Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 30 November 2017 [1]

Case C-8/17

Biosafe — Indústria de Reciclagens SA
v
Flexipiso — Pavimentos SA

(Request for a preliminary ruling
from the Supremo Tribunal de Justiça (Supreme Court, Portugal))

(Request for a preliminary ruling — VAT — Deduction of input VAT — Limitation of the deduction of input VAT — Accrual of the right of deduction)

I. Introduction

1. The present proceedings concern a question of VAT law which has been referred to the Court in the context of a civil dispute relating to the amount of the purchase price payable.

2. At the time of concluding the contract, both parties assumed that a reduced rate of VAT would apply. The tax authority having subsequently established the correct statutory tax rate, the issue is whether the supplier may retrospectively claim that amount from the defendant as recipient of the supply. The defendant says not, since it may no longer claim a deduction of input VAT because the time limit for exercising that right has expired.

3. In this case, and in *Volkswagen AG*,[2] pending, the subject matter of which is similar, the Court must now give a ruling on the point at which the right to deduct the full (i.e. objectively correct) amount of input VAT arises. It may arise as soon as the supply is made and the recipient of the supply is in possession of an invoice, even if the amount of tax shown on the invoice is too low (in this event, in 2008). Alternatively, the right to deduct in the full amount may not arise until an invoice showing the correct (higher) amount of tax is issued (in this event, in 2012).

4. The present case must at the same time be viewed in the light of *Barlis 06*[3] and *Senatex*.[4] In those cases, the Court held that an incorrect invoice has no bearing on the point at which the right to deduct input VAT arises. The Court now has an opportunity to develop that case-law further in this regard.

1 Original language: German.

2 Case C-533/16 — *Volkswagen AG*.

3 Judgment of 15 September 2016, *Barlis 06 — Investimentos Imobiliários e Turísticos* (C-516/14, EU:C:2016:690).

4 Judgment of 15 September 2016, *Senatex* (C-518/14, EU:C:2016:691).

II. Legal framework

A. EU law

5. Article 168 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax [5] provides:

'In so far as the goods and services are used for the purposes of the taxed transactions of a taxable person, the taxable person shall be entitled, in the Member State in which he carries out these transactions, to deduct the following from the VAT which he is liable to pay:

(a) the VAT due or paid in that Member State in respect of supplies to him of goods or services, carried out or to be carried out by another taxable person;

…'

6. Article 178 of that directive reads:

'In order to exercise the right of deduction, a taxable person must meet the following conditions:

(a) for the purposes of deductions pursuant to Article 168(a), in respect of the supply of goods or services, he must hold an invoice drawn up in accordance with Sections 3 to 6 of Chapter 3 of Title XI;

…'

7. Article 226 of that directive contains the following provision:

'Without prejudice to the particular provisions laid down in this Directive, only the following details are required for VAT purposes on invoices issued pursuant to Articles 220 and 221:

…

(10) the VAT amount payable, except where a special arrangement is applied under which, in accordance with this Directive, such a detail is excluded;

…'

B. Portuguese law

8. In Portuguese law, Article 7 of the Código do Imposto sobre o Valor Acrescentado (Value Added Tax Code, 'CIVA') provides:

'1. Without prejudice to the provisions contained in the following paragraphs, VAT shall be due and become chargeable:

(a) in the case of the supply of goods, at the time when the goods are made available to the purchaser'.

5 OJ 2006 L 347, p. 1.

Article 8 of the CIVA provides:

‘1. Notwithstanding the provisions contained in the preceding article, VAT shall, where the supply of goods or services gives rise to an obligation to issue an invoice or equivalent document in accordance with Article 29, become chargeable:

(a) if the invoice or equivalent document is issued within the time limit laid down, at the time of its issue’.

9. Article 36 of the CIVA further provides:

‘ …

5. The invoices or equivalent documents must be dated and numbered sequentially and contain the following information:

…

(d) the rates [of tax] applicable and the amount of tax payable’.

10. The time limit for exercising the right to deduct is laid down in Article 98 of the CIVA:

‘…

2. Without prejudice to any special provisions, the right to deduct tax or to reimbursement of overpaid tax may be exercised only for a period of four years from accrual of the right to deduct or payment of the excess tax.’

III. The dispute in the main proceedings

11. Between February 2008 to May 2010, the appellant in the main proceedings before the national court, Biosafe — Indústria de Reciclagens, SA (‘Biosafe’), sold to the respondent, Flexipiso — Pavimentos SA, rubber granules worth EUR 664 538.77 in total, on which it charged VAT at a reduced rate of 5%.

12. In 2011, however, a tax assessment for the years 2008 to 2010 found that the appellant should have applied a VAT rate of 21%. The tax authority then ordered a retrospective recovery of tax equal to the difference of EUR 100 906.50, which the appellant paid to the State.

13. On 24 October 2012, the appellant sent the respondent a request for payment in the amount of the aforementioned difference, which the defendant refused to pay.

14. By the civil action, the appellant seeks to have the respondent ordered to pay it the aforementioned amount. In the appellant’s submission, the respondent will later be able to reclaim the amount payable from the tax authority, since it will be entitled to deduct input VAT once it has made payment to the appellant.

15. The respondent counters the foregoing with the contention that Article 98(2) of the CIVA attaches a four-year time limit to the purchaser’s right to deduct VAT which has been passed on to him. By the date of receipt of the request for payment, which, according to the referring court, contains all the elements necessary to be regarded as an invoice for the purposes of VAT law, that time limit had already expired.

16. The court of first instance and the Tribunal da Relação de Lisboa (Court of Appeal, Lisbon, Portugal) took the view that the point at which that time limit started to run, and therefore the point at which the right to deduct input VAT arose, was when the original invoices were issued in 2008 rather than when the rectifying documents were issued in 2012. For that reason, the lower courts dismissed the action, and, as a result, the appellant brought an appeal before the Supremo Tribunal de Justiça (Supreme Court, Portugal).

IV. Procedure before the Court of Justice

17. The Supremo Tribunal de Justiça (Supreme Court, Portugal), before which the present dispute is pending, referred the following questions to the Court for a preliminary ruling:

'(1) Does Directive 2006/112/EC, and in particular Articles 63, 167, 168, 178, 179, 180, 182 and 219 thereof, and the principle of neutrality, preclude legislation which has the result that, in circumstances where the seller of the goods, liable for VAT, (i) was subject to a tax inspection which found that the VAT rate that he applied in a given situation was less than the due rate, (ii) paid to the State the additional tax and (iii) seeks to obtain the respective payment from the purchaser, also liable for VAT, the time period for the latter to be able to deduct that additional tax is calculated from the date of issue of the initial invoices and not from the date of issue or receipt of the rectifying documents?

(2) If the foregoing question is answered in the negative, do the abovementioned articles of that directive and the principle of neutrality preclude legislation which has the result that, once documents rectifying the initial invoices are received, issued following the tax inspection and payment to the State of the additional tax, for the purpose of obtaining payment of that additional tax, at a time when the period for exercising the right of deduction has already elapsed, it is legitimate for the purchaser to refuse to pay, on the basis that refusal of the passing on of tax is justified where it is impossible to deduct that additional tax?'

18. In the proceedings before the Court, written observations have been submitted by the Portuguese Republic, Biosafe and the European Commission.

V. Legal assessment

A. Admissibility of the questions referred for a preliminary ruling

19. The Portuguese Republic considers the second question referred to be inadmissible. Both of the questions referred exhibit the particular feature of having presented themselves to the referring court in a civil case in which the parties are effectively in dispute over the amount of the consideration. The amount of the consideration is primarily a question calling for an interpretation (in civil law) of the contract between the parties and does not fall within the jurisdiction of the Court. The question whether a retrospective increase in the agreed consideration is even possible in the first place, in the case where a legal transaction has been incorrectly assessed for VAT purposes by one or both of the contracting parties, is also in principle a matter of national law.

20. It must be borne in mind that, according to the settled case-law of the Court, questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining, and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer

to the questions submitted to it.[6]

21. That cannot be assumed to be so in the case of either of the questions referred. It would appear to be possible in Portuguese law for the consideration payable by the recipient of the supply to be retrospectively increased where the tax authority has imposed a higher rate of VAT on the supplier. In such a situation, it may be a matter of paramount importance (in civil law) whether the recipient of the supply is able to neutralise the additional VAT by deducting input VAT. For, where the recipient of the supply is not entitled to deduct input VAT, that person alone would carry the risk of a VAT error if the consideration could be retrospectively increased. Where that person *is* entitled to deduct input VAT, on the other hand, the risk would be borne by the supplier alone if the consideration could not be retrospectively increased. To this extent, the Court's findings on whether the recipient of the supply is entitled to deduct input VAT may be at least useful to the referring court in the context of the civil dispute pending before it. The position is similar with respect to the second question referred for a preliminary ruling. Consequently, both questions may still be regarded as admissible.

B. The first question

1. The content of the question referred

22. By its first question, the referring court expressly wishes to ascertain whether 'the time period for the [purchaser] to be able to deduct that additional tax is calculated from the date of issue of the initial invoices and not from the date of issue or receipt of the rectifying documents'.

23. The referring court's purpose in asking that question, contrary to what the Commission's and the Portuguese Republic's submissions indicate, is not to determine whether the four-year time limit laid down in national law is appropriate. Rather, it seeks clarification as to whether the right to deduct input VAT in the full amount arises as soon as the transaction is carried out (which, in this case, was in 2008), even where, the parties having wrongly assumed that a lower VAT charge would apply, neither of them factored a higher VAT rate into the price or showed one on the invoice.

24. There are only two conceivable possibilities here. Either input VAT is deducted at the objectively correct rate irrespective of the rate the parties imagined would be applicable and irrespective of the rate shown on a corresponding invoice. In that event, it would have been deducted in 2008 in this instance. Or the amount of the input VAT deduction is limited by the VAT amount actually shown on a corresponding invoice. In that event, input VAT would have been deducted in 2008 in relation to the 5% tax rate but not until 2012 in relation to the difference between that rate and the 21% tax rate.

25. I consider the second proposition to be correct. For, in my view, a distinction must be drawn between the accrual of the right to deduct *in principle* (see point 26 et seq.) and the accrual of the right to deduct *in a given amount* (see point 34 et seq.). On closer inspection, moreover, that proposition is consistent with the Court's case-law on the retrospective correction of formally incorrect invoices (see point 53 et seq.).

6 Judgments of 17 September 2014, *Cruz & Companhia* (C-341/13, EU:C:2014:2230, paragraph 32); of 30 April 2014, *Pfleger and Others* (C-390/12, EU:C:2014:281, paragraph 26); of 22 June 2010, *Melki and Abdeli* (C-188/10 and C-189/10, EU:C:2010:363, paragraph 27); and of 22 January 2002, *Canal Satélite Digital* (C-390/99, EU:C:2002:34, paragraph 19).

2. Accrual of the right to deduct input VAT in principle

26. A closer look at the Court's case-law shows that it has to date ruled principally on the accrual of the right to deduct *in principle*.

27. According to that case-law of the Court, the right to deduct is an integral part of the VAT scheme and in principle may not be limited. It is exercisable immediately in respect of all the taxes charged on transactions relating to inputs. [7]

28. The deduction system is intended to relieve the operator entirely of the burden of the VAT payable or paid in the course of all his economic activities. The common system of VAT therefore ensures complete neutrality of taxation of all economic activities, whatever their purpose or results, provided that they are themselves subject to VAT. [8]

29. As regards the substantive conditions to be met for a right to deduct to arise, the Court has held [9] that it is apparent from Article 168(a) of the VAT Directive that the goods and services relied on to give entitlement to that right must be used by the taxable person for the purposes of his own taxed transactions, and that, as inputs, those goods or services must be supplied by another taxable person.

30. Since Article 168 of the VAT Directive does not impose any other condition relating to the use by the person to whom the goods and services at issue are supplied, it must be concluded that, provided the two conditions mentioned in the preceding paragraph are satisfied, a taxable person is, in principle, entitled to deduct input tax. [10]

31. That case-law supports the view that the only critical factors are that the supply must take place between two taxable persons and that the recipient of the supply must use the supply received in order to carry out taxable transactions. The Court appears to treat the existence of a correct invoice as a mere formality. In that case-law, however, the Court has only ever ruled on the accrual of the right to deduct input VAT in principle because the amount of the tax due and the amount of the input tax deduction were undisputed from the outset.

32. The question to be decided upon here, on the other hand, has to do with the accrual of the right to deduct not in principle but *in a given amount*, an incorrect tax rate having initially been used. There is no doubt that, so far as concerns the agreed and invoiced rate of 5%, [11] the recipient of the supply (in the present case, Flexipiso — Pavimentos SA) has a right of deduction in principle and in the given amount.

33. The only question is whether the recipient of the supply was entitled to deduct input VAT at a rate of 21% [12] immediately in 2008, since this would actually have been the correct rate of tax, even though neither party assumed or knew this to be the case.

7 Judgments of 21 September 2017, *SMS group* (C-441/16, EU:C:2017:712, paragraph 39); of 22 June 2016, *Gemeente Woerden* (C-267/15, EU:C:2016:466, paragraph 31); of 22 December 2010, *Dankowski* (C-438/09, EU:C:2010:818, paragraph 23); and of 15 July 2010, *Pannon Gép Centrum* (C-368/09, EU:C:2010:441, paragraph 37).

8 Judgments of 21 September 2017, *SMS group* (C-441/16, EU:C:2017:712, paragraph 40); of 15 September 2016, *Senatex* (C-518/14, EU:C:2016:691, paragraph 27); of 15 September 2016, *Barlis 06 — Investimentos Imobiliários e Turísticos* (C-516/14, EU:C:2016:690, paragraph 39); of 22 March 2012, *Klub* (C-153/11, EU:C:2012:163, paragraph 35); and of 22 December 2010, *Dankowski* (C-438/09, EU:C:2010:818, paragraph 24).

9 Order of 12 January 2017, *MVM* (C-28/16, EU:C:2017:7, paragraph 28); and the judgments of 15 September 2016, *Senatex* (C-518/14, EU:C:2016:691, paragraph 28); of 15 September 2016, *Barlis 06 — Investimentos Imobiliários e Turísticos* (C-516/14, EU:C:2016:690, paragraph 40); of 22 June 2016, *Gemeente Woerden* (C-267/15, EU:C:2016:466, paragraph 34); see, to that effect, judgment of 22 October 2015, *PPUH Stehcemp* (C-277/14, EU:C:2015:719, paragraph 28) and the case-law cited.

10 Judgment of 22 June 2016, *Gemeente Woerden* (C-267/15, EU:C:2016:466, paragraph 35).

11 In the light of Article 73 of the VAT Directive, this should be more precisely referred to as 5/105 of the agreed consideration.

12 In the light of Article 73 of the VAT Directive, this should be more precisely referred to as 21/121 of the agreed consideration.

3. Accrual of the right to deduct input VAT in a given amount

34. It is therefore necessary to clarify the *point at which the right to deduct input VAT in a given amount arises*. To this end, decisive significance attaches not only to the provision contained in Article 168 of the VAT Directive but also to the provisions contained in Article 178(a) in conjunction with Article 226(10).

(a) The purpose of indicating the VAT rate to be applied

35. It must be recalled here, first, that, in accordance with the first paragraph of Article 179 of the VAT Directive, the deduction is to be made by subtracting from the total amount of VAT due for a given tax period the total amount of VAT 'in respect of which, during the same period, the right of deduction has arisen and is exercised in accordance with Article 178'. It follows that the right to deduct VAT must in principle be exercised in respect of the period during which, first, the right has arisen and, secondly, the taxable person is in possession of an invoice. [13]

36. Article 178(a) of the VAT Directive therefore makes exercise of the right of deduction subject to the condition of possession of a particular invoice. That invoice must have been issued in accordance with Articles 219a to 240 of the VAT Directive. Pursuant to Article 226(10) of the VAT Directive, this means that the invoice must show the 'VAT amount payable'.

37. Through the provision contained in Article 178(a) of the VAT Directive, the legislature links the substantive right to deduct the VAT payable by the recipient of the supply to possession of an invoice which shows the VAT payable by him. [14]

38. As the Court has already held, the purpose of linking the right to deduct input tax to possession of a corresponding invoice lies, on the one hand, in the fact that the details which must be shown on an invoice are intended to allow the tax authorities to monitor payment of the tax due and, if appropriate, the existence of the right to deduct VAT. [15] This is true in particular of details concerning the nature and time of the supply and the identity of the supplier.

39. An indication of the VAT amount payable, however, is not required for these purposes. The VAT amount payable follows by operation of law from the application of the tax rate and the agreed consideration. This is a mathematical calculation, based on a matter of law (the tax rate), which, even without an express indication of the 'VAT amount payable' (i.e. the result of the calculation) on the invoice, can be monitored by the tax authority at any time.

40. The statutory requirement laid down in Article 226(10) of the VAT Directive must therefore serve an additional purpose. In my view, that purpose is to ensure parity between the tax owed by the supplier and the deduction of input tax by the recipient of the supply.

41. By the invoice, the supplier indicates to the recipient of the supply the VAT he believes he owes to the State and is passing on to the recipient of the supply as indirect taxation. Such an invoice also makes it clear to the recipient of the supply that he will sustain a charge to VAT in that amount when he pays the invoice. As a consequence, he will also be eligible for relief in that amount (alone), which, moreover, is generally equal to the VAT owed by the supplier.

13 Judgment of 15 September 2016, *Senatex* (C-518/14, EU:C:2016:691, paragraph 35). See to that effect judgment of 29 April 2004, *Terra Baubedarf-Handel* (C-152/02, EU:C:2004:268, paragraph 34).

14 See also to that effect the Opinion of Advocate General Campos Sánchez-Bordona in *Volkswagen* (C-533/16, EU:C:2017:823, point 60).

15 Judgment of 15 September 2016, *Barlis 06 — Investimentos Imobiliários e Turísticos* (C-516/14, EU:C:2016:690, paragraph 27), see also my Opinion in *Barlis 06 — Investimentos Imobiliários e Turísticos* (C-516/14, EU:C:2016:101, points 30, 32 and 46).

(b) Taking into account the principle of neutrality

42. In addition, that provision also serves to implement the principle of neutrality enshrined in VAT law. The principle of neutrality represents a fundamental principle [16] of VAT, inherent in its nature as a tax on consumption, which comprises two main elements.

43. First, it precludes economic operators who effect the same transactions from being treated differently in respect of the levying of VAT. [17] Secondly, the principle of neutrality requires that the undertaking, acting as tax collector on behalf of the State, should be fundamentally relieved of the final charge to VAT, [18] in so far as the economic activity carried on by the undertaking is itself geared (in principle) towards the realisation of taxable transactions. [19]

44. I should like to draw attention here to the concept of VAT relief. It follows from this, as Advocate General Campos Sánchez-Bordona recently submitted, [20] that a deduction of input tax is possible only if the recipient of the supply sustains a charge to VAT. The latter, however, does not sustain a charge immediately upon supply of the goods or services but only upon payment of the consideration, and the VAT contained within that consideration, on the basis of an invoice showing the amount of VAT due.

45. This is readily apparent even from the Court's earlier case-law in which it was still explicitly stating [21] that the immediate right to deduct is based on the assumption that, in principle, taxable persons do not make payment and therefore do not pay input VAT until they have received an invoice, or another document which may be considered to serve as an invoice, and that the VAT cannot be regarded as being chargeable on a given transaction before it has been paid.

46. After all, the extent to which the recipient of the supply sustains (or will sustain) a charge to VAT is apparent only if VAT in that amount was included in the calculation of the consideration payable by the recipient. Whether VAT was included in the consideration, however, is apparent only from the legal relationship underlying that consideration and the billing for performance under that relationship, that is to say the invoice.

47. In the absence of such an arrangement and in the absence of an invoice (based on that arrangement), the recipient of the supply can and will not pay VAT to the supplier. This also explains, as Advocate General Campos Sánchez-Bordona rightly notes, [22] the provision in Article 178 of the VAT Directive linking exercise of the right to deduct to possession of a corresponding invoice.

48. If the supplier — as here — has not included the statutory rate of tax in his price and has not passed on that rate of tax to the recipient of the supply through the consideration agreed (which it had not yet done in 2008), the recipient of the supply will not sustain a charge to VAT in that amount. Until he does, a deduction of input VAT would not eliminate a charge to tax, [23] but only promote one. He might at some point apply a deduction of input VAT which the supplier, being unaware of the higher rate of VAT, would be entirely unable to pass on.

16 In the judgment of 13 March 2014, *Malburg* (C-204/13, EU:C:2014:147, paragraph 43), the Court speaks of a principle of interpretation.

17 Judgments of 16 October 2008, *Canterbury Hockey Club and Canterbury Ladies Hockey Club* (C-253/07, EU:C:2008:571, paragraph 30); of 7 September 1999, *Gregg* (C-216/97, EU:C:1999:390, paragraph 20); and of 11 June 1998, *Fischer* (C-283/95, EU:C:1998:276, paragraph 22).

18 Judgments of 13 March 2008, *Securenta* (C-437/06, EU:C:2008:166, paragraph 25), and of 1 April 2004, *Bockemühl* (C-90/02, EU:C:2004:206, paragraph 39).

19 Judgments of 13 March 2014, *Malburg* (C-204/13, EU:C:2014:147, paragraph 41); of 15 December 2005, *Centralan Property* (C-63/04, EU:C:2005:773, paragraph 51); of 21 April 2005, *HE* (C-25/03, EU:C:2005:241, paragraph 57); and my Opinion in *Centralan Property* (C-63/04, EU:C:2005:185, point 25).

20 Opinion of Advocate General Campos Sánchez-Bordona in *Volkswagen* (C-533/16, EU:C:2017:823, point 64).

21 Judgment of 29 April 2004, *Terra Baubedarf-Handel* (C-152/02, EU:C:2004:268, paragraph 35).

22 Opinion of Advocate General Campos Sánchez-Bordona in *Volkswagen* (C-533/16, EU:C:2017:823, point 58 et seq.).

23 See in this regard the same view as expressed by Advocate General Campos Sánchez-Bordona in his Opinion in *Volkswagen* (C-533/16, EU:C:2017:823, point 64).

49. I would therefore submit — in concert to this extent with the view expressed by the Commission — that it also follows from the principle of neutrality that the right to deduct input VAT in a given amount arises only to the extent of the 'VAT amount payable' that must be shown on the invoice, pursuant to Article 226(10) of the VAT Directive.

50. The special significance of Article 226(10) of the VAT Directive as compared with the other formal requirements of an invoice set out in Article 226 is also apparent from Article 203 of the VAT Directive. The feature that must be present in order for the recipient of the supply to be able to deduct input VAT (the 'VAT amount payable') triggers a statutory tax liability solely by virtue of being indicated on an invoice. In the converse event of the tax rate applied being too high, therefore, the amount shown on the invoice would be owed but the recipient of the supply would have no right of deduction because the amount shown on the invoice was more than the tax statutorily due.[24] That detail — which a supplier is obliged to provide under Article 220 of the VAT Directive — thus has implications which are not only formal but also substantive. In my view, those implications affect both the supplier (Article 203 of the VAT Directive) and, correspondingly, the recipient of the supply, too (Article 168 of the VAT Directive in conjunction with Article 178).[25]

51. The appellant in the main proceedings rightly makes the further point that to take as the effective point in time the time of supply (or the first invoice after the supply is made) would also be prejudicial to the parties' freedom of contract. In that event, the parties would be obliged to fix the final price (under civil law) within the limitation period to be laid down by the Member States (under tax law) as being applicable to the right to deduct input VAT. The recipient of the supply would otherwise be precluded from deducting input VAT. This would be an unusual outcome, given that VAT law, although concerned in principle with economic transactions, is not intended to reconfigure them.

(c) Conclusion

52. Consequently, in the light of the wording and purpose of Article 178(a) in conjunction with Article 226(10) of the VAT Directive, and taking into account the principle of neutrality, the right to deduct input VAT in a given (objectively correct) amount does not arise at the time of supply. I would therefore submit — in concert with the view put forward by the Commission and Biosafe — that the right of Flexipiso Pavimentos SA to deduct input VAT (in respect of the proportion of tax in excess of the VAT amount, based on a rate of 5%, shown on the [first] invoice) arose no earlier than 2012, when it received a [second] invoice showing the VAT amount payable.

4. Case-law on the retrospective correction of an invoice

53. Neither is the foregoing precluded by the Court's more recent case-law on the retrospective correction of an invoice. It is true that the Court has held in this regard that the substantive requirements for the right to deduct are those which govern the actual substance and scope of that right, such as those provided for in Chapter 1 of Title X of the VAT Directive, entitled 'Origin and scope of the right to deduct'. However, the formal requirements for that right regulate the rules governing its exercise and monitoring thereof and the smooth functioning of the VAT system, such as the obligations relating to accounts, invoicing and filing returns.[26]

24 Judgments of 15 March 2007, *Reemtsma Cigarettenfabriken* (C-35/05, EU:C:2007:167, paragraph 23), and of 13 December 1989, *Genius* (C-342/87, EU:C:1989:635, paragraph 15).

25 Advocate General Campos Sánchez-Bordona almost certainly takes the same view in *Volkswagen* (C-533/16, EU:C:2017:823, point 67).

26 Judgment of 28 July 2016, *Astone* (C-332/15, EU:C:2016:614, paragraph 47). See, to that effect, judgment of 11 December 2014, *Idexx Laboratories Italia* (C-590/13, EU:C:2014:2429, paragraphs 41 and 42) and the case-law cited.

54. At the same time, the fundamental principle of the neutrality of VAT requires deduction of input VAT to be allowed if the substantive requirements are satisfied, even if the taxable persons have failed to comply with some formal conditions. Consequently, where the tax authorities have the information necessary to establish that the substantive requirements have been satisfied, they cannot, in relation to the right of the taxable person to deduct that tax, impose additional conditions which may have the effect of rendering that right ineffective for practical purposes. [27]

55. The Court concludes from this that the tax authority cannot refuse the right to deduct VAT on the sole ground that an invoice does not satisfy the conditions required by Article 226(6) and (7) of the VAT Directive if they have available all the information to ascertain whether the substantive conditions for that right are satisfied. [28]

56. This might support the inference that input VAT is deductible even without any invoice at all. At the end of the day, after all, an invoice, as the Court has held, is only a formal condition. Where it is objectively established that the substantive conditions laid down in Article 168 of the VAT Directive are satisfied, a failure to comply with formal conditions might not be a bar to the deduction of input VAT. However, that inference is precluded not least by the clear wording of Article 178(a) of the VAT Directive. In the case-law cited, moreover, the Court expressly lays down as a further condition [of the right to deduct] [that account be taken of] a corrected invoice. [29] Consequently, neither that case-law nor the VAT Directive supports the inference of a right to deduct without possession of an invoice.

57. All that remains unclear is whether an invoice (in this case, from 2008) which shows too little or no VAT can be regarded as an incorrect invoice within the meaning of the case-law cited. If so, an invoice could in some cases be *retrospectively* corrected on account of a purely formal error, meaning that a deduction of input VAT, too, could or would have to be claimed retrospectively.

58. In that regard, it must be pointed out, first and foremost, that the Court's decisions on the retrospective correction of invoices have essentially been concerned with situations very different from those of the present case. In those cases, the right of deduction had arisen in principle and there was agreement between the supplier and the recipient of the supply in relation to the amount deductible, too. On receiving the invoice, the recipient of the supply therefore knew in what amount he would sustain a charge to VAT and in what amount he was entitled to obtain relief on that charge. What is more, he sustained the charge to VAT no later than at the point when he paid the formally incorrect invoices. In those situations, the invoices were lacking only a number of details which did not for that matter have any bearing on the amount of the tax owed by the supplier or the amount of the charge to tax sustained by the recipient of the supply.

59. It seems inappropriate to me to infer from that case-law that the amount of an input tax deduction to which the right, in principle, has arisen may also be amended retrospectively. As the Court itself emphasised in *Senatex*, [30] the particular feature of that case was '[that] Senatex held invoices at the time of exercising its right to deduct VAT and had paid input VAT'.

27 Judgments of 15 September 2016, *Barlis 06 — Investimentos Imobiliários e Turísticos* (C-516/14, EU:C:2016:690, paragraph 42); of 9 July 2015, *Salomie und Oltean* (C-183/14, EU:C:2015:454, paragraphs 58 and 59); see also, to that effect, albeit in the context of a reverse charge procedure, judgments of 21 October 2010, *Nidera Handelscompagnie* (C-385/09, EU:C:2010:627, paragraph 42); and of 1 March 2012, *Kopalnia Odkrywkowa Polski Trawertyn P. Granatowicz, M. Wąsiewicz* (C-280/10, EU:C:2012:107, paragraph 43).

28 Judgment of 15 September 2016, *Barlis 06 — Investimentos Imobiliários e Turísticos* (C-516/14, EU:C:2016:690, paragraph 43).

29 In its judgment of 15 September 2016, *Senatex* (C-518/14, EU:C:2016:691, paragraph 39), the Court expressly draws a distinction between that judgment and the judgment of 29 April 2004, *Terra Baubedarf-Handel* (C-152/02, EU:C:2004:268, paragraph 38), noting that, in the latter case, there was no invoice, while, in *Senatex*, there was an invoice which was paid inclusive of VAT.

30 Judgment of 15 September 2016, *Senatex* (C-518/14, EU:C:2016:691, paragraph 39).

60. It is to be noted here that, in its case-law, the Court has, for the benefit of the recipient of a supply — who concurs with the VAT shown on the invoice, has paid that VAT and, therefore, sustained it as a charge — allowed formal errors in the invoice to be (retrospectively) corrected on grounds of proportionality (and to avoid 'punitive interest'). The absence of any indication of the VAT amount or the indication of a VAT amount which is too low, however, is quite different from a missing VAT identification number, an incorrect date or an inaccurate description of the goods or services supplied. These details are material only to the monitoring of transactions by the tax authority.

61. The VAT amount shown on the invoice, on the other hand (as stated in point 39 et seq. above), is material to the amount of the charge sustained by the recipient of the supply and, therefore, to the amount of the relief sought by means of input tax deduction. Unlike most of the other invoice details prescribed by Article 226 of the VAT Directive, Article 226(10) of the VAT Directive is not therefore a purely formal condition of input VAT deduction. Rather, that detail is essential to ensuring parity between the charge to tax (see Article 203 of the VAT Directive) and the deduction of input VAT by the recipient of the supply. A retrospective amendment of the 'VAT amount payable' cannot therefore have retroactive effect within the meaning of the aforementioned case-law of the Court.

62. Consequently, an increase of VAT not previously charged (that is to say, not entered on an invoice) is not merely the correction of a formal error. Rather, it is comparable with the initial issue of an invoice. For, here too, the supplier indicates for the first time the amount of (additional) VAT he is passing on. The recipient of the supply likewise discovers for the first time the extent of the (additional) charge to VAT on the relevant transaction which he would sustain (in addition) if he paid the later invoice.

63. The substantive nature [of increasing VAT not previously charged] is also apparent from the rationale underpinning the provisions contained in Article 90 and Article 185 of the VAT Directive. Both provisions govern the treatment of a later reduction of the basis of assessment. In the case of taxable persons, this is dealt with in Article 90 of the VAT Directive and, in the case of persons entitled to deduct input VAT, in Article 185 of the VAT Directive.[31] As is clear from Article 184 of the VAT Directive, deductions of input VAT are corrected *ex nunc*. The same is true of Article 90 of the VAT Directive, inasmuch as, here too, there is nothing to indicate that the reduction provided for applies retroactively to the tax liability previously established. The principle that a mutually agreed reduction of the consideration due is not retroactive must also apply to a subsequent mutually agreed increase in the consideration due, and even to a subsequent unilateral increase in the consideration due on account of an increase in the tax rate (in this case, from 5% to 21%).

64. In the light of the Court's case-law on the retrospective correction of formally incorrect invoices, too, therefore, the right to deduct input VAT arises only on possession of an invoice first indicating the VAT amount payable and limits the level of deduction to that amount.

5. Summary

65. The *existence* of an invoice clearly showing the VAT due is not only a formal criterion but *a substantive* condition of deducting input VAT. This follows from the purpose served by an invoice, which is, inter alia, to ensure parity between the tax due and the input tax deduction. Since the right to deduct input VAT depends, substantively, on whether a taxable person has sustained a charge to VAT (because he has already paid it in the consideration) or will sustain such a charge (because he has agreed to pay the consideration on that basis), an indication of that charge in the invoice is mandatory.

31 See, on the relationship between the two, my Opinion in *Di Maura* (C-246/16, EU:C:2017:440, point 27), and the Opinion of Advocate General Saugmandsgaard Øe in *T — 2* (C-396/16, EU:C:2017:763, point 56 et seq.).

66. That interpretation alone is consistent with the particular features of Article 226(10) in conjunction with Article 203, Article 90, Article 184 and Article 185 of the VAT Directive.

67. The right to deduct input VAT in a given amount, too, therefore, cannot arise (or be exercised) until the recipient is in possession of an invoice showing a VAT value in that amount. In the present case, this did not occur until 2012.

68. It also follows that the question, discussed at length by the Portuguese Republic, as to how long such a right is exercisable for under national law can be left unanswered here. There is nothing to indicate that the time limit laid down in national law of four years from the point of possession of the invoice is questionable from the point of view of EU law.

C. The second question

69. Since the first question has been answered in the affirmative, there is no need to consider the second question any further.

70. Moreover, the purchaser's refusal to pay the consideration is a question of civil law the answer to which does not flow from the VAT Directive. Whether a purchaser who is no longer able to deduct input VAT must nevertheless pay the consideration retrospectively, in the case where the tax rate which the two parties, on concluding the contract, both assumed would apply was too low, is a question calling for an interpretation of the contract that takes into account all the circumstances of the individual case. The only inference that can be drawn from Article 73 of the VAT Directive is that VAT is an integral part of the consideration originally agreed. Whether and to what extent that originally agreed consideration can be adjusted retrospectively is a question to be determined primarily by reference to the distribution of risk between the parties under the contract.

VI. Proposed answer

71. I therefore propose that the answer to the request for a preliminary ruling from the Supremo Tribunal de Justiça (Supreme Court, Portugal) should be as follows:

In accordance with Article 168(a) in conjunction with Article 178(a) and Article 226(10) of the VAT Directive, the right to deduct input VAT in the value of the VAT amount entered as being payable on an invoice arises only on receipt of such an invoice. A retrospective increase (correction) of the VAT amount payable on an amended invoice does not trigger the retroactive accrual of the right to deduct input VAT. Consequently, the provisions of the VAT Directive preclude legislation under which, in a situation such as that in the present case, the time limit for deducting the additional VAT starts to run as soon as the original invoice is issued.