictitious* [Judgment of the CJEU in the joint cases C-439/04 and C-440/04 Axel Kittel, point 10]." This resulted in Ang Computime Belgium not being entitled to deduct VAT on such taxable supplies. Several proceedings followed based on the filed remedies, which culminated in the filing of an appeal to the Cour de cassation by Mr. Kittel, who was the bankruptcy administrator in the case in question. It was the Cour de cassation that turned to the CJEU with a preliminary question as part of the appeal procedure.[9]

The CJEU slightly modified the preliminary questions asked in such a way that *"(...) the referring court asks essentially whether, where a recipient of a supply of goods is a taxable person who did not and could not know that the transaction concerned was part of a fraud committed by the seller, Article 17 of the Sixth Directive must be interpreted as meaning that it precludes a rule of national law under which the fact that the contract of sale is void, by reason of a civil law provision which renders the contract incurably void as contrary to public policy on the ground that the basis of the contract is unlawful by reason of a matter which is attributable to the seller, causes that taxable person to lose his right to deduct that tax* [Judgment of the CJEU in the joint cases C-439/04 and C-440/04 Axel Kittel, point 27]."

[9] We have to add that the preliminary proceedings also related to another matter in which the company Recolta appeared, which, like the company Ang Computime Belgium, was suspected of participating in a fraudulent chain.

When assessing this preliminary question, the court, as we mentioned above, formulated the so-called Axel Kittel text. This test contains questions that must be answered when assessing a chain of fraud. Specifically, these are the following questions:

1. is there a tax loss?
2. if so, is this the result of tax fraud?
3. if there was a tax fraud, were the business transactions of the taxpayer connected with this fraud?
4. if the business transactions of the taxpayer were associated with fraud, did this payer know (or should have known) about it?

The ideal situation should therefore look like the tax administrator, or another competent authority within the justification of its decision should answer each of the above-mentioned questions and only after answering them in the affirmative can such a tax authority come to the conclusion that the payer was part of some fraudulent chain and therefore not grant him the claimed right to deduction VAT (or for the return of an excessive deduction, if he incurred a negative tax liability).

Resolution of the CJEU in case C-610/19 Vikingo Fővättörä Kft.

Among the more recent ones, we can refer to the **Resolution of the CJEU in case C-610/19 Vikingo Fővättörä Kft.** of 3rd September 2020, ECLI:EU:C:2020:673. This decision was already directly related to the issue of facticity of the supplier when claiming the right to deduct VAT in accordance with the relevant legal regulations. Also interesting is the state of facts and the procedure of the judicial authorities, when the court of first instance did not agree with the opinion expressed by the local Supreme Court and, due to persistent doubts, turned to the CJEU with prejudicial questions.

The company Vikingo focused in its business activity on the wholesale of sweets and candies. As part of its business activity, it secured packaging and filling machines from another Hungarian company (Freest Kft.) on the basis of two contracts with agreed delivery on 21st May 2012 and 30th March 2013. The contracts allowed the use of subcontractors for fulfilment, which Freest Kft. also used and secured the machines from another entity, which in turn acquired them from another company. Vikingo deducted the input VAT paid from the taxable transactions in question, which led the tax authority to reject the claimed claim on the grounds that *"(...) on the basis of findings made during related checks and of the statements of the directors of the companies involved in the supply chain, that the machines had in fact been purchased from an unknown person, with the result that those transactions had not*

taken place either between the persons identified on the invoices or in the manner indicated on them [Resolution of the CJEU in case C-610/19 Vikingo Fővättörä Kft., point 24]." This led to the initiation of proceedings within the structure of the tax authorities there, but also in the local courts until, in the case in question, the national court turned to the CJEU with prejudicial questions.

The CJEU came to fundamental conclusions applicable to the question of assessing the facticity of the supplier when deducting VAT when assessing the preliminary questions posed by the national court. According to the CJEU, European law,[10] in connection with principles such as tax neutrality, efficiency and proportionality, should be interpreted in such a way as to prevent national practice, on the basis of which the relevant tax authority rejects a taxable person's right to deduct VAT, due to implausibility invoice because:

1. the person who issued the invoice could not produce or deliver the said goods due to a lack of necessary material and human resources, i.e. the goods were actually acquired from another person whose identity was not determined,
2. national legal regulations in the field of accounting were not observed,
3. the supply chain that led to the mentioned purchases was not economically justified, and
4. there were irregularities in some previous transactions that were part of this supply chain [Resolution of the CJEU in case C-610/19 Vikingo Fővättörä Kft., point 77].

In this context, the CJEU adds that: *"In order to provide a basis for such a refusal, it must be established to the requisite legal standard that the taxable person actively participated in fraud or that that taxable person knew or should have known that those transactions were connected with fraud committed by the issuer of the invoices or any other trader acting upstream in that supply chain, which it is for the referring court to ascertain* [Resolution of the CJEU in case C-610/19 Vikingo Fővättörä Kft., point 77]."

Judgment of the CJEU in case C-154/20 Kemwater ProChemie s.r.o.

We consider the **Judgment of the CJEU in case C-154/20 Kemwater ProChemie s.r.o.** of 9th December 2021, ECLI:EU:C:2021:989 is particularly important when it comes to proving the actual supplier. The matter in question related to domestic court proceedings, which stemmed from the factual situation when Kemwater ProChemie s.r.o. the right to deduct VAT paid for advertising services provided during golf tournaments held in 2010 and 2011

[10] Specifically, this is Council Directive 2006/112/EC of 28th November 2006 on the common system of value added tax.

was not granted. Even in this case, the tax administrator did not essentially question the actual performance of such performance (advertising services), but doubts were expressed in relation to it, who actually performed such performance. The Regional Court in Prague granted the administrative action of Kemwater ProChemie s.r.o., which led the Financial Directorate of the Czech Republic to file a cassation complaint on the Supreme Administrative Court of the Czech Republic, which then turned to the CJEU with preliminary questions.

The submitted questions were connected by the CJEU due to answering them together. According to the CJEU, the national court (Supreme Administrative Court of the Czech Republic) essentially asks whether *"(...) Directive 2006/112 must be interpreted as meaning that the right to deduct input VAT must be refused, without the tax authorities having to prove that the taxable person committed VAT fraud or that he or she knew, or ought to have known, that the transaction relied on to establish the right of deduction was connected with such fraud where, **the true supplier of the goods or services concerned not having been identified**, that taxable person fails to adduce proof that that supplier had the status of taxable person* [Judgment of the CJEU in case C-154/20 Kemwater ProChemie s.r.o., point 23]."

The CJEU concluded that *"(...) the right to deduct input value added tax (VAT) must be refused, without the tax authorities having to prove that the taxable person committed VAT fraud or that he or she knew, or ought to have known, that the transaction relied on to establish the right of deduction was connected with such fraud, where, the true supplier of the goods or services concerned not having been identified, that taxable person fails to adduce proof that that supplier had the status of taxable person, provided that, taking into account the factual circumstances and the evidence produced by that taxable person, the information needed to verify that the true supplier had that status is lacking* [Judgment of the CJEU in case C-154/20 Kemwater ProChemie s.r.o., point 43]."

It follows from the decision in question that the right to deduct VAT must always be granted if the substantive legal conditions are met, regardless of any failure to meet the formal conditions, which primarily means the requisites of the tax document. In the event that the actual supplier of the taxable supply is not indicated on the relevant tax document (invoice), then in accordance with the expressed opinion of the CJEU, the taxpayer must prove that the supply was provided by a person identified for tax purposes (VAT payer).

4. Conclusion

Several conclusions and limits in the area of VAT deduction flow from the selected decisions of the CJEU, which should be respected by the relevant tax authorities across the EU

member states in their decision-making activities. Only in this way can the protection of the rights and legally protected interests of taxpayers be guaranteed. At this point, we will summarize the formulated points, which should be authoritative in application practice in order to avoid the outlined, selected problems when deducting VAT.

In the context of the above-analysed decisions of the CJEU, the following facts should be respected:

- each transaction within the fraudulent chain needs to be assessed separately, with the fact that entities that are part of it unknowingly are not responsible for a fraudulent transaction,
- tax administrators, or public authorities in general should always proceed when assessing a specific situation in terms of the so-called Axel Kittel test and thoroughly answer all the questions contained in it,
- the possible unreliability of invoices due to a dispute regarding the factual supplier of the taxable supply cannot automatically lead to the rejection of the claim for VAT deduction for the aforementioned reason,
- the right to deduct VAT must always be granted if the substantive legal conditions are met, regardless of any non-fulfilment of formal conditions.

Only by strictly respecting these conclusions can it be concluded that the relevant tax authority acted in accordance with the jurisprudence of the CJEU, and any decision that may result in tax proceedings will thus be legally compliant. However, the practice of national authorities as well as courts so far shows the opposite, and the expressed conclusions or limits of the CJEU are often left unnoticed, which is, of course, not correct and it is necessary to appeal for their strict observance.

However, in the conditions of the Slovak Republic, the situation may change in connection with the establishment of the Supreme Administrative Court of the Slovak Republic, within which its respective senates will also specialize in the tax-legal agenda, and there is hope that it will unify the jurisprudence of lower courts and it will contribute to the consistent respect of the jurisprudence of the CJEU, which in many cases is rather to the benefit of the taxpayer, which we evaluate very positively.

The Constitutional Court of the Slovak Republic has already dealt with the issue in question in the framework of proceedings on complaints by natural persons or legal entities in Resolution IV. ÚS 86/2022 dated 15th February 2022. Despite the fact that the constitutional complaint was rejected as clearly unfounded, the fact that it was included in the Overview of selected decisions of the Constitutional Court of the Slovak Republic for

the period III./2022 testifies to the importance of this decision. As part of it, the conclusions (among others) from the above analysed decisions of the CJEU in the case of Vikingo Fővállalkozó Kft. and Kemwater ProChemie, s.r.o..

In it, the Constitutional Court of the Slovak Republic stated that the mere fact that the suppliers of the taxpayer (VAT payer) are non-contact cannot deprive the VAT payer of the right to deduct VAT from such performance. These facts are outside the scope of the taxpayer's disposal, and therefore the burden of proof cannot be transferred to him. It is here that one can see the application of the conclusions judged in the case of Vikingo Fővállalkozó Kft.

As the Constitutional Court of the Slovak Republic goes on to state, with which we fully identify, *"The financial administration does not have to have an idea of the exact course of individual transactions, nor does it have to acquire the conviction that the chosen business model of the taxpayer is optimal or justified, while the existence of various doubts cannot automatically transfer, if he does not demonstrate participation in tax fraud or knowledge of it, to the taxpayer* [Resolution of the Constitutional Court of the Slovak Republic, no. IV. ÚS 86/2022, point 28]."

However, it is natural that meeting only the formal conditions for applying the right to VAT deduction would not be sufficient, and it is only up to the taxpayer to meet and prove the prerequisites according to § 49 et seq. of the VAT Act. However, it is essential that *"If the taxpayer fulfils the substantive legal conditions, deficiencies in the fulfilment of formal conditions may not automatically mean a negative consequence for the taxpayer* [Resolution of the Constitutional Court of the Slovak Republic, no. IV. ÚS 86/2022, point 26]." Here the Constitutional Court of the Slovak Republic confirmed what was stated by the CJEU in the case of Kemwater ProChemie, s.r.o..

At this point, we express our hope that other public authorities (including tax administration authorities) will join the decision-making activities of the Constitutional Court of the Slovak Republic and thus the rights of taxpayers, including the controversial right to deduct VAT, will be truly fulfilled.

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