

Rights and Obligations of Taxable Persons when VAT Fraud is Concerned

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1. Introduction

VAT fraud cases have kept the European Court of Justice busy. Even when confining the topic of cases to only business to business (B2B), the Court had to decide dozens and dozens of these. This reflects the fact that VAT fraud causes huge losses for governments. One quarter of the EU VAT gap, i.e. the difference between expected VAT revenues and those actually collected, of EUR 93 billion in 2020 was attributed to EU-trade VAT fraud alone; to this, domestic B2B fraud needs to be added. Governments in turn seek to take counter-measures often in fragmented ways that threaten the internal market. However, VAT fraud also poses grave dangers for taxpayers. In theory, the neutrality of the VAT as the cornerstone of tax demands that taxable persons supplying goods and services be relieved of input VAT on purchased supplies. Moreover, insult should not be added to injury. *Bona fide* taxpayers who have fallen prey to fraud should therefore not suffer adverse VAT consequences. In the face of VAT fraud, the Court of Justice,

however, has severely limited the portent of the neutrality principle in two directions.

First, the Court has relied on the prohibition of abuse of law also in the field of VAT. The decisions in *Halifax*,¹ *Italmoda*,² and *Cussens*³ in particular have established that VAT provisions cannot be relied upon for fraudulent or abusive purposes.⁴ Since then, the Court has decided numerous cases on when taxable persons can be denied benefits under the VAT Directive. Like unfortunate passersby may be killed in gang shootings, taxable persons may also be hit by stray bullets and be denied relief in fraudulent supply chains even if they did not actively participate in the fraud. It suffices that they knew or should have known that a transaction was fraudulent (knowledge test).⁵ VAT exemptions granted for intra-Community supplies or exports can similarly be denied.

Second, the Court has carefully navigated its way between a dogmatic interpretation of the provisions of the directive and the neutrality principle when requirements for input VAT are not fulfilled. For that purpose, it has again resorted to the knowledge test. It protects taxable persons only if they did not and could not have known that the transaction was connected to fraud.

All of this, however, also does not mean that the Court would implement a good faith test that would override any dogmatic considerations. In particular, the statement that the good taxable person enjoys protection while the bad loses all claims⁶ is not always true.⁷ As a counter-example, good faith protection is limited to exceptional cases when substantive requirements are not fulfilled. Conversely, taxable persons acting in bad faith are not necessarily denied benefits⁸; neither is bad faith a prerequisite for doing so.⁹

1 CJEU, 21 February 2006, C-255/02, *Halifax*, EU:C:2006:121.

2 CJEU, 18 December 2014, C-131/13, C-163/13 & C-164/13, *Italmoda*, EU:C:2015:2455.

3 CJEU, 22 November 2017, C-251/16, *Cussens*, EU:C:2017:881.

4 See on this topic R. de la Feria, *On Prohibition of Abuse of Law as a General Principle of EU Law*, EC Tax Review 2020, pp. 142–146.

5 CJEU, 7 December 2010, C-285/09, *R.*, EU:C:2010:742; see also, e.g. R. Ismer & A. Keyser, *Grenzüberschreitender Vertrauensschutz im Umsatzsteuerrecht*, in: Oestreicher (ed), *Aktuelle Fragen der Unternehmensbesteuerung* (Herne: NWB, 2012) p. 6 with further references; U. Grünwald, *Guter Glaube und üble Gesinnung – Das subjektive Element in der Umsatzsteuer*, MwStR 2013, p. 13; examples for bad faith: M. Robisch, in: Bunjes, *Umsatzsteuergesetz*, 21st Edition (Munich: C.H.Beck, 2022) § 6a, para. 82; in an attempt to categorize good and bad faith in VAT Law J. Lindenberg, J. Klamet & J. Schmidt, *Empfehlen sich gesetzliche Konkretisierungen zur Bösgläubigkeit und Gutgläubigkeit des Leistungsempfängers beim Vorsteuerabzug?*, UR 2015, p. 895, propose a legal basis.

6 C. Höink, *Kein Ausschluss vom Vorsteuerabzug bei Kenntnis von Zahlungsschwierigkeiten des leistenden Unternehmers – UAB „HA. EN.“*, MwStR 2022, p. 807; U. Grünwald, *Guter Glaube und üble Gesinnung – Das subjektive Element in der Umsatzsteuer*, MwStR 2013, p. 13.

7 Also J. Kokott, in: J. Kokott, *Das Steuerrecht der Europäischen Union*, 1st edition Munich: C.H.Beck, 2018) § 8, para. 405.

8 CJEU, 17 December 2020, C-656/19, *BAKATI*, EU:C:2020:1045, para. 89.

9 CJEU, 14 April 2021, C-108/20 *Finanzamt Wilmersdorf*, EU:C:2021:266, para. 31, repeated in CJEU, 11 November 2021, C-281/20, *Ferimet*, EU:C:2021:910, para. 58.

Overall, it is fair to say that the topic remains somewhat blurred. In her opinion in HA.EN,¹⁰ Advocate General Kokott aptly described the confusion surrounding the topic by citing a passage from *The Sorcerer's Apprentice* by Johann Wolfgang von Goethe: "Sir, my need is sore. Spirits that I've cited My commands ignore." According to her, the case "once again highlights the uncertainties and problems that arise when value added tax (VAT) law is understood less conventionally, but rather is also used to combat fraud and abuse in the case-law".

It is hardly surprising that the extent of rights and obligations of taxable persons when VAT fraud is concerned is disputed in the literature. The denial of rights in fraudulent supply chains has been highly controversial at least since the CJEU's decision in the *Italmoda*¹¹ case.¹² While Heuermann,¹³ for example, approves of the case law, Wäger advocates for an objectified recipient's view from which the right to deduct input tax is to be assessed.¹⁴ Reiß, on the other hand, objects to the lack of a legal basis.¹⁵ Höink warns that VAT becomes a sanctioning measure under the CJEU's decisions and considers the case law on abuse to be getting out of hand.¹⁶

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- 10 Opinion of Advocate General Kokott, 5 May 2022, C-227/21, HA.EN., EU:C:2022:364, para. 1.
- 11 CJEU, 18 December 2014, Joined Cases C-131/13, C-163/13 & C-164/13, *Italmoda*, EU:C:2015:2455.
- 12 On the development, see, for example, R. de la Feria & R. Foy, *Italmoda: The Birth of the Principle of Third-Party Liability for VAT Fraud*, BTR 2016, pp. 270 et seq.; C. McCarthy, *The good faith requirement in VAT*, World Journal of VAT/GST Law 2017, p. 63. From the German-language literature, see, for example, T. Ehrke-Rabel, *Missbrauch und Vorsteuerabzug*, in: Umsatzsteuerforum e.V. & Bundesministerium der Finanzen (eds.), *100 Jahre Umsatzsteuer in Deutschland 1918-2018: Festschrift* (Cologne: OttoSchmidt, 2018) especially pp. 740 et seq.; B. Heuermann, *Mit Italmoda auf den Schultern von Larenz*, DStR 2015, p. 1416; B. Heuermann, *Probleme des Vorsteuerabzugsrechts*, MwStR 2017, pp. 735 et seq.; M. Kemper, *Der "Missbrauch" und die Steuerhinterziehung bei der Umsatzsteuer*, UR 2017, p. 449; N. Madauß, *Urteil des EuGH vom 18.12.2014 in Sachen Italmoda – Was ist das Neue für die Praxis?*, NZWiSt 2015, p. 417; C. Wäger, *Das Zeitalter der Absichtsbesterung beim Vorsteuerabzug*, UR 2017, p. 41. Regarding intra-Community services M. Hassa, *Vertrauensschutz im Mehrwertsteuerrecht*, UR 2015, p. 809; on the special case of an intra-Community supply following importation see U. Schrömbges, *Zur Betrugsbekämpfungsklausel des EuGH bei der innergemeinschaftlichen Anschlusslieferung*, MwStR 2018, p. 157. Generally, P. Mann, *Der Schutz des guten Glaubens im Umsatzsteuerrecht im Spannungsfeld des Umsatzsteuerbetrugs*, 1st Edition (Lohmar: JOSEF EUL Verlag, 2017).
- 13 B. Heuermann, *Mit Italmoda auf den Schultern von Larenz*, DStR 2015, p.1416.
- 14 C. Wäger, *Das Zeitalter der Absichtsbesterung beim Vorsteuerabzug*, UR 2017, p. 41; C. Wäger, *Gutglaubensschutz im Umsatzsteuerrecht*, in: K. Drüen et al. (eds.), *100 Jahre Steuerrechtsprechung in Deutschland 1918-2018: Festschrift für den Bundesfinanzhof* (Cologne: OttoSchmidt, 2018) p. 1591.
- 15 W. Reiß, *Steuerstrafrechtliche und (umsatz-)steuerrechtliche Aspekte bei grenzüberschreitenden Warenlieferungen in der Union*, in: M. Fischer (ed.), *Festgabe für Heinrich List zum 100. Geburtstag am 15. März 2015* (Stuttgart, Munich: Boorberg, 2014) pp. 149 et seq.
- 16 C. Höink, *Kein Ausschluss vom Vorsteuerabzug bei Kenntnis von Zahlungsschwierigkeiten des leistenden Unternehmers – UAB „HA. EN.“*, MwStR 2022, p. 808; C. Höink & B. Lüger, *Umsatzsteuerrecht ist nicht allgemeines Sanktionsrecht, Anmerkungen zu BFH v. 12.3.2020 – V R 20/19 und V R 24/19*, MwStR 2020, p. 923; concerning the sanctioning measure also C. Pötters, *EuGH-Vorlage zur Versagung des Vorsteuerabzugs wegen Steuerhinterziehung des ursprünglichen Verkäufers*, MwStR 2022, p. 37 and M. Kemper, *Der "Missbrauch" und die Steuerhinterziehung bei der Umsatzsteuer*, UR 2017, p. 455.

Questions also remain regarding the applicable criteria to determine whether a taxable person “*knew or should have known*” about the VAT fraud.¹⁷ There is no consensus as to how taxable persons can demonstrate that they did not and could not have known that they participated in a fraudulent transaction. The CJEU is very frugal with comments on this issue. Whether taxable persons knew or should have known that they were involved in a fraudulent transaction needs to be determined by the referring court.¹⁸ The VAT Directive does not provide a legal basis or procedures regarding the evidence of fraud. Therefore, this criterion is to be determined according to domestic law. The effectiveness of EU law, however, must not be undermined.¹⁹ In the literature, different suggestions in this regard are made, e.g. by Ramdewar,²⁰ Nellen,²¹ and Lasiński-Sulecki.²²

The question of the protection of taxpayers acting in good faith is not assessed uniformly in the academic literature, either. Lasiński-Sulecki states that good faith has become an additional requirement for deducting input VAT despite not being mentioned in any provision of the VAT Directive.²³ Friedrich-Vache argues in favour of unrestricted good faith protection even in cases when the wording of the law does not provide for it, given that the taxpayer himself does not commit tax evasion.²⁴ Van Brederode argued back in 2008 that parties acting in good faith should also be protected if they derived a benefit from the fraud scheme.²⁵ Reiß, on the other hand, denies full protection of good faith, especially with regard to the absence of substantive requirements for input tax deduction.²⁶ Finally, Kokott

- 17 F. Nellen, *On the Liability of the Uninformed Taxable Person in EU VAT*, Intertax 2019, p. 616; J. Kokott, in: J. Kokott, *Das Steuerrecht der Europäischen Union*, 1st Edition Munich: C.H.Beck, (2018) § 8, para. 409; M. Winter, *Einfuhrumsatzsteuerbefreiung auch bei gutem Glauben des Importeurs – Milan Božičević Ježovnik*, MwStR 2019, p. 107; K. Lasiński-Sulecki, *Looking for Taxable Person’s Good Faith – Stehcemp Case*, International VAT Monitor 2016, p. 114.
- 18 As recently repeated in CJEU, 1 December 2022, C-512/21, *Aquila*, EU:C:2022:950 paras. 31-33; CJEU, 24 November 2022, C-596/21 *Finanzamt M*, EU:C:2022:921, paras. 37-39; CJEU, 15 September 2022, C-227/21 *HA.EN.*, EU:C:2022:687, para. 27; CJEU, 11 November 2021, C-281/20, *Ferimet*, EU:C:2021:910, para. 50; CJEU, 17 December 2020, C-656/19, *BAKATI*, EU:C:2020:1045, para. 83; CJEU, 3 September 2020, C-610/19, *Vikingo*, EU:C:2020:673, para. 66; CJEU, 25 October 2018, C-528/17, *Božičević Ježovnik*, EU:C:2018:868, para. 41.
- 19 CJEU, 3 September 2020, C-610/19, *Vikingo*, EU:C:2020:673, para. 59 with references.
- 20 D. Ramdewar, *The Good Faith Doctrine in EU VAT Law: A New Holy Grail for the Taxable Person*, International VAT Monitor 2022, pp. 89–90.
- 21 F. Nellen, *Information Asymmetries in EU VAT*, 1st Edition (Alphen aan den Rijn: Wolters Kluwer, 2017) pp. 235 et seq.
- 22 K. Lasiński-Sulecki, *Looking for Taxable Person’s Good Faith – Stehcemp Case*, International VAT Monitor 2016, pp. 114–115.
- 23 K. Lasiński-Sulecki, *Looking for Taxable Person’s Good Faith – Stehcemp Case*, International VAT Monitor 2016, pp. 113–114.
- 24 See e.g. H. Friedrich-Vache, *Schutz des guten Glaubens und damit Vertrauensschutz beim Vorsteuerabzug?*, UR 2015, p. 889.
- 25 R. van Brederode, *Third-Party Risks and Liabilities in Case of VAT Fraud in the EU*, International Tax Journal 2018, p. 35.
- 26 W. Reiß, *Vorsteuer(abzug) ohne Erhalt einer tatsächlich ausgeführten Lieferung oder Dienstleistung eines anderen Unternehmers*, MwStR 2018, p. 372; W. Reiß, *Vorsteuerabzug und Steuerschuld aus (An-)Zahlungen an Betrüger für nicht erbrachte Lieferungen – Zu zwei (unvollkommenen) BFH-Vorlagen an den EuGH*, MwStR 2017, p. 444.

points out that formal requirements are in tension between the rights of taxpayers, the principle of proportionality, the uniform application of Union law, and the principle of neutrality.²⁷

The following paper discusses the CJEU case law on the rights and obligations of taxable persons in instances of B2B VAT fraud. It argues that the case law can best be understood through a combination of three components, namely, (i) the prohibition of abuse of law in its concretization for VAT purposes, (ii) the formal and substantive requirements under the VAT Directive and domestic law, as well as (iii) the proportionality principle as a limiting factor. Thus, the Court generally grants protection for reasons of proportionality when there is no compliance with formal requirements. Yet, this does not apply if the taxable person fails the knowledge test. The lack of substantive requirements, by contrast, generally results in a denial of benefits regardless of whether the transaction was fraudulent. The only exception is a constellation when the proof of substantive requirements by the Member States is possible solely by means of certain documentation when good faith protection can be granted (2.). The knowledge test is also the relevant criterion when it comes to third parties being held liable in case of fraudulent supply chains, for example, through denial of rights or liability. However, a restriction by the principle of proportionality is demanded in constant case law. Knowledge in this sense hence requires at least gross negligence. In addition, the latest relevant point in time for knowing is when the supply is realized. Finally, a subordination of liability follows from the prohibition of overcompensation (3.). A short summary concludes the chapter (4.).

2. Overcoming deficient formal requirements

Regarding the rights of taxable persons, the CJEU distinguishes in its case law between substantive and merely formal requirements.²⁸ Thus, the non-fulfilment of formal requirements in principle must not – unless the Directive provides otherwise²⁹ – entail a loss of rights. Instead, the Court allows alternative evidence provided that the transaction is not fraudulent (2.1.). On the other hand, it was clarified in the SGI³⁰ decision that the actual supply of goods and services as a substantial prerequisite for the deduction of input tax is indispensable (2.2.). When determining the borderline between formal and substantive requirements, however, it must be borne in mind that case law exceptionally grants protection of good faith if the formal requirement embodies a substantive requirement (2.3.).

27 J. Kokott, *Vom Sinn der Form*, in: Umsatzsteuerforum e.V. & Bundesministerium der Finanzen (eds.), *100 Jahre Umsatzsteuer in Deutschland 1918-2018: Festschrift* (Cologne: OttoSchmidt, 2018) p. 109.

28 See M. Merckx, *Just a Formality!: Substance over Form in EU VAT and the Right to Deduct Input VAT*, *Intertax* 2022, p. 556; B. Heuermann, *Durchsetzung des Unionsrechts im MwSt-Recht: Euro Tyre, Italmoda, Barlis 06 und die Folgen*, *DB* 2017, p. 991.

29 Art. 138(1)(b) of the VAT Directive; M. Kemper, *Die Umsatzsteuer-Identifikationsnummer als „materielle Voraussetzung“ der Steuerbefreiung innerschweizerischer Lieferungen*, *UR* 2018, p. 337.

30 F. Grube, *SGI, Valérieane SNC v Ministre de l'Action et des Comptes publics*, *MwStR* 2018, p. 712.

2.1. Formal requirements dispensable only if taxable persons meet knowledge test

Ever since 2007, the Court has ruled in numerous cases such as *Collée*,³¹ *VSTR*,³² *Mecsek-Gabona*,³³ *Plöckl*,³⁴ and *Cartrans Spedition*³⁵ that the principle of proportionality³⁶ requires that the simple absence of certain formal requirements must not lead to a denial of taxpayer's rights such as the exemption of an intra-Community supply. There are, however, two exceptions to this rule: The failure to meet formal requirements may result in the denial of a right such as a VAT exemption if either the lack of formal requirements frustrates the proof that the substantive requirements were met or in cases of VAT fraud.³⁷ These two exceptions were – regarding the right to deduct input VAT – recently repeated by the CJEU in *Ferimet*.³⁸ While stating the name of a fictitious trader on an invoice alone solely concerns a formal requirement, an input VAT deduction may be denied if thereby the tax status of the true trader cannot be determined.³⁹ Regarding the second exception, the Court stated:

[T]he taxable person cannot be refused the right to deduct unless it is established on the basis of objective factors that he or she knew or should have known that, through the purchase of the goods or services on the basis of which the right to deduct is claimed, he or she was participating in a transaction connected to such a VAT fraud committed by the supplier or by another trader acting upstream or downstream in the supply chain of those goods or services.⁴⁰

This second statement, of course, applies regardless of whether the formal requirements of a transaction are met.⁴¹ The VAT exemption for exports can, if the substantive requirements are fulfilled and solely the formal requirements are not complied with, also only be denied under the aforementioned two circumstances.⁴²

In essence, this means, while formal requirements are, in principle dispensable for accommodating the proportionality principle, this applies in fraud cases only if the taxable person knew or should have known about the VAT fraud.

31 CJEU, 27 September 2007, C-146/05, *Collée*, EU:C:2007:549.

32 CJEU, 27 September 2012, C-587/10, *VSTR*, EU:C:2012:592.

33 CJEU, 6 September 2012, C-273/11, *Mecsek-Gabona*, EU:C:2012:547.

34 CJEU, 20 October 2016, C-24/15, *Plöckl*, EU:C:2016:791.

35 CJEU, 8 November 2018, C-495/17, *Cartrans Spedition*, EU:C:2018:887.

36 CJEU, 8 November 2018, C-495/17, *Cartrans Spedition*, EU:C:2018:887, para. 38; CJEU, 20 October 2016, C-24/15, *Plöckl*, EU:C:2016:791, para. 23; CJEU, 27 September 2012, C-587/10, *VSTR*, EU:C:2012:592, para. 52; CJEU, 6 September 2012, C-273/11, *Mecsek-Gabona*, EU:C:2012:547, para. 64; CJEU, 27 September 2007, C-146/05, *Collée*, EU:C:2007:549, para. 29.

37 CJEU, 8 November 2018, C-495/17, *Cartrans Spedition*, EU:C:2018:887, paras. 40-42 with references.

38 CJEU, 11 November 2021, C-281/20, *Ferimet*, EU:C:2021:910.

39 CJEU, 11 November 2021, C-281/20, *Ferimet*, EU:C:2021:910, paras. 27-48.

40 CJEU, 11 November 2021, C-281/20, *Ferimet*, EU:C:2021:910, para. 48 with references.

41 As will be described in section 3.

42 CJEU, 17 December 2020, C-656/19, *BAKATI*, EU:C:2020:1045, para. 89; CJEU, 17 October 2019, C-653/18, *Unitel*, EU:C:2019:876, paras. 29-30.

2.2. Generally no protection in the absence of substantive requirements

By contrast, the Court has decided that this approach cannot be transferred to cases when the substantive requirements are not met.⁴³ Thus, no input VAT can be deducted if goods or services were not actually supplied. For the deduction of input tax, this follows *e contrario* from the decisions in the cases *PPUH Stehcamp*⁴⁴ and *Tóth*.⁴⁵ The referring court in *PPUH Stehcamp* considered the supplier to be a non-existent trader⁴⁶ and, in *Tóth*, the supplier's licence had been withdrawn.⁴⁷ In both cases, the Court came to the conclusion that the substantive conditions for an input VAT deduction were fulfilled⁴⁸ and, thus, it could only be denied in the case that the taxable person knew or should have known that the transaction concerned VAT fraud.⁴⁹

This approach – that an input VAT deduction cannot be granted if no service was actually rendered or good supplied, even if the alleged recipient of the supply assumed this in good faith – was then explicitly confirmed in *SGI* and *Valériane*.⁵⁰ As the Court simply put it: “*It follows that the existence of a right to deduct of VAT is conditional on the corresponding transactions having actually been carried out.*”⁵¹ The same should apply if the supply was not realized by a taxable person. This is again illustrated by the decision in the *SGI* case.⁵² *SGI* and *Valériane* wanted to purchase equipment that was intended to be leased to operators. Since the items were not actually delivered, the input tax that had initially been deducted was reclaimed after a tax audit. The question here was whether it was sufficient to prove that no delivery had been made or whether it was also necessary to prove that the taxable person claiming the input tax deduction should have known that the transaction was connected with VAT fraud.⁵³ The CJEU ruled that the right to deduct VAT arises at the time when the VAT becomes chargeable. Thus, the time at which the supply of the goods took place is decisive. The term “supply of goods”⁵⁴ is objective in nature. The intention of the taxable person or

43 See W. Reiß, *Vorsteuerabzug und Steuerschuld aus (An-)Zahlungen an Betrüger für nicht erbrachte Lieferungen – Zu zwei (unvollkommenen) BFH-Vorlagen an den EuGH*, MwStR 2017, pp. 451 et seq.; also: C. Wäger, *Das Zeitalter der Absichtbesteuerung beim Vorsteuerabzug*, UR 2017, p. 45.

44 CJEU, 22 October 2015, C-277/14, *PPUH Stehcamp*, EU:C:2015:719.

45 CJEU, 6 September 2012, C-324/11, *Gábor Tóth*, EU:C:2012:549.

46 CJEU, 22 October 2015, C-277/14, *PPUH Stehcamp*, EU:C:2015:719, paras. 18-20.

47 CJEU, 6 September 2012, C-324/11, *Gábor Tóth*, EU:C:2012:549, para. 16.

48 CJEU, 22 October 2015, C-277/14, *PPUH Stehcamp*, EU:C:2015:719, para. 43; CJEU, 6 September 2012, C-324/11, *Gábor Tóth*, EU:C:2012:549, para. 27.

49 CJEU, 22 October 2015, C-277/14, *PPUH Stehcamp*, EU:C:2015:719, para. 53; CJEU, 6 September 2012, C-324/11, *Gábor Tóth*, EU:C:2012:549, para. 53.

50 CJEU, 27 June 2018, C-459/17 & C-460/17, *SGI*, EU:C:2018:501.

51 CJEU, 27 June 2018, C-459/17 & C-460/17, *SGI*, EU:C:2018:501, para. 40.

52 See also the lucid first classification of F. Grube, *Tatsächlich ausgeführte Lieferung als materielle Voraussetzung für begehrten Vorsteuerabzug/kein Gutgläubenschutz für Leistungsempfänger – SGI und Valériane SNC*, MwStR 2018, p. 715.

53 CJEU, 27 June 2018, C-459/17 & C-460/17, *SGI*, EU:C:2018:501, paras. 13-22.

54 Art. 5(1) Directive 77/388/EEC, now Art. 14(1) of the VAT Directive.

any other participant in the supply chain is not to be determined or taken into account.⁵⁵ The right to deduct input VAT is thus linked to the actual supply of goods. It does not arise if there is no supply regardless of the reason. An input tax deduction solely for the reason that VAT is shown on the invoice is therefore not possible.⁵⁶ The good or bad faith of the invoice recipient is irrelevant for the question of whether a supply was actually carried out. However, the Court somewhat surprisingly seems to have suggested in *Stroy trans* and *LVK*⁵⁷ that the tax authorities should bear the burden of proof.⁵⁸ In that case, the actual realization of the supplies was questionable but also could not be disproven.

The *Kollroß* and *Wirtl* cases do not contradict the approach either as they do not allow the deduction of input VAT for supplies that were not carried out as such. Instead, the outcome was determined by the special fact that they concerned advance payments.⁵⁹ In both cases, combined heat and power (CHP) plants were ordered and advance payments including VAT were made. The delivery date was not yet fixed at the time of payment. However, the orders were never delivered. Insolvency proceedings were opened against the suppliers, rejected for lack of assets, and the persons involved were convicted of fraud. No tax evasion resulted from the order for reference. *Kollroß* and *Wirtl* each wanted to deduct the input tax from the payment on account, which was rejected by the tax offices.⁶⁰

The CJEU first ruled that the tax on supplies in the case of payments on account arises at the time of receipt of the amount of money if the decisive elements of the future supply, including the actual effect thereof, are already known at that time. If this is not the case, no tax claim arises under Art. 65 of the VAT Directive.⁶¹ The right to deduct input tax arises in the case of payments on account at the time the payment is made. This is the point in time at which the acquirer assumes all financial risks in advance. Facts that subsequently become known do not prevent the right to deduct input tax.⁶² Since, in both cases – despite the lack of delivery dates – it could be assumed at the time of the down payment that the CHP units

55 CJEU, 15 October 2015, C-494/12, *Dixons Retail*, EU:C:2013:758, paras. 19, 21 and the case law cited; CJEU, 27 June 2018, C-459/17 & C-460/17, *SGI*, EU:C:2018:501, para. 38.

56 CJEU, 4 July 2013, C-572/11, *Menidzherski biznes reshenia*, EU:C:2013:456, paras. 19-20 and the case law cited; CJEU, 27 June 2018, C-459/17 & C-460/17, *SGI*, EU:C:2018:501, paras. 33-37.

57 CJEU, 27 June 2018, C-459/17 & C-460/17, *SGI*, EU:C:2018:501, paras. 40-46.

58 CJEU, 27 June 2018, C-459/17 & C-460/17, *SGI*, EU:C:2018:501, para. 30 and paras. 45-47; in the same sense also: F. Huschens, *Nachweispflichten der Finanzverwaltung bei Versagung des Vorsteuerabzugs*, EU-UStB 2018, pp. 79 et seq. However, the decision does not appear to be free of contradictions as, in para. 39, the burden of proof is placed on the person who wants to claim the input tax deduction: “In that regard, it must be remembered that it is for the person seeking deduction of VAT to establish that he meets the conditions for eligibility”.

59 CJEU, 31 May 2018, C-660/16 & C-661/16, *Kollroß and Wirtl*, EU:C:2018:372.

60 CJEU, 31 May 2018, C-660/16 & C-661/16, *Kollroß and Wirtl*, EU:C:2018:372, paras. 16-34.

61 CJEU, 31 May 2018, C-660/16 & C-661/16, *Kollroß and Wirtl*, EU:C:2018:372, paras. 38-42 with reference to CJEU, 13 March 2014, C-107/13, *FIRIN*, EU:C:2014:151.

62 CJEU, 31 May 2018, C-660/16 & C-661/16, *Kollroß and Wirtl*, EU:C:2018:372, paras. 47-48 with reference to CJEU, 21 February 2006, *BUPA Hospitals and Goldsborough Developments*, C-419/02, EU:C:2006:122.

would be delivered and no circumstances were known that would constitute tax evasion, the input tax deduction was initially to be granted. The deduction, however, could be denied if the purchaser “*knew or should reasonably have known that the supply was uncertain*”.⁶³

The CJEU also ruled that the VAT Directive itself does not require good faith protection on the deduction of input tax on payments on account. However, it interpreted the Directive as allowing Member States to waive an input tax adjustment in such cases. The second guiding principle of its decision reads literally:

Arts. 185 and 186 of Directive 2006/112 must be interpreted as not precluding, in circumstances such as those of the main proceedings, national legislation or practice under which the adjustment of the deduction of input tax in respect of an advance paid for the supply of goods is conditional on that advance being repaid by the supplier.⁶⁴

The German Federal Fiscal Court (Bundesfinanzhof) seized this opportunity and, in this author’s opinion, in a somewhat questionable manner, decided that German law indeed prohibited an input tax adjustment.⁶⁵

2.3. Exceptionally, substantive requirements can be overcome by protection of good faith in the case of formal embodiment

At first glance, there is a certain tension between the results reached so far and the original decisions in the *Teleos* and *Netto Supermarkt* cases.⁶⁶ In both cases, there was no transfer abroad (as a material prerequisite for the tax exemption of the cross-border supply), but the CJEU nevertheless granted good faith protection. The explanations on the special situation of intra-Community supplies where proof of shipment abroad cannot be provided in any other way than in paper form according to the conditions set by the national legislator offer clues to resolving this supposed contradiction.⁶⁷ As the decision in the *Mecsek-Gabona* case shows, the fact that the tax authorities did not initially object to the export document after examination is not crucial.⁶⁸ Rather, the supplier’s lack of evidence is decisive.⁶⁹

63 CJEU, 31 May 2018, C-660/16 & C-661/16, *Kollroß and Wirtl*, EU:C:2018:372, para. 51.

64 CJEU, 31 May 2018, C-660/16 & C-661/16, *Kollroß and Wirtl*, EU:C:2018:372, para. 69.

65 Critically also W. Reiß, *Vorsteuerabzug und Vorsteuerberichtigung bei Anzahlungen für nicht erbrachte Lieferungen*, *MwStR* 2018, p. 643.

66 CJEU, 27 September 2007, C-409/04, *Teleos*, EU:C:2007:548; CJEU, 21 February 2008, C-271/06, *Netto Supermarkt*, EU:C:2008:105.

67 Correspondingly for the intra-community delivery of new vehicles CJEU, 14 June 2017, C-26/16, *Santogal*, EU:C:2017:453, para. 75.

68 CJEU, 6 September 2012, C-273/11, *Mecsek-Gabona*, EU:C:2012:547, para. 41.

69 CJEU, 6 September 2012, C-273/11, *Mecsek-Gabona*, EU:C:2012:547, para. 41: “On that point, the Court has observed that, where there appears to be no tangible evidence to substantiate the conclusion that the goods concerned have been transferred out of the territory of the Member State of supply, to oblige taxable persons to provide conclusive proof of this does not ensure the correct and straightforward application of the exemptions.” Similar also W. Reiß, *Materielle und formelle Voraussetzungen für die Befreiung der innergemeinschaftlichen Lieferung nach Art. 138, 131 MwStSystRL einschließlich postfaktischer Erweiterungen nach der Rechtsprechung des EuGH*, UR 2017, p. 259.

In other words, in a situation in which the national legislature provides proof of the substantive requirements by means of a document, there is an exception to the principle that substantive requirements must be met. In such situations, the taxpayers are protected against falsification of this document if they act in good faith. Since the rulings in the *Teleos* and *Netto Supermarkt*, it has been recognized for intra-Community supplies and export supplies that taxable persons acting in good faith must be protected under certain circumstances. Protection is only granted if, even when exercising due commercial care, they could not have been aware that the conditions for exemption were not in fact fulfilled because the export documents provided by the buyer were falsified.⁷⁰ In *Božičević Ježovnik*, this was confirmed for the exemption of importations followed by an intra-Community supply.⁷¹ Protection cannot be granted, however, if the taxable person knew or should have known that a supply involved VAT fraud.⁷²

The exact prerequisites for the protection of good faith and the required procedure⁷³ have not yet been finally clarified. However, the jurisprudence of the CJEU suggests that a stricter standard of care applies here; it is not a question of formal requirements but rather the exceptional overcoming of the non-existence of substantive requirements. Therefore, it is not sufficient if the taxpayers were merely unaware of the tax fraud. Rather, they must exercise due commercial care. The scope of this exception has also not yet been clarified: If, in accordance with the case law of the CJEU,⁷⁴ the existence of an invoice is considered as an indispensable requirement for the deduction of input tax, an unrecognizably forged invoice could possibly be sufficient even though this is a requirement of EU law and not of the Member States.

70 CJEU, 21 February 2008, C-271/06, *Netto Supermarkt*, EU:C:2008:105, para. 27 and CJEU, 27 September 2007, C-409/04, *Teleos*, EU:C:2007:548, para. 68. Accordingly for the intra-Community supply of new vehicles: CJEU, 14 June 2017, C-26/16, *Santogal*, EU:C:2017:453, para. 75.

71 CJEU, 25 October 2018, C-528/17, *Božičević Ježovnik*, EU:C:2018:868, para. 46.

72 CJEU, 25 October 2018, C-528/17, *Božičević Ježovnik*, EU:C:2018:868, para. 47; CJEU, 6 September 2012, C-273/11, *Mecsek-Gabona*, EU:C:2012:547, para. 54.

73 R. Weymüller, *Kein Schutz des guten Glaubens an das Vorliegen der Voraussetzungen des Vorsteuerabzugs im Feststellungsverfahren*, MwStR 2015, p. 816, does not want to grant good faith protection in the declaratory proceedings but in the special equitable procedure. The submission of BFH, M. Kemper, *EuGH-Nachfolgeentscheidung: Änderung der Rechtsprechung zu den Rechnungsanforderungen*, MwStR 2018, p. 802 and J. Scharrer, *Zum Rechnungsmerkmal "vollständige Anschrift" bei der Ausübung des Rechts auf Vorsteuerabzug*, MwStR 2018, p. 933 to the CJEU, on the other hand, asked whether a grant in declaratory proceedings was required; however, the question did not need to be answered by the CJEU. The Advocate General had concerns to grant good faith protection in the special equitable procedure, T. Hartmann, in: Musil/Weber-Grellet, *Europäisches Steuerrecht*, 2nd Edition (Munich: C.H.Beck, 2022) § 15 UStG, para. 33 with reference to Opinion of Advocate General Wahl, 5 July 2017, C-374/16 & C-375/16, *Geissel*, EU:C:2017:515, paras. 70 et seq. and further references.

74 CJEU, 29 April 2004, C-152/02, *Terra Baubedarf-Handel*, EU:C:2004:268.