https://doi.org/10.60923/issn.2036-3583/24127
ISSN 2036-3583

The right to deduct VAT in cases of fraudulent behaviour: some considerations on a recent CJEU ruling

Court of Justice of the European Union, Sec. V, 24 November 2022, Case C-596/21

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Submitted: June 18, 2025 – Accepted: December 13, 2025 – Published: July 15, 2026

Il diritto di detrazione dell'IVA nell'ipotesi di condotte fraudolente: alcune considerazioni a margine di una recente pronuncia della CGUE. Corte di Giustizia dell´Unione Europea, Sez. V, 24 Novembre 2022, Causa C-596/21

The Court of Justice of the European Union has recently ruled on the right to deduct input VAT in the context of chain transactions involving a fraudulent supply. In line with its well-established case law, the Court clarified that, where a transaction is carried out in furtherance of fraud, the right to deduct VAT must be denied whenever the final purchaser knew, or could not reasonably have been unaware, of the fraudulent conduct committed within the chain of supplies.

La Corte di giustizia dell'Unione Europea si è recentemente pronunciata in ordine al diritto di detrazione dell'IVA assolta a monte, nei casi di cessioni a catena in cui sia riscontrabile una operazione fraudolenta. I giudici europei hanno chiarito, nel solco di una giurisprudenza oramai consolidata, che, nell'ipotesi di negozio realizzato, come nella specie, in frode alla legge, debba essere negato il diritto di detrazione dell'imposta sul valore aggiunto ogniqualvolta il soggetto cessionario finale del bene sia a conoscenza (e non potrebbe non esserlo) delle condotte evasive poste in essere nel circuito di vendita del bene.

Keywords: Tax law; European Union; VAT; Right of deduction; Fraudulent transaction.

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SUMMARY: 1. Introduction. Classification of the facts, the questions referred for a preliminary ruling and the profiles of analysis – 2. The right to deduct VAT as a guarantee of neutrality of the tax and as a mechanism to safeguard the stability of the single market – 2.1 The denial (or limitations) of the right to deduct VAT in cases of fraudulent transactions – 2.2 Burden of proof and diligence payable in the context of transactions carried out in fraud of value added tax – 3.The effects of the refusal of the right to deduct VAT in full – 4. Concluding remarks

1. Introduction. Classification of the facts, the questions referred for a preliminary ruling and the profiles of analysis

In order to fully frame the issues that will be the subject of this comment, it is necessary to first frame the factual circumstances and the regulatory context of reference, in order to better understand the context in which the case under examination is inserted.

The question concerns three persons in Germany during the 2011 tax year: "A", a trader and applicant in the main proceedings, "C", who claimed to be "W", and "W" himself, an economic operator who had agreed to let "C" pretend to be him.

In particular, "A" intended to purchase a used vehicle to use it to carry out his business activity; so that he turned, for this purpose, to the seller "C", who formally presented himself as "W" and therefore as a subject different from what he really was.

In that context, "C" invoiced "W" the sum of EUR 52 100.84 plus EUR 9 899.16 in VAT for the supply of the second-hand motor vehicle and "W" then invoiced "A" the sum of EUR 64 705.88 in addition to EUR 12 294.12 in respect of VAT; then "W" delivered that invoice to "C", who in turn forwarded it to "A", the applicant in the main proceedings.

"A" thus corresponded to "C" the amount indicated on the invoice, for a total of EUR 77 000, of which EUR 64 705.88 was for the value of the goods and EUR 12 294.12 for VAT. "C" decided to retain all the amounts for himself and indicated, in his tax returns, a sale price of EUR 52 100.84 and EUR 9 899.16 by way of VAT, on the basis of the invoice issued by him to "W" (the original purchaser in agreement with "C"). Thus, in practice, "C" paid the Treasury an amount of EUR 9 899.16 by way of VAT, as shown in the invoice issued to "W"; the latter, for its part, had not recorded the sale either in its accounts or in its tax returns, thus not paying any tax in relation to it.

Trader "A", the transferee of the goods and the final purchaser, sought to claim deduction of the amount paid to "C" (which, in "A's mind", was "W") by way of input VAT: he therefore claimed deduction in the amount of EUR 12 294.12.

The German tax authorities ("Finanzamt M") refused to grant the right to deduct VAT relied on by "A", on the assumption that the latter could not have been unaware that the supply in which he had taken part was part of a scheme to deduct value added tax.

The dispute therefore pitted "A" and the German tax authorities against each other before the Nuremberg Tribunal.

The subject matter of the case evidently revolved around the right to deduct VAT in the case of chain supplies, in the event that the Tax Administration disputes the existence of a plan in fraud of the law of which the final purchaser (in this case, "A") is aware.[1]

1. Or, at least, was in a position to have knowledge of it.

https://doi.org/10.60923/issn.2036-3583/24127

Coming to the merits of the *procedure* according to the German court's arguments, it should be noted that the Nuremberg Tribunal classified the transactions carried out by the three economic operators in the context of various events considered to be "anomalous" and expressed itself in the sense of considering that "A" should have been aware of the fraudulent nature of the supply and of the subjective concealment between "C" and "W": according to the referring court, "A" should, therefore, have carried out adequate checks in order to probe the real intentions of the seller who had sold the property to him.[2]

Following a complex examination of German case-law and subsequent regulatory guidelines, the Nuremberg Tribunal questioned whether there was a right to deduct input VAT paid by claimant "A" and the extent of that right, i.e. the amount of the deductible amount.

On the one hand, the German court noted that (according to the order of 14 April 20221, C-108/20) the refusal of the right to deduct VAT would be part of a logic of combating evasive and avoidance transactions, regardless of whether or not the taxable person involved has benefited from an economic advantage;[3] on the other hand, it favoured a limitation of the refusal of the right to deduct VAT, in the sense that the refusal should relate only to the amount giving rise to damage to the public purse and not to the full amount of the tax paid: in the present case, in the face of that approach, "A" would be entitled to deduct EUR 9 899.16 and the excess would have to be refused, EUR 2 394.96 (amount corresponding to the actual tax damage suffered by the State, given by the arithmetical difference between EUR 12 294.12 and EUR 9 899.16).

In those circumstances, in view of the complexity of the case, the *Finangericht Nurnberg* decided to stay the proceedings and refer three questions to the CJEU for a preliminary ruling,[4] in which it sought to ascertain whether the second purchaser of an asset could be denied the right to deduct input VAT (in the chain of supply transactions), given that the latter should have known that the original seller (in this case, "C") had evaded VAT at the time of the first supply, even though the first purchaser (i.e. "W") was also aware of the fraudulent design; if the answer to the first question was in the affirmative, the referring court also asked for an examination of whether the non-recognition of the right to deduct VAT was limited, in terms of amount, to the damage suffered by the State as a result of the fraud or whether, on the contrary, it could exceed that amount.

Finally, if the answer to the second question was in the affirmative, the German courts asked the European courts to indicate how the loss of tax revenue was to be calculated.

2. The right to deduct VAT as a guarantee of neutrality of the tax and as a mechanism to safeguard the stability of the single market

Before proceeding to examine the arguments put forward by the European Union Courts regarding the aspects of doubt raised by the referring court in the context of the questions referred to the European Court for a preliminary ruling, it is necessary to recall the centrality of the right to

2. For example, by verifying the identity of the person from whom he was buying the vehicle.

3. Whether or not the transferee has benefited from the fraud or that, despite being aware of the abusive design orchestrated by others, he stands on the sidelines of it and does not become an active participant in it, is irrelevant: the right to deduct VAT must undoubtedly be denied. The state of culpable ignorance in which the passive subject finds himself does not excuse. This was clarified by the CJEU of 14 March 2006, Axel Kittel, in joined cases C-439/04 and C-440/04. We will return to this point below.

4. A clarification is needed on this point. Unlike what often happens in cases where national courts decide to refer the matter to the Court of Justice, in the present case the referring court did not indicate any legislative provision in which to frame the questions referred for a preliminary ruling; however, the Court of Justice, in paragraph 20 of the judgment in question, held that, in view of the subject matter dealt with and the rules governing it, the questions posed by the Nuremberg Tribunal concern the interpretation of Articles 167 and 168 of VAT Directive No 112/2006, read in the light of the generalised prohibition of fraud that finds space within the European Union, as a general principle of European law. See, to that effect, CJEU, 29 April 2021, Granarolo, case C-617/19.

https://doi.org/10.60923/issn.2036-3583/24127

deduct VAT for the purposes of the proper functioning of the single market; if only because it is a right that, As will be explained below, it is subject to limitations only in very exceptional cases.[5]

The right of economic operators to deduct VAT in the context of the production and exchange of goods and/or services is a fundamental principle of law, an integral part of the mechanism for the operation of that tax, which is intended to ensure that the tax burden falls solely on the final consumer and that, on the other hand, all commercial transactions carried out by the trader (or, on the other hand, all commercial transactions carried out by the trader (or, more generally, the person exercising arts and professions) do not suffer the economic burden of the tax: in this sense, as is well known, the de facto taxable person is, therefore, the final consumer or who, once the amount due by way of VAT has been paid, will not be able to recover it.[6]

In this sense, as noted over time by the copious literature that has intervened on the subject that concerns us and, more generally, on the mechanisms underlying the proper functioning of value added tax,[7] the latter acts as a neutral tax as it does not affect the intermediate steps of supply of goods or services since each operator subject to VAT, in recourse, recovers the amount paid, so as not to suffer any asset impoverishment.[8]

That said, it should be pointed out here that the neutrality of the tax in question favours, from a Union perspective, the free movement of goods and the mechanisms of competition, not distorted by the application of the tax on consumption, between Member States: these profiles emerge clearly from the preamble of Directive 2006/112/EC, where the neutrality of VAT is placed in close connection with the discipline of competition in the single market "*in the sense that, in the territory of each Member State, goods and services of the same type bear the same tax burden, regardless of the length of the production and distribution circuit*".[9]

From this perspective, taking into account the neutrality on which the operation of the tax is based,

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5. In that regard, reference is made to paragraph 24 of the judgment cited above, where it is pointed out that the prevention of evasion, avoidance and abuse is an objective encouraged by Directive 2006/112, with the result that it is for the national authorities and courts to refuse to grant the right of deduction if it is established that it is being misused. In this sense, see CJEU, 11 November 2021, Ferimet, case C-281/20, as well as the case-law cited therein.

6. These are the terms expressed by F. Gallo, *Nuove espressioni di abilità tributaria*, in Rassegna tributaria, 2015, 4, pp. 771-784.

7. There are numerous contributions in journals and monographs that contain interesting reflections on the subject. See, by way of example, L. Salvini, *Rivalsa, detrazione e abilità tributaria nell'imposta sul valore aggiunto*, in Riv. dir. trib., 1993, 1, pp. 1287-1292.; ID., *The deduction in the sixth Directive and in the domestic legal system: general principles*, in AA.VV., *Studi in onore di Victor Uckmar*, Padova, 1997, 2, p. 1046; P. Boria, *Diritto tributario europeo*, Milan, 2017, pp. 349 ff.; F. Amatucci, *Interpretative problems of the Sixth Directive and the state of harmonization of VAT in the Community context*, in Riv. Dir. Trib. Int., 2007, 3, pp. 157 ff.; M. Greggi, *Tax Fraud and Tax Neutrality in VAT Discipline*, in Dir. and Prat. Trib., 2016, 1, p. 121; L. Salvini, *L'imposta sul valore aggiunto,* in *Diritto Tributario delle attività economiche*, Giappichelli, 2019, pp. 258-259; R. Lupi, *Alla ricerca del «supplier», tra interlocutore giuridico ed esecutore materiale*, in Dialoghi trib*.*, 2012, pp. 397 ff.; M. Logozzo, *Il diritto alla detrazione dell'IVA tra principi comunitari e disposizioni interne*, in Rass. Trib., 2011, 4, pp. 1069 ff.; A. Comelli*, IVA comunitaria e IVA nazionale*, Padova, 2000; R. Miceli, G. Melis, *Le giudici interpretative della Corte di giustizia delle comunità europee nel diritto tributario: spunti dalla giurisprudenza relativa alle direttive sull'imposta sui conferimenti e sull'Iva*, in Riv. Dir. Trib., 2003, 2, pp. 111-178; L. Perrone, *L'armonizzazione dell'Iva: il ruolo della Corte di Giustizia, gli effetti verticali e l'affidamento del contribuente*, in Rass. Trib*.*, 2006, pp. 423 ff.; M. Basilavecchia, *The VAT deduction between form and substance*, in Corr. trib., 2019, 1, pp. 35-38.; P. Boria, *The legal nature of value added tax,* in Riv. Dir. Trib. Int., 2024, 1, pp. 7-28; P. Boria, *The function of the Court of Justice with respect to the formation of the EU tax system,* in European Tax Studies, 2021, vol. 11.; F. Amatucci, *Interpretative Problems of the Sixth Directive and the State of Harmonization of VAT in the Community Area*, in Riv. Dir. Trib. Int., 2007, 3, pp. 157 ff.

8. On this point, see the arguments put forward by the CJEU, in paragraph no. 30 of the Ferimet Judgment, which refers to the order of 3 September 2020, Vikingo Fővállalkozó, case C-610/19: quoting verbatim*,* "It should be remembered that the deduction system is intended to fully exempt the entrepreneur from the burden of VAT due or paid in the context of all his economic activities. The common system of VAT therefore ensures neutrality of taxation for all economic activities, whatever the purpose or results of those activities, provided that they are, in principle, themselves subject to VAT."

9. Preamble, no. 7, Directive no. 112 of 2006.

the right to deduct VAT arises under specific conditions.[10] In particular,

it is necessary that the economic operators involved are VAT taxable persons,[11] that there is a commercial transaction of supply of goods or services between the subjects in question, and that adequate accounting of the transaction itself is kept through the regular preparation of an invoice drawn up in accordance with the indications provided by the European directive.[12]

2.1. The denial (or limitations) of the right to deduct VAT in cases of fraudulent transactions

What has been said so far is necessary to understand the "pathological" profiles that characterize the case in question: it is necessary, that is, to ask what happens in the event that the VAT taxable person, who believes he can make use of the right of deduction, is acting in the context of a fraudulent economic transaction[13] or, even if he does not act actively, is aware (or is believed to be) of the fact that tax fraud is being carried out upstream of the subsequent transfers.

On this point, the participation of the VAT taxable person in the fraud can be translated into a form of active participation whenever he personally carries out fraudulent acts and designs,[14] or into a

10. In relation to the conditions that must be met jointly in order for the right of VAT deduction to arise, reference should be made to the numerous jurisprudential contributions that have taken place on the subject, *ex multis* CJEU, 29 April 2004, Faxworld, case C-137/0; CJEU, 26 May 2005, Antònio Jorge, case C-536/03.

11. Pursuant to Article 9 of Directive 112/2006 where "*VAT taxable persons*" are qualified as those who carry out supplies of goods or services in the context of the exercise of businesses or arts and professions (or who carry out, in the context of such activities, intra-community transactions or imports). They have the right of deduction, recovering the tax they pay on purchases by acquiring a claim against the State, and they have the right of recourse, recovering the tax due to the State from those who purchase the goods and services supplied by them. In essence, the taxable person (entrepreneur or self-employed worker) who carries out taxable transactions is liable to the State for VAT commensurate with the consideration due to him and, at the same time, creditor (of recourse) towards the transferees/purchasers of the goods or services. VAT taxable persons are required to comply with a series of formal obligations, including documentation, registration and declaration of transactions subject to VAT, required for the application of the tax.

12. According to European case law, the substantive requirements of the right of deduction define the basis and scope of that right. On the contrary, the formal requirements regulate the modalities and control over the exercise of the right, as well as the proper functioning of the VAT system, including accounting, invoicing and declaration obligations. In EU case-law, see, on this point, CJEU, 13 February 2014, Maks Pen, case C-18/13, and CJEU 29 July 2010, Profaktor, case C-188/09.

13. The abuse of law in the context of the pathology of the tax case has seen the contribution of the most authoritative tax doctrine and the scientific material available is very extensive: P. Pistone, *Abuso di diritto ed elusione fiscale*, Padova, 1995; L. Carpentieri, *Il sistema tributario tra abuso e incertezza del diritto*, in Riv. dir. trib., 2008, pp. 1053 ss.; M. Logozzo, *L'abuso di diritto in materia di IVA*, in *Abuso di diritto ed elusione fiscale*, Torino, 2016, pp. 223 ff.; P. Boria, *L'abuso di diritto in materia tributaria come principio generale di derivazione giurisprudenziale*, in *L'abuso di diritto. Evoluzione del principio e contesto normativo*, Torino, 2018, pp. 79 ff.; M. Tortorelli, *L'abuso di diritto in materia tributaria*, 2019; M. Beghin, *Elusione fiscale e principio di divieto di abuso di diritto*, 2021; C. Glendi, C. Consolo, A. Contrino, *Abuso di diritto e novità sul processo tributario*, 2016; D. Conte, *La distinzione tra abuso di diritto ed evasione fiscale: idee per un quadro critico*, in Riv. Trim. Dir. Trib., 2022, 2, pp. 291-317; F. Gallo, G. Scognamiglio, *L'abuso di diritto in materia tributaria e gli istituti di diritto civile e commerciale*, in Quaderni di giurisprudenza commerciale, 2019; V. Ficari, G. Marini, E. Della Valle, *Abuso di diritto ed elusione fiscale*, 2016. Without leaving room for any evaluations whatsoever, the words in the CJEU, 8 May 2019, case C712/17, *EN.SA.*, appear very clear, according to which "it is inherent in the VAT mechanism that a fictitious transaction cannot give rise to any right to any deduction of that tax". On this point, it is worth remembering that the concepts of abuse of tax law (or tax avoidance), on the one hand, and tax evasion-fraudulent construction, on the other, take on a different relevance for domestic purposes as theformer relates to transactions that are formally lawful but devoid of economic substance, relevant in terms of sanctions.administrative for the purpose of disregarding the tax advantages unduly obtained; the second, on the other hand, presupposes the direct and conscious violation of tax rules through the use of fraudulent or simulated conduct, with consequences, if the conditions are met, even of a criminal nature. Therefore, in cases of VAT fraud, the question of the right of deduction is clearly part of the field of participation – even if only negligent – of the taxable person in an evasive-fraudulent mechanism.

14. See G. Petrillo, *Il principio di proporzionalità e il diniego della deduzione per "consapevolezza" nelle frodi IVA*, in Riv. Trim. Dir. Trib., 2017, 2, pp. 440 ff.; I. Caraccioli, S. Mattia, L. Pintaldi, *Fatture per operazioni inesistenti e onere della prova*, in Il Fisco, 2016, 40, pp. 3824 ff.

form of passive participation,[15] if he places himself in a position of "connivance" with respect to an evasive phenomenon carried out by third party economic operators.[16]

Turning to the present case, the answer given by the Luxembourg courts to the first question referred by the applicant in the main proceedings, "A", is of considerable importance.

The CJEU, in fact, in paragraph 32 of the annotated judgment, clearly states that "[…] *Articles 167 and 168 of Directive 2006/112, read in the light of the principle of the prohibition of fraud, must be interpreted as meaning that the second purchaser of goods may be refused the benefit of deducting input VAT on the ground that he knew or should have known of the existence of VAT fraud committed by the initial seller at the time of the first sale, even if the first buyer had, in turn, knowledge of such evasion*".

In fact, according to the reasoning followed by the European judges, the final buyer ("A") who has purchased the asset from the transferor having the full knowledge[17] that the transaction has been registered in the context of tax fraud, must not and cannot benefit from the right to deduct turnover tax, since with the purchase he has facilitated the evasive design "[…] allowing the marketing of the products in question."[18] tag.

In the case at hand, therefore, in the opinion of the CJEU, "A", the transferee, was in a position to know that the other two economic operators involved, "W" and "C", had agreed and had put in place a subjective interposition, thereby striving to ensure that "C" evaded part of the VAT.

In this sense, in the Court's opinion, "A" knowingly—or, in any case, negligently—facilitated the fraudulent transaction and, therefore, could not have invoked the right to deduct the tax that he had paid to "C"; in this context, it would not be relevant in any way whether the intermediary/first purchaser "W" was aware of and had made the fraud possible or that "A" had possibly benefited, at a later time, by the resale of the goods.[19]

The jurisprudential result of the Court of Justice on the issue of the knowledge of the fraudulent design by the transferee provides valuable insights for the purposes of this investigation.

In fact, the case in question is certainly not the first case in which the European judges were called upon to rule on the articulated issue of the right to deduct VAT in the case of chain supplies conducted by economic operators acting with evasive purposes.

The principle according to which the "*scientia fraudis*" of the final transferee precludes a legitimate exercise of the right to deduct VAT has its roots in the well-established Community jurisprudence which, for reasons of thematic and spatial nature, it is not possible to scrutinize in every pronouncement; however, it is useful to briefly recall some of the most relevant judgments, within the limits of what is necessary to understand the scope and define the perimeter of the issue that concerns us.

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15. On this point, the considerations expressed by CJEU, 9 January 2023, A.T.S., case C-289/22, therefore, "the benefit of the right of deduction must be refused not only when VAT fraud is committed by the taxable person himself, but also if it is demonstrated, in the light of objective factors, that the taxable person, to whom the goods or services on which the right of deduction was based were supplied, knew or should have known that, with the purchase of those goods and services on which the right of deduction was based, he participated in a transaction that was part of such evasion committed by the supplier or by another operator who intervened upstream or downstream in the chain of supplies or services."

16. See paragraphs 21 to 25 of the CJEU, 14 April 2021, case C-108/2020, where it is made explicit that any form of participation in the fraud carried out by the VAT taxable person (transferee/purchaser of the goods or services subject to the economic transaction) is an indication of not being extraneous to the fraudulent circuit and entails the loss of the right to deduct turnover tax.

17. Or being able to have it, using the diligence of a shrewd economic operator.

18. Paragraph 30 of the annotated judgment referring to CJEU, 14 April 2021, Finanzamt Wilmersdorf, case C-108/20. By "products in question" the reference is clearly to the motor vehicle in question.

19. Paragraph 35 of the judgment in question.

As already reiterated above, if it is true that the right to deduct VAT is a principle of law recognized at European level and to which, therefore, the legislators and the judicial authorities of the Member States are called upon to comply due to the primacy of EU law, it is also true that national courts retain margins of free appreciation in the context of the decision of cases brought before them; The latter are, in fact, often called upon to rule on the hypotheses of limitation or denial of the right of deduction in cases where the benefit is invoked fraudulently and, in this sense, the scope of European jurisprudence comes to their aid, which constitutes the horizon to be taken into consideration in order to ensure judicial solutions that are as reasonable and proportionate as possible.

For this reason, it is of the utmost importance, *first and foremost* for legal practitioners, to identify the limits that underlie the functioning of VAT.

In this sense, an essential element, beyond the objective requirements, for the purposes of the right to deduct VAT is the "psychological" state[20] in which the taxable taxpayer finds himself: the latter must act in good faith and must not be in a position to know (or be able to know) that he is actively taking part in (or facilitating) an evasive or elusive activity.[21]

As already mentioned, the valuation of the subjective element for the taxable person is the result of a jurisprudential acquisition of the Court of Justice: the European Union judges, called upon to rule on cases concerning the right to deduct VAT, insisted, as early as the early 2000s, on the centrality of both the "objective" elements of the disputes submitted to their review—i.e. the existence of the fraudulent design and the elements that characterize—both on the "subjective" state in which the taxpayer finds himself, i.e. on the knowledge of the transaction in fraud of the law by the taxpayer himself, who, if in good faith, would be unjustly denied the opportunity to deduct value added tax, as moreover provided for by the well-known mechanism of operation of the tax.[22]

In this perspective, the constant and almost unanimous hermeneutical orientation expressed by the judges of Luxembourg has been consolidated over the years by virtue of which, in a logic of combating evasive transactions but still enhancing the subjective status of the taxpayer, a balance between the interests involved would be of central importance: if on the one hand the fight against tax evasion represents a primary objective that the Member States must pursue through efficient tax policies, on the other hand, the right to deduct VAT cannot be denied to the taxable person in good faith; If only because, as mentioned, the right to deduct value added tax is a cardinal principle of the EU legal system[23] on which the functioning of the European single market is also based.[24]

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20. To be understood in terms of "subjective".

21. For all of them, see D. Peruzza, *L'indeducibilità dell'IVA per il cliente che "sapeva o avrebbe dovuto sapere"*, in Riv. Trim. Dir. Trib, 2014, 3, pp. 774 ff.

22. The contributions of the literature with explicit reference to the awareness of fraud on the part of the VAT taxable person are numerous: see, ex *multiis*, F. Cerioni, *La prova della frode fiscale relative all'imposta sul valore aggiunto e della "mala fede" del contribuente nella giurisprudenza europea e nazionale*, in Dir. prat. trib., 2014, 1, p. 145; F. Amatucci, *Frodi carosello e "consapevolezza" del cessionario Iva*, in Riv. trim. dir. trib., 2012, 1, pp. 3 ff.; M. Miccinesi, *Le frodi carosello nell'Iva*, in Riv. dir. trib., 2011, 1, pp. 1089 ff.; E. Marello, *Frodi Iva e buona fede del soggetto passiva*, in Giur. it., 2011, 5, pp. 1214 ff.; M. Cardillo, *Tutela della buona fede e delle aspettative del soggetto passivo in materia di frode IVA per operazioni "carosello"*, in Rass. trib., 2008, Vol. 51, pp. 235-260; M. Fanni, *La posizione recentemente assunta dalla giurisprudenza comunitaria in materia di frode IVA: la rilevanza dell'elemento soggettivo nelle sentenze "subite" di Optigen e Alex Kittel. Brevi riflessioni sul profilo probatorio-procedurale*, in Riv. dir. trib., 2006, 3, p. 231; G. Moschetti, *Diniego della deduzione per conoscenza nella lotta contro la frode IVA. Alla luce dei principi di certezza del diritto e di proporzionalità*, 2013.

23. For a complete picture of the evolution of European jurisprudence that has led to the hermeneutical approaches briefly identified above, please see, for all, the CJEU, 6 July 2006, Axel Kittel and Recolta Recycling, joined cases C-439/04 and C-440/04.

24. Recently, see A. Purpura, *VAT and natural disasters: Italian legislation is not compatible with European law*, in Tax News (Online Supplement to the Quarterly Review of Tax Law) of 29 October 2024 where the Author comments on the judgment of the Court of Justice, 18 March 2024, case C-37/23 which declared Article 33 incompatible with European law, paragraph 28 of Law no. 183/2011, according to which taxpayers affected by the earthquake that struck the Abruzzo region in 2009, can request a refund, to the extent of 60%, of the amount paid by way of value added tax in the period between April 2009 and December 2010. The EU Judges have reached these conclusions by enhancing the principles of fiscal neutrality of VAT and the effectiveness of European law, criteria of a general nature whose

Having recalled the scope of the principle of the right to deduct VAT and also the unanimous interpretative orientation of the CJEU on this point, it is logical to question the inferential path that the national and EU judges are called upon to conduct in order to identify which of the two subjects, the Tax Authority or the taxpayer, bears the burden of proving the knowability (as a subjective psychological state) on the part of the VAT taxable person involved, as in the present case, in a series of chain transfers.

2.2. Burden of proof and diligence payable in the context of transactions carried out in fraud of value added tax

Given the right to deduct VAT for the taxable economic operator who acts in the market by carrying out commercial transactions of purchase and sale of goods, the investigation into the proof of the taxpayer's awareness of being participating in or facilitating a phenomenon of tax evasion cannot be neglected.

In fact, the annotated judgment offers a starting point on the subject: once it has been understood that the right of deduction of "A" must be denied in the face of the correct interpretation of Articles 167 and 168 of Directive 2006/112/EC,[25] it is necessary to verify whether it is the German tax authorities that must prove that the main applicant "A" was in fact aware of the fictitious interposition that occurred between "W" and "C" and, therefore, of the evasive intent of the economic operators, or whether it is the applicant "A" who must provide (negative) proof of having had no awareness of the fraudulent design.

We therefore access a different area of analysis that concerns the correct declination of the burden of proof in the context of value added tax fraud.

Well, also with regard to this perspective of study, the jurisprudential arrests of the CJEU are unequivocally oriented in the identification of the subject on whom the burden of proof rests.[26]

More precisely, it now constitutes *ius receptum* within the European legal system, and consequently also in the legal systems of the Member States,[27] the principle that the burden of proving knowledge

application would have been jeopardized by the "distorting" effects produced, in practice, by the Italian legislation.

25. Article 167 of Directive 112/2006 establishes the principle that the right of deduction arises at the time when the deductible tax becomes chargeable; Article 168 identifies the amounts deductible by the taxable person for VAT. Also of importance is Article 178 which defines the procedures for exercising the right of deduction.

26. On this point, the contributions of the literature are numerous and address the issue of the burden of proof, providing useful interpretations that are valuable for this investigation; see A. Giovanardi, *Le frodi IVA. Profili ristruttivi*, Torino, 2013; A. Gaggero, *Operazioni soggettivamente inesistenti: ancora qualche oscillazione in tema di distribuzione dell'onere della prova della buona fede*, in Dir. e Prat. Trib., 2018, Vol. 89, 4, pp. 1684-1699; M. Damiani, *Detrazione indebita di fatture ai fini IVA e imposte dirette: ripartizione dell'onere della prova – transazioni inesistenti – Distribuzione dell'onere della prova in transazioni soggettivamente inesistenti*, in GT-Riv. Giur. Trib. 2018, 5, pp. 416 et seq.; E. Marello, *Prova impossibile e repressione della frode IVA nella prospettiva della sentenza di merito*, in *Tribunal Justice*, 2009, pp. 471-491; A. Sbroiavacca, *Nuovo onere probatorio e impatto sulla motivazione degli atti dell'Amministrazione fiscale*, in Riv. Tel. Dir. Trib., 2024; A. Marcheselli, *Onere della prova, tono assoluto, riforma della giustizia tributaria e desiderabile de prufundis per le cosiddette presunzioni giurisprudenziali*, in Riv. Tel. Dir. Trib., 2022.

27. As is well known, since VAT is a harmonised tax, the interpretation of the European judges prevails over that of the national courts. The latter, as courts of the European Union, are called upon to disapply national legislation or practice that may conflict with the rules of EU law. This is the view expressed by the CJEU, 11 January 2024, Global Ink Trade, case C-537/22, paragraph 26. This provides an opportunity to reiterate the well-known principle that the referring court, which has referred certain questions to the Court of Justice for a preliminary ruling, is bound by the interpretation of the European legislation as provided by the Luxembourg courts. To learn more about the topic, see, *ex multis*, D. Gallo, *L'efficacia diretta del diritto dell'Unione europea*, 2018; P. Boria, *La funzione della Corte di giustizia rispetto alla formazione del sistema fiscale comunitario*, in European Tax Studies, 2021, Vol. 11, pp. 1-16.; Pistone, *Diritto tributario europeo*, Torino, 2018; M. Basilavecchia, *L'influenza delle interpretazioni della Corte di Giustizia*, in GT - Riv. Giur. Trib., 2008; V. Nucera, *Le sentenze interpretative della Corte di giustizia e il loro impatto sul diritto tributario*, in Rass. Trib., 2006, 4, pp. 1136 ff.

of the fraudulent arrangement by the VAT taxable person falls on the tax authorities,[28] with the clarification that, in such a case, the correct discharge of the burden of proof necessarily passes through proof of the existence of a supply (or, as in the present case, a chain of supplies) made in order to defraud value added tax, and through an assessment of the taxpayer's subjective status (and this translates into the demonstration that the latter, by resorting to the diligence required of him, knows that he is part of an evasive design).

On the other hand, if this were not the case, it would lead to the affirmation of an "objective liability" of the subject who was a party to the fraudulent transaction, without the appropriate verification of the causal contribution to the realization of the latter and the degree of culpability attributable to him.[29]

That said, it should be emphasized that, after a phase of interpretative oscillations by the Court of Justice of the European Union, the latter has clarified[30] that it is the duty of the Tax Authorities to provide an adequate demonstration of the objective elements that allow the conclusion that the taxable person (transferee) is aware (or should be aware) of the fact that the transaction, from which the legitimate (or illegitimate) exercise of the right derives, derives of value added tax deduction, is part of tax evasion committed by the supplier or another operator upstream in the supply chain.[31]

In the light of the conclusions reached by the European Court—of which the judgment in question is also clear testimony—it can be said that the correct definition of the burden of proof in the case of VAT fraud requires that the Tax Authorities do not impose on the taxable person, the person

28. It is a principle definitively transposed into the case-law of the CJEU that it is for the national tax authorities, in accordance with domestic law, to prove the existence of both the objective elements of possible VAT fraud and the subjective elements: this, of course, in compliance with the right of deduction of VAT as a fundamental principle of the common system of turnover tax. In this sense, reference is made to CJEU, 1 December 2022, case C- 512/21, *Aquila Part*, in which the European Court unequivocally states that the transferee's right to deduct VAT can only be denied in the presence of solid investigative bases to be provided by the tax authorities, which have the duty to investigate and demonstrate the *status* of the subjective in which it is located. In the same sense, CJEU, 11 January 2024, Global Ink Trade, case C-537/22.

29. For a reflection on the subject, see, for all, A. Salvati, *Regime probatorio in materia di frode IVA derivante da inesistenza soggettiva e responsabilità per il fatto altrui*, in Riv. Tel. Dir. Trib., 2022, pp. 1-21; F. Mantovani, Colpa [voce], in Digesto, disc. pen., Turin, 1988; A. Canepa, *L'imputazione soggettiva della colpa*, Turin, 2011; for reflections on the liability for the actions of others outlined by the civil legislator, see R. Scognamiglio, *Responsabilità per fatto altrui*, in Noviss. Dig. it., XV, Turin, 1968. On this point, reference is also made to CJEU, 21 June 2012, Mahagébenkft and Dàvid, joined cases C-80/11 and C-142/11, paragraph 48: "*the establishment of a system of strict liability would go beyond what is necessary to guarantee the rights of the Treasury*". Interesting are the observations of A. Giovanardi., *op. cit.*, pp. 91-95, who underlines that "*if the excriminating factor is the knowledge of the fraud of others, the objective nature of the notions of 'supply of goods,' 'taxable person' and 'economic activity' is no longer sufficient for the purposes of recognizing the right to deduct tax*", evidently emphasizing the relevance of the subjective element as a prerequisite for the denial of the right to deduct VAT.

30. With important repercussions on the regulatory level also for the Member States. Suffice it to say that following this pronouncement of the CJEU, the Italian Supreme Court also began to change its orientation, initially profoundly different, in order to conform to the lines held by the EU judges. Although it is not possible to exhaustively examine all the pronouncements of the jurisprudence of the Court of Cassation on the subject of the subjective element of the transferee involved in fraudulent transactions, it is interesting to recall the turn in a "subjectivist" sense carried out by the domestic judges: by way of example, see Cass. Civ., 30 January 2007, no. 1950, as well as Cass. Civ., 20 January 2010, no. 867 and Cass. Civ., 21 January 2011, no. 1364, which represent the very first signs of progressive openness of the Ermines in the direction of a progressive recognition of the subjective status, understood as full awareness or knowability, of the VAT taxable person. For further information, see, F. Scrimieri, *Complesso onere della prova in materia di IVA frode di natura soggettiva*, in Riv. Tel. Dir. Trib, 2022, 3, pp. 317-346.

31. In this regard, reference is made to CJEU, 21 June 2012, Mahagébenkft and Dàvid, joined cases C-80/11 and C-142/11. Before the judgment in question carried out a significant *Revirement*, in fact, the Community jurisprudence tended towards the valuation of the objective data only, i.e. the existence of fraud, as an impediment to the right of VAT deduction. Expressive of the "objectivist" orientation prevalent in the nineties within European jurisprudence are the CJEU judgments, 14 February 1985, Rompleman, case C-268/83, paragraph 19 and CJEU, 13 December 1989, Genius Holding Bv., case C-342/87, paragraph 13. The first indications of the gradual overcoming of this concept in favour of the enhancement of the subjective elements can be found with the judgments of 12 January 2006, Optigen, Joined Cases C-354/03, C-355/03 and C-484/03, of 11 May 2006, Federation of Technological Industries, Case C-384/04, and of 6 July 2006, Axel Kittel and Recolta Recycling SPRL, Cases C-439/04 and C-440/04. In the wake of this process of evolution is the emblematic pronunciation mentioned *above*, Mahageben and David.

https://doi.org/10.60923/issn.2036-3583/24127

liable for tax, the obligation to carry out excessively complex and detailed checks on the identity of the supplier (as in the case dealt with by the judgment), or, more generally, on any anomalies.

If only because those checks and audits are the exclusive responsibility of the tax authority, which can make use of the specific powers conferred on it.[32]

On closer inspection, if the approach followed were to consider the economic operator carrying out a business activity to be burdened by investigative burdens and sophisticated investigations that in fact are not his responsibility, then it should be expected that every business operator, in the context of his ordinary work activity, must carefully scrutinize the commercial history of each supplier (or more generally, transferor) with whom he has a professional relationship; however, carrying out an activity of this type would require the use of a much higher degree of diligence than the "ordinary" one, trusted by the taxpayer-economic operator, who could never assume the role of "investigating" authority in order to counter evasive phenomena.[33]

That said, if it is now a well-established principle[34] that it is the tax authority that is responsible for verifying, and therefore proving, the existence of a fraudulent offence and the subjective status of the taxable operator, it is also true that the European judges have not failed to note that the taxpayer subject to VAT falls, in any case, a precise duty to act in the market according to diligence. From this it follows that defining the perimeter of the "diligence payable" by the taxpayer rises to a decisive parameter to ascertain whether or not he has knowledge of the fraudulent design in which he took part.[35]

In this regard, the Court of Justice of the European Union has already specified, some time ago, that it is for the national courts, which are responsible for assessing the facts in the main proceedings, to determine whether the taxable person has actually taken the measures that can reasonably be expected in given circumstances and has shown "sufficient diligence".[36]

It can therefore be deduced that, once the burden of proof defined above has been discharged by the Tax Authorities , the burden of proving that he or she has acted according to the diligence required

32. In this sense, the CJEU clearly expressed itself, 19 October 2017, Paper Consult, case C-101/16; CJEU, 1 December 2012, Aquila Part, case C-512/21; CJEU, 14 April 2021, Finanzamt Wilmersdorf, case C-108/2020; CJEU, 22 October 2015, PPUH Stehcemp, case C-227/14. In the literature, M. G. De Flora, *La rilevanza dell'elemento soggettivo nella frode IVA,* in Dir. prat. trib. int., 2020, 3, pp. 1168 ff.; in this regard, see. the contribution of E. Covino, R. Lupi, *Frodi carosello tra solidalità e disconoscimento della detrazione*, in Dial. Trib., 2012, 4, pp. 394-398; E. Marello, *Frode IVA e buona fede del soggetto passivo*, cit., p. 1219, the Author emphasizes the fact that small companies do not have adequate tools to carry out scrupulous checks on the suppliers who orbit around the activity commercial and are therefore not in a position to effectively combat hypothetical "anomalous" situations (or real VAT fraud); K. Guarini, *Nella frode IVA, l'onere probatorio rigoroso ricade sulle autorità fiscali – Confine incerto tra ragionevolezza e proporzionalità nell'onere probatorio per la frode IVA*, in GT- Riv. Giur. Trib., 2024, 11, p. 876; G. Verna, *L'onere probatorio nella frode IVA ricade sulle autorità fiscali*, GT- Riv. Giur. Trib., 2016, p. 197.

33. See R. Lupi, *Quando la controparte "vede ciò che gli piace", ma non è "un confronto"*, in Dial Trib., 2011, 4, p. 397.

34. In addition to the numerous judgments already cited, see also CJEU, 27 September 2007, Telos, case C-409/04; CJEU, 11 May 2006, Optigen, joined Cases C-354/03, C-355/03 and C-484/03; CJEU, 11 May 2006, Federation of Technological Industries, Case C-384/04; CJEU, 16 October 2019, Glencore Agriculture Hungary, case C189/18; CJEU, 6 December 2012, Bonik, case C285/11; CJEU, 13 February 2014, Maks Pen, case C18/13, paragraph 28 and CJEU, 3 September 2020, Vikingo Fővállalkozó, case C610/19. From the reading of the judgments cited, it is clear that the European judges have once again enhanced the centrality of the subjective element as an indefectible prerequisite for denying the right to deduct VAT invoked by the taxable person liable for tax in the context of an economic transaction.

35. In this regard, reference is made to p.to 28 of the CJEU order, 14 April 2021, *Finanzamt Wilmersdorf*, case C-108/20, in which the judges point out that "*it is not contrary to EU law to require the supplier to take all the measures that can reasonably be required of him in order to ensure that the transaction carried out does not lead him to participate in tax evasion, it being understood that the determination of the measures which, in a specific case, may reasonably be imposed on a taxable person wishing to exercise the right to deduct VAT in order to ensure that his transactions are not connected with fraud committed by an input trader depends, essentially, on the circumstances of that case". The reference to the burdens incumbent on the purchaser is immediately evident, who must work with due diligence in carrying out commercial transactions that present risk profiles, in terms of tax evasion*".

36. The observations made by the CJEU, 1 December 2022, *Aquila Part*, case C-512/21 and CJEU, 16 June 2022, DuoDecad, are exhaustive on this point, case C-596/20.

of a prudent operator will fall on the taxpayer who is the final purchaser of the asset[37] , clearly in compliance with the criteria of proportionality and reasonableness[38] based on the circumstances of the specific case, without encroaching on a *probatio diabolica* against the latter[39] tag.

Without prejudice to these considerations, the judgment in question would seem to be perfectly aligned with the interpretative indications given, unequivocally over time, by the Court of Justice of the European Union.

On this point, paragraph 37 of the judgment under analysis is clear, where the European Judges place on the national authorities and judges the duty to demonstrate that the right to deduct VAT has been invoked fraudulently by the taxable person liable for payment.
Therefore, it must be considered that, in the present case, it is for the German tax authorities to support with adequate evidentiary findings the decision that "A" should be denied the right to deduct the tax in question, duly taking into account the existence of a fraudulent plot and the fact that "A", as transferee and final purchaser of the goods, was aware of the illicit design carried out by "C" and "W".

3. The effects of the refusal of the right to deduct VAT in full

Having clarified the perimeter, and analyzed the most important profiles concerning the first preliminary question, it is interesting to dwell on the second question submitted to the Court of Justice of the European Union.

On this point, the EU Courts—called upon to define the effects of a VAT evasion plan on the right to deduct the tax—have clarified that, where the denial of the right of deduction were limited exclusively to the portion of the VAT due corresponding to the amount subject to the evasion, taxable persons would be induced exclusively to take measures to reduce the consequences of any evasion, without necessarily taking those precautions aimed at ensuring that the transactions carried out do not involve them in tax evasion or do not favor its implementation.[40]

It follows that the finding of the existence of an abusive design corresponds to the denial of the right of deduction of VAT not limited only to the amount subject to evasion, but extended to the entire amount of the sums due by way of VAT (even if the fraudulent arrangement concerned only a part of the economic transaction).

In the present case, according to the Luxembourg courts, it must therefore be held that "A" must be refused the right to deduct input VAT in its entirety, despite the fact that it has in fact paid

37. According to EU law, diligence is defined as "the normal degree of special skill and care which can reasonably be expected to be exercised by a trader towards consumers" EC Directive 11 May 2005, no. 29, art. 2, letter h).

38. Reference is made to the observations of the jurisprudence of legitimacy intervened on this point. For all Cass. Civ., 28 December 2022, no. 37889; Cass. Civ., 13 July 2022, no. 22190; Cass. Civ., 20 December 2021, no. 40690; Cass. Civ., 17 August 2021, no. 22969; Cass. Civ., 3 August 2021, no. 22107.

39. On this point, it is useful to remember that the assessment of the adequate discharge of the parties' obligations is the responsibility of the national courts of the Member States, which are called upon to rule on the disputes submitted to the scrutiny without ever neglecting that the right to deduct VAT is a cornerstone of the Community tax system. On the subject and, specifically, on the centrality of the right to deduct VAT – and on the need to ensure its correct application within the Member States also by national courts – see ex *pluribus* R. Miceli, L. Pennesi, *Nullità dell'atto giuridico e diritto alla detrazione dell'IVA*, in European Tax Studies, 2023, Vol. 13, 2, pp. 16 ff.; F. Gallo, *Profili per una teoria dell'imposta sul valore aperto*, Torino, 1974; R. Miceli, *Il recupero dell'IVA deducibile tra principi comunitari e norme interne*, in Rass. trib., 2006, 6, pp. 1871-1896; L. Perrone, *L'armonizzazione dell'Iva: il ruolo della Corte di Giustizia, gli effetti verticali e la fiducia del contribuente*, cit.; F. Bosello, *L'imposta sul valore aggiunto*, Bologna, 1979; R. Cordeiro Guerra, *L'imposta sul valore aggiunto*, in P. Russo, *Manuale di diritto tributario*, *Parte Speciale*, Milano, 2002; A. Fantozzi, *Operazioni imponibili, non imponibili ed esenti nel processo di applicazione dell'Iva*, in Riv. dir. fin., 1973, 1, pp. 138 ff.; G. Falsitta, *Manuale di diritto tributario*, *Parte speciale*, Padova, 2021; L. Costanzo, *Corsi e ricorsi di accertamento della "frode IVA" tra fornitore e cliente alla prova dei principi europei*, in Riv. Tel. Dir. Trib., 2020, pp. 1-8.

40. Paragraph 40 of the judgment in question.

"C" EUR 12 294.12 in VAT and despite the fact that the actual tax damage suffered by the State amounts to EUR 2 394.96[41] (amount equal to the tax evaded by "C"), and this due to the knowledge (or knowability) of the fraudulent circuit in which it was entering.[42]

Well, if it is true that the *rationale* underlying this pronouncement is to be found in the need to discourage the implementation of fraudulent mechanisms,[43] regardless of the actual loss of tax revenue, the conclusions reached by the Court nevertheless open up some questions.

If only because deny the right to deduct value added tax also a that part of the shop not characterized by a *Animus* fraudulent—and therefore not aimed at tax evasion—would seem to configure a sanctioning response[44] o "*para-sanctioning*"[45] excessive because it is not consistent with the principle of proportionality[46] that, as a general principle of administrative and legislative action[47]—expressed by the European Court[48] and typified today also in the Italian tax system[49]—requires

41. Arithmetic difference between EUR 12 294.12 and EUR 9 899.16 (equal to the VAT remitted by "C").

42. That is why it is worth questioning this point and investigating whether or not the measure identified by the European courts is proportionate: proof of this is the fact that the German court itself favoured limiting the refusal of the right to deduct VAT to the amount of EUR 2 394.96 only. P.to 18 of the judgment in question.

43. For the record, it should be noted that the third question referred for a preliminary ruling in the context of the judgment in question is not assessed by the CJEU as the answer given to the second question makes it idle to answer the last question concerning the methods of calculating the loss of tax revenue for the German Treasury (p.to 43).

44. See M. Miccinesi, *Le frodi carosello nell'IVA*, in Riv. Dir. Trib., 2011, Vol. 21, 12, p. 1094, in which the Author seems to identify in the non-deductibility "an afflictive function, connected to the responsibility that follows from the general duty of fairness incumbent on the taxpayer and which constitutes the tool capable of contributing to the pursuit of the general interest in the lawfulness of the production chain".

45. It should be noted that this is not intended to be in contrast with authoritative doctrine that in several circumstances has pointed out that the refusal to deduct VAT in the event of fraud is not to be identified with a sanctioning measure, but rather as a logical consequence of the very mechanism of operation of the tax and the lack of the necessary conditions for the right in question to be recognized. In this regard, in order to better understand the picture, we quote the words contained in the CJEU, 18 December 2014, Italmoda, case C-131/13 in which "the refusal of the benefit of a right deriving from the common system of VAT in the event of the involvement of the taxable person in fraud is nothing more than the mere consequence of the non-existence of the conditions required in this regard by the relevant provisions of the Sixth Directive, That refusal is not, as the Advocate General observed in point 60 of his Opinion, in the nature of a penalty or a sanction within the meaning of Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, or Article 49 of the Charter of Fundamental Rights of the European Union. to that effect, CJEU judgments of 11 December 2000, Emsland-Stärke, Case C-110/99, paragraph 56; 21 February 2006, Halifax and Others, Case C-255/02, paragraph 93, and 6 September 2012, Döhler Neuenkirchen, Case C262/10, paragraph 43)." And it is also the CJEU that has highlighted that the limitations on the right to deduct VAT must not exceed what is necessary to ensure the correct collection of the tax and avoid fraudulent constructions: in this regard, see CJEU, 21 March 2000, joined cases C-110/98 to C-147/98; CJEU 21 March 2000, Joined Cases C-286/94, C-340/95, C-401/95 and C-47/96. Given and agreed, it is therefore intended to highlight how the denial of the deduction to the extent corresponding to the entire amount of VAT due, although a part of this has been correctly paid to the Treasury by the transferee (as in the case at hand for subject "A"), is undeniably a measure characterized by afflictive profiles and functional to the disincentive of illegal conduct. For a reflection, see R. Miceli, L. Pennesi, *Op. cit.*, pp. 27 ff.

46. On this point, see M. Cartabia, *The principles of reasonableness and proportionality in Italian constitutional jurisprudence*, *Trilateral Conference of the Italian, Portuguese and Spanish Constitutional Court* (Rome, Palazzo della Consulta 24-26 October 2013), which refers to A. Barak, *Proportionality*, Cambridge University Press, 2012, pp. 175-210. On this point, see also G. Ruggieri, *Codice dei contratti pubblici*, Milan, 2007, 32, who, like the author just cited, points out that the principle of proportionality has been developed primarily by German doctrine and jurisprudence as a synonym for "proportionate equality" addressed to the public administration.

47. F. Nicotra, *I principi di proporzionalità e ragionevolezza dell'azione amministrativa*, in *Federalismi.it*, 2017, 12, pp. 2 ff.

48. CJEU, 18 December 1997, Molenheide, joined cases C-286/94, C-340/95, C-401/95; CJEU, 10 July 2008, Sosnowska, Case C-25/07; CJEU, 27 November 2008, Societè Papillon, case C-418/07; CJEU, 11 June 1998, Société Générale des grandes sources, Case C-361/96; CJEU, 8 July 1999, Baxster, Case C-254/97; CJEU, 11 July 2002, Marks & Spencer, Case C-62/00; CJEU, 25 February 1988, Drexl, Case C-299/86.

49. Article 10-ter of the Statute of Taxpayers' Rights, according to which "*The tax procedure balances the protection of the tax interest in the collection of the tax with the protection of the fundamental rights of the taxpayer, in compliance with the principle of proportionality*". Therefore, "*In accordance with the principle of proportionality, administrative action must be necessary for the implementation of the tax, not exceeding the purposes pursued and not limit the rights of taxpayers*

that the content and form of the action be related to the aim pursued[50] and therefore, in practice, that the legislative and administrative activity does not exceed what is necessary for the purposes of the correct collection of the tax.[51]

Reasoning in these terms, denying in full the right to deduct value added tax, even if a part of the tax has been paid to the Treasury and therefore the economic damage for the State is limited to a well-identified sum, would seem to have the intention of striking at the unlawful conduct of the taxpayer who has acted knowingly, in order to prevent transactions of the same type from being carried out in the future.

In this sense, the denial of full deduction seems to be the most suitable measure to completely eradicate fraudulent phenomena[52] which sometimes involve economic operators. In this perspective, the approach of the European Court would not be so much to collect the tax "*right*",[53] as well as neutralize any evasive conduct, even for the non-fraudulent part of the transactions carried out by economic operators.

Given these considerations, it would seem evident the expressly afflictive direction espoused by the Court with the judgment in question.

A logic that is understandable, if understood from the perspective of combating VAT fraud in the context of the European single market, but which is less so from a legal point of view, given that the correct application of the principle of proportionality – in the terms briefly described – would seem to require only the recovery of the tax not paid due to the abusive design.[54]

4. Concluding remarks

The judgment just commented on, as already noted, is part of a well-established orientation of EU jurisprudence, by reason of which the VAT tax system, based on the principle of neutrality of the tax and harmonization of the laws of the Member States in a logic of development of the single market and guarantee of free competition, must effectively counter the implementation of mechanisms created for the sole purpose of defrauding the tax in discussion.

In this sense, the denial of the right of VAT deduction for the taxable person can only occur in the event of "pathological" situations, such as those that characterize the case in question in question: when objective elements, i.e. the actual existence of fraud, and subjective elements, to be understood as the state of awareness of the taxpayer who "knew or should have known" that he was taking part in a fraudulent transaction, here the right to deduct VAT ceases to exist and the burden of proving,

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beyond what is strictly necessary to achieve their objective."

50. Thus, A. Purpura, *Omitted payment of VAT and joint liability: some considerations in the margins of a recent (and not entirely convincing) judgment of the CJEU*, in International Tax Law and Practice, 2021, 4, p. 1842.

51. CJEU, 17 July 2014, Equoland, case C-272/13; CJEU, 19 July 2012, Redlihs, Case C-263/11.

52. See paragraph no. 40 of the judgment in question.

53. For this expression, see A. Marcheselli, *Verso un giudice tributario "europeo": profili critici dell'indipendenza della giurisdizione tributaria italiana nel quadro dei principi della Convenzione europea dei diritti dell'uomo*, 2014, 325, in F. Bilancia, C. Califano, L. Del Federico, P. Puoti (a cura di), *Convenzione europea dei diritti dell'uomo e giustizia tributaria italiana*, where the Author points out that the interest of the tax authorities would not be that of the collection of any tax, but the interest in the collection of the "*fair*" tax.

54. On the subject, it should be noted that different positions can be found in the literature. On the one hand, there are those who argue that the denial of the right of deduction is a mere consequence of the mechanism of operation of VAT; on the other hand, there are those who value the decidedly afflictive and disincentive component. For the different positions, please refer respectively to R. Miceli, L. Pennesi, *Op. cit.,* and to M. Miccinesi, *Op. cit.*, p. 1095 where the Author notes that "*The essence of the fraudulent phenomenon under discussion is, in particular, the afflictive scope that distinguishes the denial of deduction, once such denial has been correctly configured as a sanction provided for in the event of violation of the general duty of care which must be borne every economic operator"*.

through the exercise of its investigative powers, the objective and subjective profiles on which the refusal is based falls on the national tax authorities.[55]

Now, if it is true that the hermeneutical approaches of the Court of Justice, as mentioned above, tend to be consolidated in the sense adopted by the judgment commented on, it is interesting to underline that, reasoning from a national perspective, the positions taken by the Court of Cassation, on issues similar to those addressed by the European Court in the present case, do not appear to be as solid.

The Supreme Court has been rather cautious in adopting the orientation of the European judges, of which the judgment commented on represents a further example: so much so that the national judges have for a long time valued only the objective profiles of fraudulent transactions, without attributing particular importance to the subjective element mentioned above, i.e. the knowledge or knowability of the fraudulent design by the transferee.

The national judges, although using the "domestic" conceptual categories of "*objectively non-existent transactions*" and "*subjectively* non-existent[56] transactions", have then progressively transposed the guidelines and interpretations of Community jurisprudence. In this context, only starting from 2009,[57] the Supreme Court has started a path of progressive recognition and enhancement of the subjective element, abandoning the mostly objectivist perspective, previously dominant, which identified as the only prerequisite for the denial of the right of VAT deduction the only fraudulent connotation of the transaction.

In the same sense, and according to the directives already drawn up by the European judges, the Supreme Court has gradually abandoned[58] the view according to which it was up to the taxpayer

55. It is precisely in these terms that the European Judges express themselves in the context of EU case-law: CJEU, 21 June 2012, Mahagében and Dávid, Joined Cases C-80/11 and C-142/11, where it is stated that "*the tax authorities may not generally require that a taxable person who intends to exercise the right to deduct VAT, on the one hand … verifies that the issuer of the invoice relating to the goods and services in respect of which the exercise of that right is sought has the status of a taxable person, that he has the goods in question and is able to supply them and that he has fulfilled his obligations to declare and pay VAT, or on the other hand, that the taxable person must have documents in that regard'* (p.to 61), then going on to '… *the tax authorities to carry out the necessary checks*.' Reference should also be made to the analysis on this point by M. Piasente, *Le deroghe al diritto di detrarre l'IVA in ragione della lotta contro l' "evasione fiscale e la frode" e l'attenuazione del principio di proporzionalità nella giurisprudenza della Corte di giustizia*, in Riv. Dir. Trib., 2002, 2, pp. 32 ff. On the enhancement of the subjective profile as an indefectible element to deny the right of VAT deduction to the economic operator involved, see M. G. De Flora, *La rilevanza dell'elemento soggettivo nelle frodi IVA*, in Dir. Prat. Trib. Int., 2020, 3, pp. 1168-1189.

56. For an analysis of the jurisprudential and regulatory evolution on this point, see F. Prosperi, *Sulla distinzione tra transazioni soggettivamente e oggettivamente inesistenti nel reato di falsa dichiarazione: punti fissi ed evoluzione nella giurisprudenza della legittimità*, in Riv. Tel. Dir. Trib, 2023; M. Manca, *Operazioni inesistenti: detrazione IVA, rilevanza del danno fiscale e proporzionalità dell'attuale regime sanzionatorio*, in Rev. Tel. Dir. Trib., 2022; on the perimeter of the concept of "*fraud*", see, most recently, A. Marcheselli, *La farmacia dei sani – episodio 5 – grande confusione sotto il cielo. Provocazioni scandalose – sulla diffusione del concetto di frode nel diritto penale tributario*, in Riv. Tel. Dir. Trib., 2023.

57. *Ex multis*, Cass. Civ., 5 February 2009, no. 2779 and Cass. Civ., 13 March 2009, no. 6124.; Cass. Civ., 20 January 2010, no. 867; Cass. Civ., 19 September 2012, no. 15741; Cass. Civ., 28 August 2013, no. 19746. In the literature, see S. Dorigo, *Frodi carosello e deducibilità dell'IVA da parte del cessionario: il difficile percorso "comunitario" della giurisprudenza della Corte di Cassazione*, in Dir. prat. trib., 2009, pp. 1251 ff. as well as M. Miccinesi, *Op. cit*., 2011, 12, p. 1097.

58. The evolutionary path of the jurisprudence of legitimacy has been gradual. Before, in fact, arriving at the declination of the burden of proof as outlined by EU jurisprudence (according to which it is the tax authorities who are required to carry out checks and verifications, and not the taxpayer who is subject to VAT), the national judges espoused a different interpretative approach. By way of example, please refer to Cass. Civ., 12 May 2011, no. 10414 where the Judges of the Supreme Court clarified that "the transferee is placed under an obligation of diligence in the choice of the supplier and attention to the requirements of the transferor, which are not formal (since it is evident that every fraudulent mechanism takes care first of all to exhibit to the outside an apparent accounting and securitization correctness) but substantial, in the sense of an effective existence in the transferor of an efficient operational structure and the ability to independently supply the goods purchased". In essence, before acknowledging the (evidently more guaranteeist) orientation of the European judges, the Court of Cassation had expressed itself in the sense of considering that each transferee/purchaser must carry out a series of checks that are not only formal, but substantial (and therefore particularly burdensome), on the identity and nature of the transferor.

to prove that he was not in a state of knowledge or knowability of the fraudulent transaction, to espouse the principle of Community matrix, already enunciated *above*. Therefore, the checks and controls on the objective and subjective profiles of the evasive economic transaction are the responsibility of the tax authorities,[59] since the latter can also make use of presumptions as long as they are serious, precise and consistent.[60]

The growing attention of the Supreme Court towards the subjective profile of fraudulent transactions clearly contributes to a stricter application of EU law, which imposes on the tax authorities the burden of ascertaining, in addition to the fraudulent nature of the transaction, also the taxpayer's awareness or knowability with respect to the evasive design. This orientation, which is increasingly consolidated also in Italy, acts as a safeguard of the principle of VAT neutrality, ensuring that the refusal to deduct the tax does not indiscriminately affect all parties involved in fraudulent transactions, but is limited only to cases in which a conscious participation in the fraud is demonstrated.

In this perspective, the judgment further testifies to the balancing exercise between the need to effectively combat tax fraud and that of ensuring that the application of the legislation does not result in a disproportionate interference in the taxpayer's scope of action, in line with the interpretative coordinates outlined at EU level.

59. Exhaustive on this point are the observations made in Cass. Civ., 9 September 2016, no. 17818 where the Judges clarified that "*in terms of VAT, the tax administration that contests carousel fraud must prove, also by means of simple presumptions, provided that they are serious, precise and consistent, the factual elements relating to the transferor (…) and the connivance on the part of the transferee by indicating the objective elements which, taking into account the concrete circumstances, should have led a normal operator to suspect the irregularity of the transactions, while it is up to the taxpayer who has deducted VAT to prove the contrary that he has actually concluded the transaction with the transferor and that he has found himself in the situation of objective impossibility despite the use of due diligence to abandon the state of ignorance on the fraudulent nature of the transactions, since the mere regularity of the accounting documentation and the demonstration that the goods have been delivered or the actual consideration paid are not sufficient for this purpose, since the circumstances in question are not conclusive*". And again, oriented in the sense of believing that the burden of carrying out adequate checks is the responsibility of the Tax Administration (and the taxpayer must instead prove that he has acted diligently), are the indications given by the Supreme Court in Cass., Civ., 20 April 2018, no. 9851 as well as Cass. Civ., 22 April 2022, no. 12853.

60. In this wake of constant and progressive evolution, as if to definitively seal the principles set out so far, is the very recent order of the Cass. Civ., Ord., 21 May 2024, no. 141102 where the Supreme Court clarified that "*for the purposes of discharging the burden of proof of knowledge or knowability, according to the utmost diligence required by a shrewd professional operator, of the existence of VAT fraud consummated upstream of the production or distribution chain, the precautions that the transferee is required to be reasonably required to adopt, in order to exclude his involvement, even if only for culpable ignorance, in the fraud committed upstream, cannot draw on complex and in-depth checks, similar to those that the tax authorities would have the means to carry out*".