FICTITIOUS INVOICING IN THE VAT SYSTEM

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Abstract

We often hear in news reports that employees of the Hungarian National Tax and Customs Administration seized luxury cars and real estate on suspicion of large-scale VAT fraud and then auctioned them off. These cases are the tip of the iceberg, but according to various European Union surveys, abuses about VAT refunds in the EU cost Member States EUR 140 billion. In the case of Hungary, this results in a loss of nearly HUF 400 billion in the budget. One of these forms of abuse is closely related to the use of fictitious invoices. For decades, the tax authority has been seriously trying to track down businesses that issue and receive fictitious invoices. In my study, I examine the abuse of fictitious invoices, with special regard to tax evasion committed by issuing and receiving fictitious invoices. I will also mention the consciousness of taxpayers in this regard, as this has a significant impact on the determination of sanctions according to the court's case law. Given that transactions cross national borders, I will also refer to the case law of the Court of Justice of the European Union. I also analyze the importance of digitalization by the tax authority, which plays an increasingly important role in detecting transactions.

Keywords: *VAT, fictitious invoice, National Tax and Customs Administration.*

1. Introduction

The legal requirements related to invoicing are laid down in the Act on Accounting, VAT Act, and Tax Administration Identification of Invoices and Receipts, as well as on the Tax Authority Control of Invoices Stored in Electronic Form (VI.30.) NGM Regulation. In EU law, invoicing is dealt with in Chapter Three of the VAT Directive.

As a general rule, the taxable person must issue an invoice for each transaction. Under Article 220 of the Directive, every taxable person is obliged to issue an invoice for the supplies of goods and services carried out by him. The strict invoicing obligation aims to ensure that taxpayers pay VAT on all transactions. The legislation defines the mandatory data content of the invoice. In principle, the mandatory data content of invoices is uniform across the EU, although minor differences between Member States still occur in practice.[1] The invoice must clearly indicate the tax base, i.e. the price of the goods or services excluding VAT, the tax rate applied and any exemptions. For intra-EU transactions, the VAT numbers of both the seller and the buyer must be indicated on the relevant document. Irrespective of the buyer's intention, invoices should be issued for supplies of goods on which the customer is liable to pay tax, such as the sale of new means of transport.

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In relation to invoices, the authenticity of their origin, the integrity of their data content and their legibility must be ensured. Invoices may only be issued by taxpayers with strict serial numbering. Invoicing programs and invoice forms must ensure that invoices are numbered continuously. During an ex-post audit, the tax authority may examine whether each invoice can be found in the taxpayer's register without omission based on the invoice numbers, and whether the amount of tax payable calculated on the basis of the invoices included in the VAT analysis is equal to the amount of taxes included in the returns.

Since the material condition for the right of deduction is that the invoice is available to the buyer, taxable customers also require sellers to issue an invoice to them. In addition to the mandatory issuance of invoices, the legislation also stipulates the obligation of both the seller and the buyer to keep invoices. At the request of the tax authorities, invoices issued or received during the period under investigation shall be made available to the audit.

Hungarian legislation – Section 119 (1), Section 120 a) of the VAT Act.) Pursuant to Section 127(1), Section 15(3), Section 165(2) and Section 166(2) of the Act on Civil Liberties, the cumulative content conditions for deducting input tax include, inter alia, that the invoice must be issued by a real taxpayer, that it must be a certified document that is correct in form and content, issued on a real economic event and that the tax has also been passed on by the other taxpayer. The right of deduction can only be exercised if the formal and substantive conditions are met. It is not an economic event per se, but an economic event according to a certified invoice that can give rise to the exercise of the right of deduction, the transactions must actually take place in accordance with their agreement, as indicated on the documents issued. An invoice shall be considered authentic if all its details are correct, and the untruthfulness of any of the information provided may overturn the authenticity of the invoice.

However, according to court rulings, an invoice alone does not certify the existence of an economic event, but other evidence supporting the economic event proves the authenticity of the invoice, so that an invoice that is only formally adequate is not sufficient for the lawful exercise of the right of deduction.

2. Disclosure and verification of invoicing from the side of the tax authority

2.1. Audit practices of the tax authority

Act CLI of 2017 on the Tax Administration Code (hereinafter: Air.) defines two types of audit: a tax audit that creates a period closed by an audit[2], and a compliance audit that does not result in a period ending with an audit[3].

One of the peculiarities of compliance audits vis-à-vis tax audits is that they do not create a period closed by an inspection. Within the framework of a compliance investigation, the tax authority may also check before the closing of the tax return period whether the taxpayer has fulfilled certain tax obligations prescribed by law, fulfils them on time and in a manner suitable for establishing, reporting and paying tax (Air. § 91 (1) (a)) and/or collect data in order to establish the veracity of the data, facts and circumstances contained in its records and

[2] Air. Pursuant to Section 89 of the GDPR, the audit department of the tax authority will carry out the audit.
[3] In detail about Air. § 91 defines what compliance checks are.

the taxpayer's records and returns, as well as their authenticity (Air. § 91 (1) (b)) and/or examine the reality of economic events (Air. § 91 (1) (c)) and/or collect data to support its audit activities, in particular for the establishment and maintenance of an estimation database (Air. § 91(1)(d)).

In addition to the main tax obligations - the obligation to declare and pay taxes - taxpayers are also subject to other obligations prescribed by law. Such obligations include, for example, the issuance, storage and bookkeeping of the document. On the one hand, these serve as a basis for taxpayers to be able to fully fulfil their obligations in accordance with legal requirements, and on the other hand, for the tax authority to be able to examine real economic processes and determine the correctness of the fulfilment of obligations or possible defaults during its audit.

One of the special cases of compliance inspections is on-site inspections, in the framework of which, for example, the operational department checks on the spot in the framework of mystery shopping whether the taxpayer fulfils its Western and invoicing obligations, or whether the online cash register operates in accordance with legal requirements, issues legal documents, and whether data communication is ensured between the cash register and the servers of NAV. In addition to imposing a default fine, the results of these audits may also provide grounds for initiating a tax audit.

A tax audit is a complex process that starts with selection and ends with some kind of finding. This finding may be both to the taxpayer's expense and benefit, as the tax authority is obliged to disclose all circumstances during audits. The legislation specifies the procedural steps that an auditor conducting an inspection must follow when conducting an inspection[4].

It is the duty or duty of the tax authority to clarify and prove the facts during the audit, unless the law reverses the burden of proof and makes it the taxpayer's obligation[5]. When disclosing the facts, the tax authority is also obliged to disclose facts benefiting the taxpayer. It is also an important stipulation that unproven facts and circumstances cannot be assessed against the taxpayer, except for the assessment procedure. The tax authority is now free to consider which evidence to take into account in its assessment, but full disclosure of the facts remains an obligation for the audit.

2.2. Evidence revealed during a tax audit

The tax authority must disclose relevant facts and circumstances related to the assessment of the decision. The law does not oblige the authority to obtain all the evidence in the case. The tax procedure itself operates on the principle of free evidence, so the legislator leaves it to the tax authority to choose the means of proof to be used. The legislation lists the most common evidence only by way of example. Evidence under the law includes, for example, statements, documents, witness hearings, inspections, experts, expert opinions and on-the-spot inspections. The provisions of the Air. are not exhaustive, do not prohibit the use of evidence not listed above, nor do they establish a hierarchy of strength of individual evidence, which must be applied by the tax authority. In the course of conducting a tax audit, on the other hand, the

[4] The main rules for conducting the inspection are laid down in Air. however, there are certain detailed rules detailed in Government Decree 465/2017 (XII.28).

[5] Az Air. Paragraph 99 of the Act stipulates that the burden of proof is on the side of the tax authority and is only shifted to the taxpayer on the basis of a special provision of the law, e.g. in connection with a supply exempt from Community tax.

content of documents is of decisive importance[6].

The tax return, the underlying records, accounting documents and other documents are evidence that the revision must be carried out by Air. provides that it must control it during the investigation of the facts. During a tax audit, the tax authority must clarify whether the taxpayer's returns contain correct data and whether they meet the requirement that tax payments be based on true facts.

The taxpayer must have the basic documents of the returns, without which the reality of the tax payment obligation cannot be verified. In some cases, the norm excludes the principle of free evidence. For example, VAT is used to account for input tax (purchased, deductible). tv. provides for bound evidence; The absence of a document certifying the amount of output tax as an objective criterion for deduction cannot be remedied. In the absence of an invoice, the verification of the authenticity of the transaction on which the invoicing is based cannot be considered substantially. Not only the invoice on which the right of deduction is based, but all other documents are relevant; this finding follows from the provisions of Act C of 2000 on Accounting (hereinafter: Accountant).[7]

The most important requirement for evidence is that it credibly verifies its content. Therefore, only data that can be verified by third parties can be considered credible. For example, in the absence of records and accounting, treasury receipts cannot be verified, so the authenticity of the cash movement included in them cannot be established. Art. Pursuant to Art. Section 7, point 24, documents: documents specified by law, registers, books and registers required by legislation on bookkeeping, as well as plans, contracts, correspondence, declarations, minutes, decisions (orders), invoices and other extracts, certificates, certificates, public and private documents, regardless of their form. If the taxpayer fails to comply with its obligation to retain documents and it is not possible to control the data contained in the return in a documentary manner, the law provides an opportunity to conduct the estimation procedure.

The case-by-case decision of the Kúria Kfv.V.35.479/2015 also highlights that if the taxpayer does not have accounts, the tax authority is not in a position to carry out an effective audit and to make a determination at the expense or benefit of the taxpayer at each return period, even if the documents are available to it; In the absence of analytics and ledger files, it is not possible to control which documents have declared their data content.

Pursuant to Section 86 (2) of the Tax Administration Implementing Decree, an estimate may be applied a) if the basis for tax or budget support cannot be established b) if there are data, facts or circumstances available to the tax authority that may be considered significant due to their number or content, it can be reasonably assumed that the taxpayer's documents are not suitable for establishing the basis for real tax or budget support, or (c) where the natural person has made an untrue, incomplete declaration or statement or has failed to make such a declaration. According to paragraph (6) of the legislation, the tax base must be estimated even if it is not possible to determine the tax base because no data, documents or other evidence of income or expenses are available to the tax authority,

[6] Darai Péter: Iratátadás az adóellenőrzés során – egy gyakorlati jogalkalmazó szemszögéből. Miskolci Jogi Szemle 15. évf. 2. sz. (2020).

[7] Kúria Kfv.V.35.479/2015.

and their absence is not due to a reason beyond the taxpayer's control.

The Air. Pursuant to Section 8(1), taxpayers are obliged to exercise their rights in good faith and to facilitate the performance of the tasks of the tax authority. The already called Air. Section 98 (1) also requires active participation and cooperation of taxpayers under tax control. However, during inspections, some taxpayers do not want to hand over the documents or just "drip" them. According to court case-law, obstruction is defined as any conduct that unduly delays or prolongs the conduct of a tax audit.[8]

It cannot be considered a bona fide exercise of rights if the taxpayer refuses to provide data despite repeated requests and later provides the documents in an incomplete, photocopy in administrative proceedings and disputes the legality of the tax authority's decision on these grounds without a specific proposal for evidence.[9]

When revealing evidence, attention should also be paid to the fact that the tax authority does not base its findings only on facts and circumstances that exist on the side of the invoice issuer, because it is not yet possible to determine the taxpayer's consciousness content from this. In connection with this, I present below the decision of the Supreme Court Kfv.I.35.362/2020, in which the tax authority found that the taxpayer was engaged in cereal sales. The tax authority did not allow taxpayers to exercise the right to deduct VAT in relation to five invoice issuers. The origin of the goods could not be established by the invoice issuers and no documents related to them could be provided to the audit. The taxpayer should have exercised due diligence when concluding the contract and should therefore have known that it was accepting documents from companies involved in tax evasion.

The Kúria emphasized that the tax authority must first examine whether the invoice issuers were able to fulfil the economic events covered by the invoices, and the material and personal conditions of the invoice issuers must be examined. If the economic event included in the invoice did not take place, then there is no need to examine the content of consciousness. If the tax authority finds that the economic event did not take place between the parties to the invoice, it is necessary to proceed to the examination of the role of the person who wants to exercise the right of deduction. The tax authority's decision must contain the objective circumstances from which the role of the taxpayer in the analysis of the economic event can be established. The decision of the tax authority did not contain in a systematic, traceable manner the evidence supporting the consciousness of the taxpayer under investigation at any of the invoice issuers.

Where tax fraud has not been committed by the taxable person himself, the right of deduction may be refused to him only where it is established from objective circumstances that that taxable person to whom the goods giving rise to the right of deduction were supplied knew or ought reasonably to have known that, by acquiring those goods, he was taking part in transactions aimed at tax evasion committed by the supplier or by an economic operator earlier or later in the supply chain. The Kúria found that the tax authority did not comply with the analysis of taxpayer consciousness content required by the CJEU but collected the circumstances giving rise to suspicion from the supplier's side and tried to justify

[8] Kfv. I.35.065/2011.
[9] Kfv.I.35.234/2015/6.

and prove the taxpayer's consciousness content with these.

The Kúria obliged the tax authority of first instance to conduct a new procedure and stated that in the course of the new procedure, the tax authority is obliged to indicate and prove, taking into account the decisions of the CJEU, the circumstances on the basis of which the taxpayer knew or could have known that it was participating in a transaction aimed at tax evasion committed by suppliers during the purchase of products.

2.3. Presentation of the related ruling of the European Court of Justice

In the case of Mahagében Kft.[10], the Baranya County Court turned to the European Court of Justice with its questions. On June 1, 2007, the company concluded a supply contract with R. Kft. for the supply of acacia logs in an unprocessed state in an amount of 500 m3. The place of performance of the contract was the premises of the customer. The contract 1.) The parties stated that they are mutually convinced that both the Customer and the Supplier are registered existing companies, have a valid and effective tax number, and that the scope of activity of the Supplier covers the terms of the contract and is able to fulfil the subject matter of the contract. During the delivery period, R. Kft. issued 16 invoices to the applicant for the delivery and sale of various quantities of acacia logs, 6 of which also had delivery note numbers attached to them. He included the invoices in his return and exercised his right of deduction.

The supplier has set up its invoices on its tax return and paid value added tax on its sales. In his statement to the tax authorities, he acknowledged that the sales had taken place. Within the scope of the audit of the right of deduction, the tax authority examined the purchases and sales of R. Kft. and concluded that R. Kft. did not have acacia log stock, and the quantity of acacia logs purchased in 2007 was insufficient to fulfill the sales invoiced on the other invoices issued to Mahagében Kft. apart from one invoice.

Both parties to the transaction stated during the audit that the delivery notes had not been kept, but later the applicant provided the revision with 22 copies of delivery notes as evidence of the economic event. The seller carried out the transport of acacia logs, but he did not have a transport vehicle, nor did his accounting contain an invoice for the rental of a motor vehicle or the consideration for transport.

The Ltd. sold most of the acacia logs to P. Kft. as fuel and resold the high-quality acacia logs for furniture making. It was included in the stock of the quantity purchased from R. Kft. and was resold.

The tax authority audited the tax returns of Mahagében Kft. for the years 2003-2007, as a result of which it imposed a tax deficit on the taxpayer, among others, in connection with the invoices of R. Kft., which resulted in a tax penalty and late payment surcharge for the tax shortfall. In connection with this economic event, it explained that Mahagében Kft. is not entitled to deduct tax in respect of invoices issued by R. Kft., since the invoices cannot be considered authentic because the economic events indicated on the invoices did not or could not take place between the parties indicated on them.

VAT. Act. 44(5) rejected the application of the rule laid down in Section 44(5) of the Act, according to which the tax rights of the taxpayer indicated in the document as a buyer may not be prejudiced if he acted with due care in relation to the

[10] Hajdu Emese: A Mahagében-Dávid ítélet. Számvitel, Adó, Könyvvizsgálat, 2012. vol. 54. no. 7-8.

taxable event, taking into account the circumstances of the supply of goods or services, because, in his view, in the case of such a high-value transaction, in the case of a new business partner or in all cases where the circumstances of the purchase differ from those of the usual commercial From the circumstances of the sale, the buyer can be expected to ascertain the existence, data and tax number of the given company from the company register.

Since the managing director of Mahagében Kft. stated that, due to long-standing acquaintance, he did not check whether R. Kft. is an existing taxpayer or whether G.T. is entitled to act in transactions and issue invoices on behalf of the Ltd., the taxpayer did not act with due diligence when he did not require any written document about the order or other security from another taxpayer to ensure the enforcement of its rights. In its view, the fact that the invoice is on file of both parties and has been entered in the accounts does not establish beyond doubt that the transaction actually took place between the parties indicated on the invoice. He emphasized that he did not dispute that Mahagében Kft. actually, purchased wood in the quantity indicated on the invoices, nor that R. Kft. included the invoices in its return and fulfilled its tax payment obligation. In its view, what is relevant for the assessment of the transaction is that the applicant could not purchase those acacia logs from R. Kft. due to lack of goods.

On the basis of the above facts, the county court asked the following questions:

1. Must Directive 2006/112 be interpreted as meaning that a taxable person for VAT who, in compliance with the provisions of that directive, fulfils the substantive conditions for deduction of VAT may be deprived of his right to deduct by national legislation or practice which prohibits deduction of VAT paid on the purchase of goods where only the invoice as a certified document certifies that the goods have been supplied and does not have a document from the issuer of the invoice who: certifies that he had possession of the product, could deliver it or fulfilled his declaration obligation. Can a Member State require, under Article 273 of the Directive, in order to ensure accurate collection of VAT and to prevent tax evasion, that the recipient be in possession of other documents proving that he has the goods issuing the invoice or that they have been delivered or transported to the recipient?

2. Does the concept of due diligence laid down in Section 44(5) of the National VAT Act contain rules compatible with the principles of neutrality and proportionality in the application of the Directive, which have already been expressed several times by the European Court of Justice, in the application of which the tax authority and established judicial practice require that the recipient of the invoice must satisfy himself whether the person issuing the invoice is a taxable person or has registered his products? whether it has a purchase invoice for these and whether it has fulfilled its declaration and VAT payment obligations.

3. Must Articles 167 and 178(a) of Directive No 112/2006 on the common system of value added tax be interpreted as meaning that that precludes national legislation or practice which, in order to exercise the right of deduction, requires the taxable person receiving the invoice to prove compliance with the law on the part of the company issuing the invoice.

On 21 June 2012, the European Court of Justice delivered *the following judgment in* joined cases C-80/11 and C-142/11 (Mahagében Kft. – Péter Dávid):

Articles 167, 168(a), 178(a), 220(1) and 226 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as *precluding a national practice*

whereby a tax authority refuses to deduct from the value added tax due by a taxable person the amount of input tax on services supplied to him on the ground that: that the issuer of the invoice for those services or one of its subcontractors committed an irregularity, without that tax authority proving, on the basis of objective circumstances, that the taxable person concerned knew, or ought reasonably to have known, that the transaction invoked to establish his right of deduction was involved in tax evasion committed by that invoice issuer or by an economic operator previously involved in the supply chain.

Articles 167, 168(a), 178(a) and 273 of Directive 2006/112 must be interpreted as *precluding a national practice whereby the tax authority refuses the right to deduct on the ground that the taxable person is not satisfied that the issuer of the invoice relating to the goods on the basis of which the right to deduct is exercised is a taxable person, whether he has the goods in question and is able to transport them or whether he is liable to declare and pay value added tax, or on the ground that that taxable person has no document other than that invoice proving that those circumstances exist,* even though all the substantive and formal requirements laid down in Directive 2006/112 for exercising the right to deduct have been fulfilled, and the taxable person was not aware of any circumstance indicating irregularity or fraud in the interests of that invoice issuer.

In the case of Mahagében Kft., the Pécs General Court announced its judgment on 6 December 2012, annulling the decision of the tax authority. In its judgment, it stated that the reasoning of the tax authority's decision was not in line with the reasoning set out in the judgment of the European Court of Justice, basing the taxpayer's denial of the taxpayer's right of deduction solely on the fact that, at the time of issue, the invoice issuer did not have conditions that were necessary for the performance of the economic events included in the invoice, in the view of the tax authority, and was also unable to provide proof of purchase of the goods. The judgment stated that national practice deviates from the interpretation of law consistently pursued by the European Court of Justice, and national practice has established requirements for the exercise of the right of deduction in several cases, which assess deficiencies detected at the invoice issuer to the detriment of the invoice recipient without carrying out any investigation on the part of the recipient, thus rendering the liability of the invoice recipient objective, which is contrary to Directive 2006/112/EC. According to the General Court, the tax authority has not disclosed any circumstance indicating that the taxpayer knew or should have known of any circumstance indicating irregularities or fraud committed in the interests of the invoice issuer. As stated in the judgment, given that the invoice issuer qualifies as a taxable person and has fulfilled its tax declaration and payment obligations, there is no possibility of tax evasion either, since tax fraud requires damage to the budget and the taxpayer's intention to do so, so not only is there not but there can be no circumstance in the litigation case that would justify the untrue economic event, Consequently, further proof is unnecessary.

2.4. Opinion of the Administrative and Labour College of the Kúria[11]

Pursuant to Section 27(1) of Act CLXI of 2011 on the Organisation and Administration of Courts, the Administrative-Labour Division of the

[11] 5/2016. (IX.26.) KMK Opinion.

Kúria issued the following collegial opinion on the interpretation of Section 120(a) of Act CXXVII of 2007 on Value Added Tax in order to promote uniform case-law:

1.) If the economic event included in the invoice did not take place, there is no need to examine whether the recipient of the invoice knew or should have known about tax evasion or tax fraud.

2.) If the economic event took place, but not between the parties included in the invoice, then – depending on the facts – it can be examined whether the recipient of the invoice knew or should have known about tax evasion or tax fraud.

3.) If the economic event took place between the parties included in the invoice, but the invoice issuer (or the issuer of the invoice received by it) has engaged in fraudulent behaviour, it must be examined in the tax administration procedure whether the invoice recipient knew or should have known about tax evasion or tax fraud.

Financial litigation occurs in a significant number in Hungarian administrative courts, and a significant proportion of this is represented by lawsuits related to the deduction/refund of value added tax (hereinafter referred to as VAT or VAT). Community law and the case-law of the Court of Justice of the European Union (hereinafter: CJEU) have a guiding effect on Hungarian legislation and enforcement. In response to Hungarian initiatives, the CJEU has laid down the principles that have brought about changes in the application of Hungarian law in several judgments in preliminary ruling proceedings (e.g. Mahagébenn/Dávid (C-80/11 and 142/11) and Tóth (C-324/11).

Act CXXVII of 2007 on Value Added Tax (hereinafter: VAT Act) Pursuant to Section 120(a): To the extent that the taxpayer – in his capacity – uses or otherwise utilizes the goods or services for the purpose of supplying taxable goods or services, he is entitled to deduct from the tax payable by him the tax that another taxpayer – including Eva, – has paid in connection with the acquisition of goods or services. – transferred to him.

This legislation is identical almost verbatim to Article 168(a) of Directive 2006/112/EC of the Council of the European Union of 28 November 2006 on the common system of value added tax (hereinafter the Directive): A taxable person shall, in so far as the goods and services are used for the purposes of his taxable transactions in the Member State in which his taxable transactions are carried out, be entitled to deduct from the amount of tax for which he is liable: supplied or to be rendered to him by another taxable person VAT due or paid in that Member State on the supply of goods or services. The Kúria has a uniform judgment that a substantially certified invoice is a mandatory condition for exercising the right of deduction. Within the scope of substantive credibility, it must be examined whether the economic event included in the invoice took place, whether it took place between the parties included in the invoice, and whether it can be proved that tax fraud/tax evasion has occurred. Judicial practice conducted before 2012 placed the burden of proof primarily on the taxpayer with regard to these circumstances. The case-law of the CJEU has laid down important principles in this regard which have an impact on the application of the law, including adjudication. The most important, general conclusions are as follows:

- The right of deduction forms an integral part of the VAT mechanism and, in principle, should not be restricted. That right, namely the total amount of input tax

charged on transactions effected, shall apply immediately.[12]

- National authorities and courts should refuse the benefit of the right to deduct where it is established, on the basis of objective circumstances, that that right has been invoked fraudulently or abusively.[13]

- It is for the tax authorities to prove, in the requisite legal manner, the existence of objective circumstances from which it may be concluded that the taxable person knew, or ought reasonably to have known, that the transaction invoked to establish his right of deduction was involved in tax evasion committed by the supplier or economic operator previously involved in the supply chain.[14]

A taxable person who knew, or ought reasonably to have known, that his acquisition involved a transaction constituting evasion of VAT must, for the purposes of the Directive, be regarded as a participant in that evasion, irrespective of whether or not he derives profits from the resale of goods or the use of services in the course of his subsequent taxable transactions.[15](Mahagében/David, paragraph 46).

In light of the above, it can be concluded that, in connection with Section 120(a) of the VAT Act, the burden of proof is on the tax authority, which must prove the existence of objective circumstances that the taxpayer invoked the right to deduct fraudulently or abusively. If the tax authority establishes the inauthenticity of the content of invoices based on evidence, the taxpayer must offer evidence capable of establishing a different fact. The "objective circumstances" related to the occurrence of an economic event are not included exhaustively either in CJEU judgments or in national legislation, and due to its diversity, they cannot be included, the scope of which may be determined by judicial practice. According to current Hungarian court practice, the legality of the defendant's decision may be based if the decision is based not on a single fact or circumstance that qualifies as objective, but on several objective facts and circumstances built on each other, which undoubtedly prove the illegality of the tax deduction.

In connection with the authenticity of the received invoice, the analysis of the taxpayer's consciousness (knew/should have known) may develop in different ways. Three distinct facts can be distinguished in the course of the investigation:

1.) The economic event included in the invoice did not take place.

The supply of goods/services included in the invoice did not take place in reality, the invoice exists only "by itself", without any underlying economic event. Its purpose is to exercise the right to deduct VAT fraudulently or abusively. The parties in the invoice are aware of the absence of an economic event, their subjective consciousness embraces its unreal nature. In view of this, it is unnecessary and incomprehensible to examine whether the invoice recipient knew or should have known about tax evasion and tax fraud. He knew about it because he was involved in tax evasion.

2.) The economic event has taken place, but not between the parties included in the invoice.

The supply of goods or services took place (e.g. the goods became the property of

[12] Mahagében/David, para. 38.
[13] Mahagében/David, para. 42.
[14] Mahagében/David, para. 49
[15] Mahagében/David, para. 46.

the invoice recipient, the house was built), but the tax authority proved that it was not performed by the taxpayer issuing the invoice. A taxpayer exercising his right of deduction often claims that he was deceived and knew that the invoicing taxpayer was performing the contract. In assessing this situation, it cannot be overlooked, on the one hand, that the right to deduct VAT applies in respect of input tax on transactions carried out (Mahagében/David, paragraph 38) and, on the other hand, that tax which has been passed on to him by another taxable person may be deducted (Section 120(a) of the VAT Act, Article 168(a) of the Directive). According to the facts disputed in this paragraph, the transaction was carried out, but the invoice issuer is not the same as the taxable person passing on VAT (the invoice issuer did not actually pass on VAT). The two cumulative conditions are therefore not met, but the dispute is whether they were encompassed by the consciousness of the plaintiff taxpayer. In this context, reference should be made to the case-law of certain courts of EU Member States (see paragraph 8 of the Summary Opinion on the outcome of the examination of "Litigation relating to the deductibility of value added tax" of the Kúria's Case Practice Analysis Group. The practice of the right of deduction of VAT by national courts – 2015.") according to which most Member States only start to examine the question of good faith if the economic event has actually occurred. If the transaction actually took place and tax evasion is associated with it, then the question of good faith may arise.

The case-law of the CJEU makes no distinction between tax evasion by the taxable person himself and where the taxable person knew or ought to have known that he was involved in a transaction aimed at VAT fraud by acquiring the goods. For the purposes of applying this Directive, he shall be regarded as a participant in such tax evasion, irrespective of whether or not he derives profits from the resale of goods or services in the course of taxable transactions subsequently carried out by him.[16]

It is the task of the tax authority to prove this taxpayer's behaviour (consciousness), but the taxpayer is obliged to cooperate, as there are cases when only the taxpayer receiving the invoice has information that can serve as evidence during the procedure. Therefore, in order to assess the legality of a tax authority decision based on the existence of "objective circumstances" compared to the case set out in point 1, it may be necessary, depending on the facts, to examine whether the invoice recipient knew or should have known about tax evasion and tax fraud.

Depending on the facts, a distinction may be made between an active invoice recipient and an invoice recipient engaged in passive tax evasion, in connection with which the behaviour of the recipient of the invoice during the realisation of the economic event must be examined. The accrual is based on whether the recipient of the invoice was a taxable person who played an active or passive role in carrying out the fraudulent conduct. Its conduct is considered active if it has actively acted to obtain an unlawful tax advantage, i.e. it has substantially contributed to the artificial transaction or transactions. In this case, it is not necessary to examine the consciousness of the recipient, but to reveal his actions that prove that he was the primary shaper of the transaction or chain under control. Its conduct is considered passive if it did not examine the conditions and circumstances offered by the other taxpayer during the execution of the transaction. In this case, the consciousness of the invoice recipient must

[16] Case C-18/13 Maks Pen, para. 48.

be revealed, since it must be proved in the administrative procedure that he knew or ought to have known that the transaction or chain thereof was actively created and involved by others in order to obtain an unlawful tax advantage. While in the former case the originator of the transaction(s) is, in the latter case, the recipient is the taxpayer receiving the invoice. In the latter case, however, if he knew, or ought reasonably to have known, that he was involved in tax evasion, he should not exercise the right of deduction. There must be at least one active tax evader in the transaction or chain transaction (carousel), unless it was created and moved from the background by a person who was not itself a counterparty to any transaction. It is therefore necessary for the tax authority to identify the taxpayer(s) benefiting from the unlawful tax advantage, in view of which, in view of the above, the applicant's taxpayer's right of deduction/refund may be denied.

1.) The economic event took place between the parties included in the invoice, but the invoice issuer (or the issuer of the invoice received by it) engaged in fraudulent conduct.

In this case, the cumulative conditions were met: the supply of goods/services took place and was fulfilled by the invoice issuer. However, the tax authority proves that the invoice issuer or, in the case of chain contracts (carousel fraud), a former taxpayer (issuer of the invoice received by him) in the queue engaged in fraudulent conduct. The question arises as to whether the exercise of the applicant's right of deduction may be connected with the conduct of other taxable persons and whether it may lose the exercise of its right, which in principle cannot be restricted. In assessing this issue, it should be borne in mind that combating tax fraud, tax evasion or other abuses is an objective recognised and promoted by the Directive, and individuals cannot rely fraudulently or abusively on norms of EU law.[17] This struggle is an objective that must apply not only between the parties to the bill, but throughout the entire economic chain. However, the applicant taxpayer cannot automatically lose his right of deduction, which, according to the CJEU, forms an integral part of the VAT mechanism because of the abusive conduct of another taxable person.[18] . It is therefore necessary to examine the consciousness of the applicant taxpayer and it is for the tax authority to prove on the basis of objective circumstances that the taxable person knew, or ought reasonably to have known, that the transaction invoked to establish his right of deduction was involved in tax evasion committed by the vendor or supplier or economic operator previously involved in the supply chain.[19]

Judicial practice is never static, it can change and evolve. This is especially true in this area of law, as the CJEU regularly issues new rulings on the legality of VAT deduction, and such cases are pending. Just as the CJEU rulings of 2011/2012 have shaped the practice of national tax authorities and courts, this is also to be expected for the future.[20]

3. Instead of closing remarks – cases that have happened in the recent past

Pharmacies tricked with fictitious bills[21]

[17] Mahagében/David, para. 41 and CJEU judgments cited.
[18] Mahagében/David, para. 38.
[19] Mahagében/David, para. 49.
[20] 5/2016. (IX.26.) KMK Opinion https://kuria-birosag.hu/hu/kollvel/52016-ix26-kmk-velemeny.
[21] https://www.vg.hu/kozelet/2024/05/gyogyszertar-fiktiv-szamla-nav.

Four pharmacies also accepted invoices from companies that were members of an invoicing network already known to the tax authorities. As a result of the official action, pharmacies amended their returns.

When analysing online account data, it was suspected that pharmacies accepted fictitious invoices for almost four times the market price as a substitute for pharmacists. The suspicion was confirmed by the fact that these invoices came from companies that were members of an invoicing network already known to the tax authorities.

In addition to fictitious invoices, there were also replacement invoices actually carried out, with the same amount and period as fictitious invoices.

On detailed examination, it appeared from the documents as if the substitute doctor of pharmacy was present in several places at once. His employer reported him working 20 hours a week, and in addition, according to the documents, 70 hours of substitution per week were accounted for, often overlapping in time and space.

There was a personal connection between the account-receiving pharmacies, the same person as owner, manager or even agent performed the financial management, representation and accounting of the companies. As a result of the authorities' action, pharmacies amended their returns and subsequently declared a total of HUF 6.5 million in taxes, which were paid into the state budget.

After the incident, pharmacies cut off contact with subcontractors and did not accept further invoices from newer companies employing "substitute" pharmacists. Their VAT returns also proved that they chose legal operation after learning from the unsuccessful attempt.

Enforcement proceedings have been initiated at the invoice issuing companies, their tax numbers have been deleted. The Doctor of Pharmacy must also give an account of what happened, and the NAV checks the declaration of his real income and the personal income tax paid.

3.1. Fictitious accounts at all levels[22]

More than two billion forints of damage was caused to the budget by the multi-level chain of companies built up of periodically changing enterprises, the operation of which was recently liquidated by the National Tax and Customs Administration (NAV). In a nationwide operation, 49 locations were searched, 29 suspects were questioned and 5 people were detained by financial investigators.

A man from Fejér County controlled a hierarchically structured criminal organization, whose members operated companies with no real economic activity with a high degree of organization and through secret communication channels.

The perpetrators put straw man persons at the head of the companies; Their sole purpose was to provide beneficial owners with invoices issued without any actual economic activity. Companies unlawfully deducted the VAT content of fictitious invoices, causing a particularly significant financial disadvantage to the budget.

With the support of NAV investigators, IT specialists, inspectors, patrols and the MERKUR Deployment Unit, they searched 49 locations, blocked real estate, bank accounts, seized cars and cash worth more than one and a half billion forints. In cooperation with the International Department of the Asset Recovery Office of the National Bureau of Investigation of the Riot Police, the investigating authority also

[22] Fiktív számlák minden szinten https://nav.gov.hu/sajtoszoba/hirek/Fiktiv_szamlak_minden_szinten.

initiated the seizure of foreign real estate and vehicles linked to the criminal organization.

NAV Central Transdanubian investigators questioned 29 people as suspects in the case. The leader of the criminal organization and four associates were detained. NAV is investigating budget fraud committed by a criminal organisation.

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