Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 8 July 2021 [1]

**Case C-156/20**

**Zipvit Ltd**
**v**
**The Commissioners for Her Majesty's Revenue & Customs**

(Request for a preliminary ruling from the Supreme Court of the United Kingdom)

(Request for a preliminary ruling – Tax legislation – VAT – Directive 2006/112/EC – Article 168 and 178(a) – Origin of right of deduction in the case of an input mistakenly considered to be exempt – VAT included in the price despite the mistake – Time of origin of right of deduction – VAT due or paid – Possession of an invoice as a substantive requirement – Differentiation from the formal requirements for the right of deduction)

## I. Introduction

1. Two undertakings assume that a service is exempt – in accordance with the view taken by the tax authorities – and do so mutually, but incorrectly under EU law. Consequently, only a price without value added tax (VAT) is agreed and invoiced, and only that price is paid. Once the mistake has been discovered, the tax authorities 'waive' a recovery of tax from the supplier, not least for reasons of administrative simplification, because many of the recipients of the supply would have a right of deduction. From a fiscal point of view, this would only amount to a 'zero-sum game' involving a great deal of administrative effort on all sides. After the limitation period has expired at the level of the supplier, the recipient of the supply (*in casu*, Zipvit Ltd) exercises its right of deduction. However, since there is no invoice stating any VAT separately, the tax authorities refuse to allow the deduction.

2. In that context, two considerations prompted the national court to make a reference to the Court of Justice. First, Articles 73, 78 and 90 of the VAT Directive indicate that the taxable amount for VAT is always the entirety of what the supplier has actually received. Consequently, Zipvit's right of deduction might have arisen on that basis. Second, in the light of the judgment of the Court in *Vădan*, [2] doubts have once again arisen with regard to the importance of an invoice for the right of deduction. This raises, in particular, the question as to whether an invoice is required for a right of deduction.

[1] Original language: German.

[2] Judgment of 21 November 2018 (C-664/16, EU:C:2018:933).

3. Therefore, the Supreme Court of the United Kingdom has doubts as to the conformity with EU law of the tax authorities' refusal to allow the deduction. The Commission, however, takes a different view, stating the following: 'The simple answer to the issues raised in the present case is that since Zipvit has paid no VAT, it is not entitled to deduct input VAT. Sometimes simple answers are correct. The Commission submits that on the basis of the following considerations, this is one of those times.'

4. Sometimes, however, an answer may indeed look simple, but in reality turns out to be not so simple at all when seeking a solution that also takes into account the dogmatics, scheme and wording of the VAT Directive. The fact that the right of deduction does not presuppose that the taxable person has paid anything shows that the reasoning proposed by the Commission cannot be correct in any event. This 'debit principle' in respect of the deduction of input tax is recognised in the case-law of the Court [3] and now also follows from the directive. The question of whether Zipvit has therefore paid no consideration (0), a net amount (100) or a gross amount of consideration (120) to the contracting party is in principle irrelevant for the purposes of the right of deduction.

5. Therefore, the Court must address other – by no means simple – fundamental questions of VAT law in the present case. The question therefore arises as to whether VAT is always included in the price where the transaction is (objectively) subject to VAT, even if the contracting parties and the tax authorities (subjectively) assume that a transaction is exempt. If that is the case, can the recipient of the supply then claim relief from that VAT already included in the price, even though the supplier has (mistakenly) not factored that VAT into the consideration and has therefore also not passed it on to the recipient of the supply? Does the VAT 'due' under Article 168(a) of the VAT Directive cover the VAT due from the supplier in concrete terms (in this case, VAT is no longer due because of the limitation period) or the VAT actually due in the abstract (that is to say, by law, so, in this case, under EU law at any rate)?

6. Since the supplier does not, of course, issue an invoice stating the VAT in cases where it mistakenly assumes that its supply of goods or services is exempt, the function of the invoice in VAT law is once again [4] of decisive importance for the right of deduction of the recipient of the supply in the present case. This is because, irrespective of the questions raised above, a deduction of input tax would be possible only if the possession of an invoice stating VAT separately were not a prerequisite for such a deduction.

[3] See, for example, judgment of 16 February 2012, *Eon Aset Menidjmunt* (C-118/11, EU:C:2012:97, paragraph 63).

[4] This case is closely related to the question raised in *Wilo Salmson France* (C-80/20) concerning the function of an invoice stating VAT separately in the context of the right of deduction of the recipient of the supply/invoice. See also, in that regard, my Opinion in *Wilo Salmson France* (C-80/20, EU:C:2021:326).

## II. Legal framework

### *A. EU law*

7. Article 63 of Directive 2006/112/EC on the common system of value added tax[5] ('the VAT Directive') regulates when the chargeable event occurs and when the VAT becomes chargeable as follows:

'The chargeable event shall occur and VAT shall become chargeable when the goods or the services are supplied.'

8. Article 73 of the VAT Directive concerns the taxable amount:

'In respect of the supply of goods or services, other than as referred to in Articles 74 to 77, the taxable amount shall include everything which constitutes consideration obtained or to be obtained by the supplier, in return for the supply, from the customer or a third party, including subsidies directly linked to the price of the supply.'

9. Article 78 of the VAT Directive sets out the components that make up the taxable amount:

'The taxable amount shall include the following factors:

(a) taxes, duties, levies and charges, excluding the VAT itself;

…'

10. Article 90 of the VAT Directive provides for the subsequent adjustment of the taxable amount and the legal consequences for the supplier:

'1. In the case of cancellation, refusal or total or partial non-payment, or where the price is reduced after the supply takes place, the taxable amount shall be reduced accordingly under conditions which shall be determined by the Member States.

2. In the case of total or partial non-payment, Member States may derogate from paragraph 1.'

11. The first sentence of Article 93 of the VAT Directive concerns the application of rates to the taxable amount and states:

'The rate applicable to taxable transactions shall be that in force at the time of the chargeable event.'

[5] Council Directive of 28 November 2006 (OJ 2006 L 347, p. 1) in the version applicable to the years in dispute (2007 – March 2010), as last amended in that respect by Council Directive 2010/23/EU of 16 March 2010 (OJ 2010 L 72, p. 1). Although the predecessor legislation (Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1; 'the Sixth Directive') is still applicable to the 2006 tax year at issue, the content of the provisions of that directive – to the extent relevant to the present case – were fundamentally identical.

12. With regard to the standard rate, Article 96 of the VAT Directive provides:

'Member States shall apply a standard rate of VAT, which shall be fixed by each Member State as a percentage of the taxable amount and which shall be the same for the supply of goods and for the supply of services.'

13. Article 167 of the VAT Directive governing the origin of the right of deduction states:

'A right of deduction shall arise at the time the deductible tax becomes chargeable.'

14. Article 168(a) of the VAT Directive regulates the substantive scope of the right of deduction:

'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'.

15. However, Article 178 of the VAT Directive regulates the exercise of the right of deduction as follows:

'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 Articles 220 to 236 and Articles 238, 239 and 240;

…

(f) when required to pay VAT as a customer where Articles 194 to 197 or Article 199 apply, he must comply with the formalities as laid down by each Member State.'

16. Article 203 of the VAT Directive ensures the concurrence of the VAT issued in an invoice and the VAT due. It provides as follows:

'VAT shall be payable by any person who enters the VAT on an invoice.'

17. Article 226 of the VAT Directive prescribes the information required in an invoice:

'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:

…

(8) the taxable amount per rate or exemption, the unit price exclusive of VAT and any discounts or rebates if they are not included in the unit price;

(9) the VAT rate applied;

(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. United Kingdom legislation*

18. The United Kingdom transposed the VAT Directive and its predecessor legislation through the Value Added Tax Act 1994 ('the VATA').

## III. Main proceedings

19. The company Zipvit ('the applicant') carries on the business of supplying vitamins and minerals by mail order. During the period 1 January 2006 to 31 March 2010, Royal Mail supplied the applicant with a number of postal services under contracts which had been individually negotiated.

20. Royal Mail is the public postal service in the United Kingdom. Article 132(1)(a) of the VAT Directive provides that Member States are to exempt 'the supply by the public postal services of services other than passenger transport and telecommunications services, and the supply of goods incidental thereto'. In implementing this provision, the legislature and the tax authorities interpreted it as covering all postal services supplied by Royal Mail. The implementing national legislation, the VATA, contained a provision to this effect (Schedule 9, Group 3, paragraph 1) and the tax authorities issued guidance notes to the same effect.

21. The contract under which Royal Mail supplied the services provided that all postage charges specified as payable by the applicant were exclusive of VAT, that the applicant 'shall pay any VAT due on Postage and other charges at the appropriate rate', and that 'VAT shall be calculated and paid on [the commercial price of the services]'. Accordingly, in so far as VAT was due in respect of the supply of the services, the total price payable by the applicant for such supply under the contract was the commercial price plus the VAT element.

22. However, on the basis of the domestic legislation and guidance and the mutual mistaken view that the services were exempt from VAT, the invoices issued by Royal Mail to the applicant in relation to the services were marked 'E' for exempt, showed no sum attributable to VAT to be due, and charged the applicant only the commercial price of the services. The applicant duly paid to Royal Mail the sums set out in the invoices. The applicant did not at the time of the supplies make any claim to recover input VAT in respect of them.

23. Since Royal Mail understood the services to be exempt, and since it had set out no charge for VAT in its invoices, it did not account to the tax authorities (Her Majesty's Revenue and Customs Commissioners; 'HMRC') for any sum relating to VAT in respect of the supply of the services, nor did it pay any such sum. HMRC made the same mistake, or had contributed to the mistake by the parties, by issuing tax guidance containing statements to the same effect. Consequently, it also did not require Royal Mail to pay the VAT.

24. Things proceeded in this way for several years, until the judgment of the Court of 23 April 2009, *TNT Post UK* (C-357/07, EU:C:2009:248; 'the judgment in *TNT Post UK*'). The Court held that the postal services exemption applied only to supplies made by the public postal services acting as such, and did not apply to supplies of services for which the terms had been individually negotiated.

25. On the basis of this interpretation of the VAT Directive by the Court, in the relevant period the services in the present proceedings should have been treated as standard-rated. Royal Mail should have charged the applicant a total price for the supply of the services equal to the commercial price plus VAT at the relevant rate, and Royal Mail should have accounted to HMRC for the VAT and paid it.

26. In the light of the judgment in *TNT Post UK*, the applicant is now making claims for deduction of input VAT in respect of the services. Those claims were calculated on the basis that the prices actually paid for the supplies include VAT. The sums claimed by the applicant as input VAT on the relevant services amount to 415 746 pounds sterling (GBP) (roughly equivalent to EUR 480 000) plus interest. The present proceedings are a test case in respect of supplies of services by Royal Mail that were likewise wrongly treated as exempt. According to the referring court, the total value of the claims made against HMRC amounts to between GBP 500 million and GBP 1 thousand million (roughly equivalent to between EUR 575 million and EUR 1.15 thousand million).

27. The applicant's claims were rejected by HMRC. This was on the basis that the applicant had been contractually obliged to pay VAT in relation to the commercial price for the services, but it had not been charged VAT in the relevant invoices and had therefore not paid the VAT.

28. In the meantime, HMRC was making inquiries with Royal Mail to establish precisely which of its services were affected by the judgment in *TNT Post UK*. In July 2010, the national limitation period of six years under section 5 of the Limitation Act 1980 for a contract claim by Royal Mail to claim the balance of the total price due to it in respect of the supply of the services (that is to say, a sum equal to the amount of the VAT due in respect of such supply, calculated by reference to the commercial price of the services) had not expired. But issuing claims against all Royal Mail's relevant customers affected by the judgment in *TNT Post UK*, including the applicant, would have been costly and administratively burdensome for Royal Mail and it had no commercial interest in doing this, and so did not pursue such claims.

29. At that time, the tax limitation periods provided for in section 73(6) and section 77(1) of the VATA had also not yet expired. However, HMRC decided against a tax assessment because national law had provided that the supply of the services was exempt and, moreover, Royal Mail had not in fact received from the applicant the VAT due in respect of the supplies. Furthermore, HMRC considered that they had created a legitimate expectation on the part of Royal Mail that it was not required to collect VAT in respect of the services, so that Royal Mail could have expected to have a successful defence to any attempt to issue assessments against it to account for VAT in respect of the services.

30. The applicant appealed against HMRC's review decision to the First-tier Tribunal (Tax Chamber) (United Kingdom). By this time, the limitation period for a contract claim by Royal Mail against the applicant for the payment of the balance of the total price due for the supply of the services had expired in relation to the greater part of the supplies which had been made. HMRC was also largely if not entirely out of time to issue an assessment against Royal Mail.

31. The First-tier Tribunal (Tax Chamber) dismissed the appeal. It found that HMRC had no enforceable tax claim against Royal Mail. Royal Mail had not issued any invoice showing the VAT as due. Moreover, HMRC had not assessed Royal Mail as liable to pay any VAT. In those circumstances there was no VAT 'due or paid' by Royal Mail in respect of the supply of the services, for the purposes of Article 168(a) of the VAT Directive.

32. Furthermore, since the applicant did not hold valid tax invoices in respect of the supply of the services, showing a charge to VAT, it had no right to claim deduction of such VAT as input tax. Repayment of notional input VAT to the applicant in respect of the services would constitute an unmerited windfall profit for the applicant. This would mean that in economic terms the applicant would have received the services for considerably less than their true commercial value. The applicant appealed. The Upper Tribunal (Tax Chamber) (United Kingdom) dismissed the appeal.

33. The applicant's appeal to the Court of Appeal (United Kingdom) was also unsuccessful. After a review of the case-law of the Court of Justice, the Court of Appeal held that it was a necessary precondition for the applicant to be able to exercise any right of deduction of input VAT in respect of the services that it should be able to produce VAT invoices which showed that VAT had been charged in respect of the supplies of the services, in compliance with Article 226(9) and (10) of the VAT Directive. The Court of Appeal considered the legal position regarding the invoice issue to be *acte clair*. The applicant has now appealed to the referring court.

## IV. Request for a preliminary ruling and procedure before the Court

34. By decision of 1 April 2020, the Supreme Court of the United Kingdom, seised of that appeal, referred the following questions to the Court of Justice for a preliminary ruling:

'(1) Where (i) a tax authority, the supplier and the trader who is a taxable person misinterpret European VAT legislation and treat a supply, which is taxable at the standard rate, as exempt from VAT, (ii) the contract between the supplier and the trader stated that the price for the supply was exclusive of VAT and provided that if VAT were due the trader should bear the cost of it, (iii) the supplier never claims and can no longer claim the additional VAT due from the trader, and (iv) the tax authority cannot or can no longer (through the operation of limitation) claim from the supplier the VAT which should have been paid, is the effect of [the VAT Directive] that the price actually paid is the combination of a net chargeable amount plus VAT thereon so that the trader can claim to deduct input tax under Article 168(a) of the [VAT] Directive as VAT which was in fact "paid" in respect of that supply?

(2) Alternatively, in those circumstances can the trader claim to deduct input tax under Article 168(a) of the [VAT] Directive as VAT which was "due" in respect of that supply?

(3) Where a tax authority, the supplier and the trader who is a taxable person misinterpret European VAT legislation and treat a supply, which is taxable at the standard rate, as exempt from VAT, with the result that the trader is unable to produce to the tax authority a VAT invoice which complies with Article 226(9) and (10) of the [VAT] Directive in respect of the supply made to it, is the trader entitled to claim to deduct input tax under Article 168(a) of the [VAT] Directive?

(4) In answering questions (1) to (3):

(a) is it relevant to investigate whether the supplier would have a defence, whether based on legitimate expectation or otherwise, arising under national law or EU law, to any attempt by the tax authority to issue an assessment requiring it to account for a sum representing VAT in respect of the supply?

(b) is it relevant that the trader knew at the same time as the tax authority and the supplier that the supply was not in fact exempt, or had the same means of knowledge as them, and could have offered to pay the VAT which was due in respect of the supply (as calculated by reference to the commercial price of the supply) so that it could be passed on to the tax authority, but omitted to do so?'

35. The United Kingdom, the Kingdom of Spain, the Czech Republic, the Hellenic Republic and the European Commission submitted written observations in the procedure before the Court.

## V. Legal assessment

### *A. Understanding of the questions referred*

36. The present request for a preliminary ruling is concerned with the – far from isolated – case where it is only on the basis of the case-law of the tax courts or – as in the present case – of the Court that it emerges that the long-standing tax treatment of certain transactions (*in casu*, certain postal services) was incorrect. In the present case, the scope of a tax exemption provision was understood in the United Kingdom in a manner much broader than that permitted by EU law, as interpreted by the Court.

37. If that (new) case-law leads to a greater tax claim on the part of the State, the tax authorities, relying on the objective legal situation, normally attempt to assess retrospectively the VAT concerned in a way that also includes transactions already carried out by the supplier in the past. This already raises the question of whether, in the case of an indirect tax on consumption, where the supplier is simply acting as tax collector on behalf of the State,[6] an undertaking can really be required to anticipate that case-law. In particular, it would have to be taken into account that a tax collector on behalf of the State does not have to have a better knowledge of tax law than the State and could therefore also rely on the relevant administrative regulations. It becomes particularly problematic when – as in the present case – the tax authorities themselves made the same mistake as the taxpayer (*in casu*, Royal Mail) and the national legislature clearly also treated the supply as exempt.

38. However, the questions referred concern the other side of the coin, that is to say, the right of deduction of the recipient of the supply. If the supplies received are to be treated as exempt, he or she does not have a right of deduction. If, however, it emerges from the case-law that the transaction was in fact taxable (when considered objectively), a right of deduction could enter into consideration in principle.

[6] In this regard see, inter alia, judgments of 23 November 2017, *Di Maura* (C-246/16, EU:C:2017:887, paragraph 23); of 21 February 2008, *Netto Supermarkt* (C-271/06, EU:C:2008:105, paragraph 21); and of 20 October 1993, *Balocchi* (C-10/92, EU:C:1993:846, paragraph 25).

39. Normally, in the event of a mistake regarding the tax rate, the supplier would increase the price by the amount of VAT concerned – if it is possible to do so under civil law – and issue a corresponding invoice (for a greater sum) to the recipient of the supply. The recipient of the supply would pay that invoice, by means of which the additional VAT burden can then be neutralised in the context of the deduction of input tax.

40. A different route was chosen in that respect, however, prompting the referring court to ask the questions referred. This is because the recipient of the supply did not have to pay any additional VAT, as the supplier did not increase its price by the amount of VAT. The supplier was able to opt not to do so, either because the tax authorities themselves opted not to issue a retrospective tax assessment, for the reasons set out above, or because the supply was exempt under national law.

41. However, since the service was objectively taxable under EU law and the applicant paid a certain price, it takes the view that the VAT due under EU law was objectively included in that price. According to the applicant, it was also entitled to neutralise that 'VAT due' in accordance with Article 168(a) of the VAT Directive, even if Royal Mail never paid that 'tax due' to the tax creditor due to the absence of a tax assessment. On the other hand, the invoice actually required under Article 178(a) of the VAT Directive, stating that VAT due from Royal Mail, was unnecessary, since the Court itself has regarded an invoice as only a formal criterion.

42. If that were correct, then a 'windfall profit' would arise for all recipients of supplies of Royal Mail who have a right of deduction. Until the Court's ruling on the scope of the tax-exemption provision, those recipients proceeded on the assumption that they did not have a right to deduction of input tax. That unexpected deduction of input tax would now make the supplies purchased cheaper, at the expense of the revenue from VAT, thereby increasing the profit margin of the recipients of the supplies (including that of the applicant). According to the referring court, this runs to a total volume of between approximately EUR 575 million and approximately EUR 1.15 thousand million (in this specific case, EUR 480 000).

43. For that reason, the referring court asks by its first and second questions, which can be dealt with together, whether, in the case of such a mutual error and the lack of a retrospective calculation of the VAT actually due, it is possible in the first place to speak of VAT 'due and paid', pursuant to Article 168(a) of the VAT Directive, which the recipient of the supply can neutralise by way of deduction of input tax. This concerns the deduction of input tax in principle (see section C.).

44. The third question concerns the implementation of the right of deduction and thus the deduction of input tax in a given amount where, due to the mutual error referred to above, the recipient of the supply does not hold an invoice separately stating the VAT actually due (see section B.). The fourth question of the referring court concerns certain details of the mutual error and other alternatives to a reversal that would not have resulted in a windfall profit. That question will be addressed together with the other questions.

45. Due to the fact that an answer to the first and second questions is actually necessary only in the event that the third question is answered to the effect that a deduction of input tax is possible even without an invoice stating VAT separately, I will answer the third question first. The latter concerns the implementation of the right of deduction and the question of whether that right is conditional upon the requirement laid down in Article 178(a) of the VAT Directive, that the

taxable person must *hold an invoice*, as the Court found in its judgments in *Volkswagen*[7] and *Biosafe – Indústria de Reciclagens*[8] (see section B.2), or whether that requirement has become obsolete in light of the judgment of the Court in *Vădan*[9] (see section B.3).

## *B. Importance of an invoice for the right of deduction (third question referred)*

### *1. Preliminary remarks*

46. The starting point for the assessment of the question of whether the right of deduction is conditional upon an invoice stating VAT separately is Article 167 of the VAT Directive. That provision states that a right of deduction (on the part of the recipient of the supply) arises at the time the deductible tax becomes chargeable (and the supplier therefore becomes liable for payment of the tax; see Article 63 of the VAT Directive). This does not require an invoice.

47. Whereas, in principle, Article 167 of the VAT Directive brings about a simultaneous liability for payment of the tax on the part of the supplier and a right of deduction on the part of the recipient of the supply, Article 178 of the VAT Directive modifies that principle. This is because, in accordance with that provision, successful enforcement of the right of deduction requires not only that the supplier has become liable for payment of the tax, but also that the recipient of the supply *holds an invoice*. Moreover, the invoice must contain certain details (see Article 226 of the VAT Directive).

48. Either the right of deduction can be exercised upon the supply of the goods or services, in keeping with Article 167 and Article 63 of the VAT Directive – in that case, the only decisive factor is whether, despite the mutual error, VAT was included in the price paid (see section C.3) – or it depends upon possession of an invoice, in accordance with Article 178 of the VAT Directive, stating the amount of VAT passed on.

49. I consider the second approach to be correct. On closer examination, only that view is also compatible with the Court's case-law to date. In that respect, a distinction must first be drawn between the origin of the right of deduction *in principle* and the origin of the right of deduction *in a given amount*.

50. Closer inspection of the Court's case-law shows that it has to date ruled mainly on the origin of the right of deduction *in principle*. The Court has found that the right to deduct and, accordingly, to a refund is an integral part of the VAT scheme and in principle may not be limited. That right is exercisable immediately in respect of all taxes charged on input transactions.[10] According to the Court's settled case-law, the fundamental principle of VAT neutrality requires the deduction or refund of input VAT to be allowed if the substantive requirements are satisfied, even if the taxable person has failed to comply with some of the formal

7 Judgment of 21 March 2018 (C-533/16, EU:C:2018:204).

8 Judgment of 12 April 2018 (C-8/17, EU:C:2018:249).

9 Judgment of 21 November 2018 (C-664/16, EU:C:2018:933).

10 Judgments of 17 December 2020, *Bundeszentralamt für Steuern* (C-346/19, EU:C:2020:1050, paragraph 46); of 18 November 2020, *Commission* v *Germany (Refund of VAT – Invoices)* (C-371/19, not published, EU:C:2020:936, paragraph 79); of 2 May 2019, *Sea Chefs Cruise Services* (C-133/18, EU:C:2019:354, paragraph 36); and of 21 March 2018, *Volkswagen* (C-533/16, EU:C:2018:204, paragraph 39).

requirements.[11] The only exception should be where non-compliance with such formal requirements has effectively prevented the production of conclusive evidence that the substantive requirements were satisfied.[12]

51. Article 168(a) of the VAT Directive – which, for the purposes of the right of deduction of the recipient of the supply, refers to the 'VAT due or paid in that Member State in respect of supplies to him of … services, carried out or to be carried out by another taxable person' – clarifies the spirit and purpose of the right of deduction. As VAT is a tax on consumption[13] and given the indirect taxation technique applied, the right of deduction relieves recipients of supplies with a right of deduction from the burden of the VAT charged to them in the price which is due from another person (the supplier – *in casu*, Royal Mail).

52. If that concept is taken at face value, then actual payment of the price by the applicant should be the criterion, as only then is it actually (indirectly) charged VAT. However, the rule enacted in Article 167a of the VAT Directive illustrates that the legislature grants a right of deduction even prior to payment. That provision allows the right of deduction to be postponed until payment has been made, even though liability for payment of the tax only arises on collection of the price. That only makes sense if a right of deduction can be exercised prior to payment in other cases.

53. Thus, the legislature clearly assumes that the recipient of the supply is usually charged VAT prior to payment of the price, but after the supply of the goods or services. At that point, the right of deduction has already arisen *in principle*.

### *2. Origin of right of deduction in a given amount*

54. However, that outcome says nothing about the right of deduction *in a given amount*. The rule enacted in Article 178(a) of the VAT Directive is of decisive importance in that regard.

55. That is because the mere supply of the goods or services says nothing about the amount of VAT charged to the recipient of the supply and included in the price. However, this is necessary for the exercise of the right of deduction. This becomes very clear in cases like the present one, where the parties are mutually mistaken about the exemption of the transaction. According to the contractual agreements, Royal Mail and the applicant assumed that the agreed price did not include VAT. If VAT were to be incurred, it was to be additionally borne by the applicant, in accordance with the contractual agreements. This never happened, although the supply was undoubtedly carried out. The supply of the goods or services in itself therefore does not contain any statement as to whether the applicant sustains a charge to VAT.

[11] Judgments of 17 December 2020, *Bundeszentralamt für Steuern* (C-346/19, EU:C:2020:1050, paragraph 47); of 18 November 2020, *Commission* v *Germany (Refund of VAT – Invoices)* (C-371/19, not published, EU:C:2020:936, paragraph 80); of 19 October 2017, *Paper Consult* (C-101/16, EU:C:2017:775, paragraph 41); of 28 July 2016, *Astone* (C-332/15, EU:C:2016:614, paragraph 45); 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, paragraph 58); of 30 September 2010, *Uszodaépítő* (C-392/09, EU:C:2010:569, paragraph 39); of 21 October 2010, *Nidera Handelscompagnie* (C-385/09, EU:C:2010:627, paragraph 42); and of 8 May 2008, *Ecotrade* (C-95/07 and C-96/07, EU:C:2008:267, paragraph 63).

[12] Judgments of 17 December 2020, *Bundeszentralamt für Steuern* (C-346/19, EU:C:2020:1050, paragraph 48); of 18 November 2020, *Commission* v *Germany (Refund of VAT – Invoices)* (C-371/19, not published, EU:C:2020:936, paragraph 81); and of 19 October 2017, *Paper Consult* (C-101/16, EU:C:2017:775, paragraph 42 and the case-law cited).

[13] See judgments of 10 April 2019, *PSM 'K'* (C-214/18, EU:C:2019:301, paragraph 40); of 18 May 2017, *Latvijas Dzelzceļš* (C-154/16, EU:C:2017:392, paragraph 69); of 7 November 2013, *Tulică and Plavoșin* (C-249/12 and C-250/12, EU:C:2013:722, paragraph 34); and of 24 October 1996, *Elida Gibbs* (C-317/94, EU:C:1996:400, paragraph 19).

56. It is therefore only logical that the legislature does not link the exercise of the right to deduct input tax solely to the supply of goods or services, but additionally requires in Article 178(a) of the VAT Directive that the recipient of the supply must 'hold an invoice'. [14]

57. The need to hold an invoice also serves to implement the principle of neutrality enshrined in VAT law. The principle of neutrality represents a fundamental principle [15] of VAT, inherent in its nature as a tax on consumption. It requires, inter alia, that the undertaking, acting as tax collector on behalf of the State, should fundamentally be relieved of the final burden of VAT, [16] in so far as the economic activity carried on by the undertaking is itself geared (in principle) towards the realisation of taxable transactions. [17]

58. It follows from the concept of VAT relief [18] that deduction of input tax is possible only if the recipient of the supply sustains a charge to VAT. [19] However, the recipient does not sustain a charge immediately upon the supply of the goods or services, but ultimately only upon payment of the consideration (see points 52 and 55 above). The rule enacted in Article 178(a) of the VAT Directive is clearly predicated on the concept that payment is generally made promptly once an invoice has been issued. This means that it is possible even at that moment to presume that the recipient of the supply sustains a charge promptly.

59. This is readily apparent even from the Court's earlier case-law, in which it was still stating [20] 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 therefore cannot be regarded as being chargeable on a given transaction in advance.

60. 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 – as also rightly submitted by the Kingdom of Spain, the Czech Republic and the United Kingdom. The extent to which 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*. The transaction performed is billed by issuing an invoice in which the supplier discloses his or her calculation.

61. In a mass procedure such as value added taxation, it is only the disclosure of how the VAT due is passed on to the recipient of the supply by means of the price that ensures that the recipient of the supply knows – and the tax authorities can check – how much the supplier believes he or she should be charged in VAT. The recipient of the supply thus also knows from when and in what amount he or she can subsequently neutralise that VAT by means of the right of deduction.

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

15 The Court refers, in its judgment of 13 March 2014, *Malburg* (C-204/13, EU:C:2014:147, paragraph 43), to the principle of interpretation.

16 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).

17 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).

18 See my Opinions in *Wilo Salmson France* (C-80/18, EU:C:2021:326, point 59 et seq.), and in *Biosafe – Indústria de Reciclagens* (C-8/18, EU:C:2017:927, point 44 et seq.).

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

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

62. If, as in the present case, both parties as well as the tax authorities mistakenly assumed that a transaction was exempt, no VAT is *passed on* from the supplier to the recipient of the supply by way of the agreed consideration – as rightly emphasised by all parties concerned, with the exception of the applicant. This is why the supplier also did not include it in the invoice. Should both parties decide to adjust the contract after discovering the mistake and to include the missing VAT in the price, this would also be reflected in a corresponding invoice, by means of which the recipient of the supply could then also exercise the right of deduction. Correspondingly, Royal Mail would also be liable for the subsequently stated VAT at the latest when the invoice was issued, in accordance with Article 203 of the VAT Directive.[21] This would restore the synchronisation of input tax and tax liability intended by Article 178(a) of the VAT Directive.

63. In the final analysis, it is precisely the invoice which must be held in accordance with Article 178(a) of the VAT Directive that is the means provided for by that directive by which the charge to VAT is passed on from the supplier (which is liable for payment of the tax) to the recipient of the supply (as part of the price) in a manner that is verifiable for all parties concerned (including the tax authorities). Only then is the recipient of the supply able to see how much the supplier believes he or she should be charged in VAT. The recipient can claim relief in that amount by means of that invoice – which gives rise to his or her tax burden.

64. The Court has already sufficiently clarified the importance of possession of an invoice as the necessary means by which the VAT burden is sustained and as the condition to relief from the charge via the right of deduction in its judgments in *Volkswagen*[22] and *Biosafe – Indústria de Reciclagens*.[23] The United Kingdom and the Czech Republic also stress that importance.

65. The judgment in *Volkswagen* concerned a case in which the parties assumed that their transactions were exempt from VAT. Invoices stating VAT separately were only issued years later, once the mistake had been noticed, and a refund application was submitted under Council Directive 2008/9/EC of 12 February 2008 laying down detailed rules for the refund of value added tax, provided for in Directive 2006/112/EC, to taxable persons not established in the Member State of refund but established in another Member State (OJ 2008 L 44, p. 23). The Court held[24] that, in these circumstances, it was objectively impossible for the recipient of the supply to exercise its right to a refund before that adjustment, as, prior to that, it had neither 'been in possession of the invoices nor aware that the VAT was due. … it was only following that adjustment that the substantive and formal conditions giving rise to a right to deduct VAT were met'.

66. The judgment in *Biosafe – Indústria de Reciclagens* concerned a case similar to the present one, except that the deduction of input tax was sought in the case of a mutual error as to the correct rate of tax. The rate was assumed to be lower and the supplier corrected its invoice years later by increasing the separately stated amount of VAT. Here again, the Court found[25] that it was objectively impossible for the recipient of the supply to exercise its right to deduct before the VAT

[21] Contrary to the view taken by the applicant, Article 203 of the VAT Directive is not a mere 'anti-fraud provision', but, rather, it also ensures the synchronisation of, on the one hand, the deduction of input tax *by means of* an invoice and, on the other hand, the tax liability *because of* an invoice.

[22] Judgment of 21 March 2018 (C-533/16, EU:C:2018:204).

[23] Judgment of 12 April 2018 (C-8/17, EU:C:2018:249).

[24] Judgment of 21 March 2018, *Volkswagen* (C-533/16, EU:C:2018:204, paragraphs 49 and 50).

[25] Judgment of 12 April 2018, *Biosafe – Indústria de Reciclagens* (C-8/17, EU:C:2018:249, paragraphs 42 and 43).

adjustment carried out, since beforehand it 'did not possess the documents rectifying the initial invoices and did not know that additional VAT was due. … it was only following that adjustment that the substantive and formal conditions giving rise to a right to deduct VAT were met'.

67. In both cases, the Court rightly proceeded on the assumption that the recipient of the supply did not sustain a charge to VAT until it was in possession of a corresponding invoice stating its VAT liability. The applicant is not in possession of such a corrected invoice in the present case, however.

68. Furthermore, as already stated by the Court,[26] only the possession of an invoice allows the tax authorities to monitor payment of the VAT and the input tax deducted. The more details the invoice contains, the more effective the monitoring by the tax authorities, as the very comprehensive list now included in Article 226 of the VAT Directive illustrates. This also suggests that the possession of an invoice stating VAT is the decisive factor and thus constitutes a substantive requirement for the deduction of input tax. It is therefore not possible for the applicant to deduct input tax without such an invoice.

*3. Deduction of input tax nevertheless possible without an invoice?*

*(a) Case-law of the Court on evidence of the right of deduction in the form of an expert report*

69. The judgment of the Court in *Vădan*[27] does not suggest otherwise – as I have already explained elsewhere.[28] The Court held in paragraph 42 of that judgment that the strict application of the substantive requirement to *produce* invoices would conflict with the principles of neutrality and proportionality, inasmuch as it would disproportionately prevent the taxable person from benefiting from fiscal neutrality relating to his or her transactions.

70. At first glance, one might assume that a right of deduction may exist even with no invoice and contrary to the wording of Article 178. However, such a reading of the judgment cited comes to nothing.

71. First, the 'only' question the Court had to answer in that case was whether a right of deduction can be based on an assessment resulting from an expert report on the usual right of deduction for the type of construction project concerned. The Court correctly found that it cannot. The right of deduction is based on the *actual* VAT burden, not on the *usual* VAT burden. The expert could only have proven the latter by assessment.

72. Second, at no point in those proceedings did it become clear whether VAT invoices were ever issued. It was only sure that the initial invoices were no longer legible and that the tax authorities had insisted that original invoices be submitted. That is incompatible with the directive, however. The directive simply requires that taxable persons hold an invoice when they exercise their right of deduction, not that they must still hold and be in a position to submit the invoice during a tax

[26] Judgments of 15 November 2017, *Geissel and Butin* (C-374/16 and C-375/16, EU:C:2017:867, paragraph 41), and 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).

[27] Judgment of 21 November 2018 (C-664/16, EU:C:2018:933).

[28] See my Opinion in *Wilo Salmson France* (C-80/20, EU:C:2021:326, point 70 et seq.).

audit. If the invoice is subsequently lost, the taxable person can of course use all possible evidence (usually a copy) to prove that at some point he or she held an invoice on which VAT was charged in a given amount.

73. Therefore, the Court's findings in *Vădan* rightly only refer to *evidence* of the right of deduction.[29] The substantive requirements (that is to say, those arising from Article 167 and Article 178 of the VAT Directive) for the deduction of VAT can be proven by all possible evidence, for which expert evidence of the usual VAT charge is per se unsuitable.[30] In my opinion, this outcome follows unequivocally from the operative part of the judgment, read with reference to the questions and the facts placed before the Court.

*(b) Case-law of the Court on the correct period for exercising the right of deduction*

74. On the basis of that understanding of the *Vădan* judgment,[31] there is also no contradiction with the case-law in which the Court addressed the specific period[32] in which the right of deduction is to be exercised. By those judgments, it always in fact relied on the need for the taxable recipient of the supply to hold an invoice.[33]

75. For example, in its judgment in *Terra Baubedarf-Handel*, the Court explicitly argued as follows: 'As regards the principle of proportionality, it is not infringed by requiring the taxable person to effect the deduction of input VAT in respect of the tax period in which the condition of possession of the invoice or of a document considered to serve as an invoice and that of the origin of the right to deduct are satisfied. First, that requirement is consistent with one of the aims of the Sixth Directive, that of ensuring that VAT is levied and collected [(evidence)] …, and secondly, … payment for delivery of goods or performance of services, and therefore payment of input VAT, is not normally made until the invoice has been received.'[34] By its judgment in *Senatex*,[35] the Court established the principle that the right of deduction must be exercised in respect of the tax period, first, in which the right of deduction arose and, second, in which the taxable person 'is in possession of the invoice'.

76. However, if the period in which the right of deduction is to be exercised depends upon possession of an invoice, then that possession is a substantive, not simply formal criterion. Consequently, the right of deduction depends upon possession of a corresponding invoice.

29 Judgment of 21 November 2018, *Vădan* (C-664/16, EU:C:2018:933, paragraph 44, 'provide objective evidence'; paragraph 45, 'evidence'; paragraph 47, 'evidence'; and paragraph 48, 'provide evidence').

30 The Court quite rightly found in its judgment of 21 November 2018, *Vădan* (C-664/16, EU:C:2018:933, paragraph 45), that an assessment cannot replace evidence.

31 Judgment of 21 November 2018, *Vădan* (C-664/16, EU:C:2018:933).

32 For example, judgments of 15 September 2016, *Senatex* (C-518/14, EU:C:2016:691), and of 29 April 2004, *Terra Baubedarf-Handel* (C-152/02, EU:C:2004:268).

33 See also the Opinion of Advocate General Campos Sánchez-Bordona in *Volkswagen* (C-533/16, EU:C:2017:823, point 58), and my Opinion in *Biosafe – Indústria de Reciclagens* (C-8/17, EU:C:2017:927, point 65 et seq.).

34 Judgment of 29 April 2004, *Terra Baubedarf-Handel* (C-152/02, EU:C:2004:268, paragraph 37).

35 Judgment of 15 September 2016 (C-518/14, EU:C:2016:691, paragraph 35).

*(c) Case-law of the Court on the retroactive correction of incomplete/incorrect invoices*

77. Ultimately, this also follows from the Court's more recent case-law on the retrospective correction of invoices,[36] by which the Court distinguishes between the substantive and formal requirements for the right of deduction. The formal requirements include 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.[37] 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 person has failed to comply with some formal requirements.[38] 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.[39]

78. However, it is clear on closer reading that the case-law of the Court on the formal shortcomings which do not preclude the right of deduction always concerns the details of the content of an invoice, never possession of an invoice as such (or the existence of an invoice).[40]

79. Thus, that case-law only refers to the absence of *certain* formal requirements, not to the absence of *all* formal requirements. It cannot therefore be concluded from that case-law that a right of deduction can arise if no invoice is held. The Court itself only notes that 'holding an invoice showing the details mentioned in Article 226 of the VAT Directive is a formal condition, [not a substantive condition,] of the right to deduct VAT'.[41] That observation is correct. The provision of *all* the information specified in Article 226 of the VAT Directive is a formal requirement. Provided it is not essential (as explained in point 81 et seq.), that information may

[36] It includes, for example, judgments of 15 September 2016, *Senatex* (C-518/14, EU:C:2016:691); of 15 September 2016, *Barlis 06 – Investimentos Imobiliários e Turísticos* (C-516/14, EU:C:2016:690); and of 8 May 2013, *Petroma Transports and Others* (C-271/12, EU:C:2013:297).

[37] 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).

[38] Judgments of 17 December 2020, *Bundeszentralamt für Steuern* (C-346/19, EU:C:2020:1050, paragraph 47); of 18 November 2020, *Commission* v *Germany (Refund of VAT – Invoices)* (C-371/19, not published, EU:C:2020:936, paragraph 80); of 19 October 2017, *Paper Consult* (C-101/16, EU:C:2017:775, paragraph 41); of 28 July 2016, *Astone* (C-332/15, EU:C:2016:614, paragraph 45); 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, paragraph 58); of 30 September 2010, *Uszodaépítő* (C-392/09, EU:C:2010:569, paragraph 39); of 21 October 2010, *Nidera Handelscompagnie* (C-385/09, EU:C:2010:627, paragraph 42); and of 8 May 2008, *Ecotrade* (C-95/07 and C-96/07, EU:C:2008:267, paragraph 63).

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

[40] As explicitly clarified in the judgment of 15 September 2016, *Senatex* (C-518/14, EU:C:2016:691, paragraph 39 et seq.). Judgment of 15 September 2016, *Barlis 06 – Investimentos Imobiliários e Turísticos* (C-516/14, EU:C:2016:690, paragraphs 35 and 49), also concerned an invoice, the possession of which was uncontested, but some of the details of which were imprecise. Judgment of 15 July 2010, *Pannon Gép Centrum* (C-368/09, EU:C:2010:441, paragraph 45), also refers to possession of an initial invoice.

[41] Judgments of 15 November 2017, *Geissel and Butin* (C-374/16 and C-375/16, EU:C:2017:867, paragraph 40), and of 15 September 2016, *Senatex* (C-518/14, EU:C:2016:691, paragraph 38, and, similarly, paragraph 29 ('holding an invoice drawn up in accordance with Article 226 of that directive')). Similarly, judgments of 21 March 2018, *Volkswagen* (C-533/16, EU:C:2018:204, paragraph 42), and of 21 October 2010, *Nidera Handelscompagnie* (C-385/09, EU:C:2010:627, paragraph 47).

also be added or amended at a later date (for example in accordance with Article 219 of the VAT Directive). *Possession* of an invoice in accordance with Article 178 of the VAT Directive is of itself a situation in fact, not a formal requirement. [42]

80. Furthermore, the Court also 'only' concludes from that finding that the tax authority cannot refuse the right to deduct VAT on the sole ground, for example, that an invoice does not satisfy the conditions required by Article 226(6) and (7) of the VAT Directive (precise description of the quantity and nature of supply and date of the supply) if they have available all the information to ascertain whether the substantive conditions for that right are satisfied. [43] The same applies to the information mentioned in Article 226(3) (supplier's VAT identification number) [44] or Article 226(2) (invoice number). [45] Consequently, the Court ascribed retroactive effect to the correction of a (formally incorrect) invoice already held by the recipient of the supply. [46]

81. This is convincing. A document that charges for a supply of goods or services is in fact an invoice within the meaning of Article 178(a) of the VAT Directive if it enables both the recipient of the supply and the tax authorities to establish which supplier has passed on to which recipient of the supply which amount in VAT for which transaction, and when it has done so. That means it needs to state the supplier, the recipient of the supply, the goods or services supplied, the price and the VAT, which must be stated separately. [47] As I have already stated elsewhere, [48] if those five essential items of information are provided, the spirit and purpose of the invoice are fulfilled and the right of deduction ultimately arises. [49]

82. Failure to comply with the other requirements specified in Article 226 of the VAT Directive does not preclude a right of deduction, provided they are corrected in the administrative or court proceedings. That legal consequence ultimately also follows from the Court's case-law on the retrospective correction of an invoice. [50]

83. However, if the shortcoming in the invoice concerns – as in the present case – the circumstance of whether VAT is stated separately, which is one of the essential features of an invoice conferring a right of deduction, the possibility to deduct input tax is ruled out for that

[42] The Court also appears to assume as much (judgment of 30 September 2010, *Uszodaépítő*, C-392/09, EU:C:2010:569, paragraph 45) in noting that Article 178 of the VAT Directive precludes the imposition of additional formal requirements, as Article 178 of the VAT Directive cannot of itself constitute a merely formal requirement. Also, the judgments of 12 April 2018, *Biosafe – Indústria de Reciclagens* (C-8/17, EU:C:2018:249, paragraph 43), and of 21 March 2018, *Volkswagen* (C-533/16, EU:C:2018:204, paragraph 50), clarify that all the substantive and formal requirements for exercising the right of deduction are fulfilled only once an invoice is held showing the VAT charged.

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

[44] Judgment of 15 September 2016, *Senatex* (C-518/14, EU:C:2016:691, paragraph 40 et seq.).

[45] Judgment of 15 July 2010, *Pannon Gép Centrum* (C-368/09, EU:C:2010:441, paragraph 45); similarly, judgment of 17 December 2020, *Bundeszentralamt für Steuern* (C-346/19, EU:C:2020:1050, paragraphs 53 and 57).

[46] See judgments of 15 September 2016, *Senatex* (C-518/14, EU:C:2016:691, paragraph 43); of 15 September 2016, *Barlis 06 – Investimentos Imobiliários e Turísticos* (C-516/14, EU:C:2016:690, paragraph 44); and of 8 May 2013, *Petroma Transports and Others* (C-271/12, EU:C:2013:297, paragraph 34).

[47] See, to that effect, Bundesfinanzhof (Federal Finance Court, Germany) judgments of 12 March 2020 (V R 48/17, BStBl. II 2020, 604, paragraph 23); of 22 January 2020 (XI R 10/17, BStBl. II 2020, 601, paragraph 17); and of 20 October 2016 (V R 26/15, BStBl. 2020, 593, paragraph 19).

[48] See my Opinion in *Wilo Salmson France* (C-80/20, EU:C:2021:326, points 93 and 94).

[49] The criterion requiring the VAT to be 'stated separately' follows from the judgments of the Court in *Volkswagen* and *Biosafe*, in which invoices were issued, but the VAT was not stated so that the right of deduction could be exercised in that amount. See judgments of 12 April 2018, *Biosafe – Indústria de Reciclagens* (C-8/17, EU:C:2018:249, paragraphs 42 and 43), and of 21 March 2018, *Volkswagen* (C-533/16, EU:C:2018:204, paragraphs 49 and 50).

[50] It includes, for example, judgments of 15 September 2016, *Senatex* (C-518/14, EU:C:2016:691, paragraph 43); of 15 September 2016, *Barlis 06 – Investimentos Imobiliários e Turísticos* (C-516/14, EU:C:2016:690, paragraph 44); and of 8 May 2013, *Petroma Transports and Others* (C-271/12, EU:C:2013:297, paragraph 34).

reason alone. The recipient of the supply cannot claim relief from a charge to VAT by means of an invoice showing an exempt supply. In that respect, the United Kingdom rightly refers to a precondition for a deduction of input tax. This is because such an invoice does not give rise to a charge to VAT. Without such an invoice as the means by which the tax burden is 'passed on', the requirements of Article 178(a) of the VAT Directive are not met.

84. A comparison between Article 178(a) and (f) of the VAT Directive clearly illustrates that the legislature has imposed an additional condition (possession of an invoice) for standard cases of indirect collection (subparagraph (a)). That requirement is not necessary in exceptional cases of direct collection (subparagraph (f), reverse charge procedure)[51] and is not therefore provided for. However, that legislative decision would be circumvented were possession of an invoice declared to be a mere and insignificant formality.

*(d) Interim conclusion*

85. Thus, it follows both from the wording of the VAT Directive and from the case-law of the Court that a right of deduction in a given amount requires the recipient of the supply to have held at some point an invoice separately stating the VAT passed on in that amount. Since this was never the case here, a right of deduction on the part of the applicant is ruled out for that reason alone.

*4. Conclusion*

86. The answer to the third question is that the right of deduction presupposes the supply of the goods or services and the possession of an invoice (Article 178(a) of the VAT Directive) documenting the passing on of VAT by virtue of being stated separately. Consequently, without such an invoice, the applicant is not entitled to claim to deduct input tax in the present case.

## *C. In the alternative: VAT 'due or paid' within the meaning of Article 168(a) of the VAT Directive (first and second questions referred)*

87. It is only in the event that the Court leaves open the question concerning the need to hold an invoice stating the VAT or assesses it differently that there is a practical need to answer the first and second questions of the referring court.

88. By those two questions, the referring court seeks to ascertain whether the price actually paid is always the combination of a net chargeable amount plus VAT thereon. This is concerned with the interpretation of Articles 73 and 78 of the VAT Directive, which concern the taxable amount (see section 2.). Furthermore, it seeks to ascertain whether – if the price also includes a VAT element – the recipient of the supply can then claim to deduct input tax under Article 168(a) of the VAT Directive as VAT which was in fact 'due or paid' in respect of that supply, even if, due to the mutual mistake, both parties assumed that the supply was exempt. The latter question relates to the interpretation of Article 168(a) of the VAT Directive. In that context, it is necessary to clarify

[51] Expressly confirmed by judgment of 1 April 2004, *Bockemühl* (C-90/02, EU:C:2004:206, paragraphs 47 and 51). That is because, in that case, the invoice does not function as the means by which the tax burden is passed on (as explained in point 60 et seq. above), as the supplier is never liable for it and therefore has no need to pass it on.

whose VAT 'due or paid' is meant by that provision (see section 1.) and whether it refers to the VAT owed in concrete terms or the VAT actually owed (in abstract terms) in correct application of the law (see section 3.).

*1. Concept of 'VAT due or paid' in Article 168(a) of the VAT Directive*

89. Article 168(a) of the VAT Directive is decisive for the purposes of the relationship between the applicant (as the recipient of the supplies) and the tax authorities. That provision refers to deduction of the 'VAT due or paid'. It is necessary to clarify which VAT is meant by this. It is either the 'VAT due [from] or paid' by Royal Mail (that is to say, the supplier) or the 'VAT due [from] or paid' by the applicant (that is to say, the recipient of the supplies) that enters into consideration in that regard.

90. However, since Article 168(a) of the VAT Directive concerns the deduction of input tax from an input supply, the answer is clear. At this stage – that is to say, when the input supply is purchased by the recipient of the supply – only one person is liable for VAT or can pay VAT. That person is the supplier, that is to say, Royal Mail in this case.

91. Whether the recipient of the supply is liable for or pays VAT depends solely on his or her output transactions – Article 168 of the VAT Directive refers to the 'taxed transactions' of a taxable person. This is confirmed, by *a contrario* reasoning, by Article 169 of the VAT Directive, which furthermore allows for a deduction of input tax in respect of certain exempt output transactions. Consequently, it is not at all certain at this stage whether the recipient of the supply will ever be liable to pay VAT to the State. Similarly, the Court has already ruled several times [52] that even a trader who has not successfully performed output transactions (such that he or she has never been liable for VAT, let alone paid VAT) has a right of deduction. For that reason alone, the wording in Article 168(a) of the VAT Directive cannot refer to such a trader.

92. This is because, with regard to his or her input transactions, the recipient of the supply – outside the cases of the reverse charge procedure under Article 194 et seq. of the VAT Directive – is not liable for VAT and also cannot pay VAT. The recipient of the supply is liable – under civil law – for only the price for the supply or service. It is also only that price that he or she can pay. That price may contain an element arithmetically reflecting the VAT liability of the supplier. However, this does nothing to change the fact that, with the payment of the price by the recipient of the supply, only the price and no VAT is due or paid. This is because the tax creditor in respect of VAT is not the supplier, but only the State.

93. That inference is confirmed by the further wording of Article 168(a) of the VAT Directive. That provision refers to 'VAT due … in that Member State'. However, the price or the arithmetically established VAT element contained therein is due not in a Member State, but to the contracting party. In that respect, the applicable law or the place of jurisdiction is to be determined by the contractual agreements and not by the place of supply provisions under value added tax law.

[52] Judgments of 17 October 2018, *Ryanair* (C-249/17, EU:C:2018:834, paragraph 18); of 29 February 1996, *Inzo* (C-110/94, EU:C:1996:67, paragraph 17); and of 14 February 1985, *Rompelman* (268/83, EU:C:1985:74, paragraphs 23 and 24); and my Opinion in *Ryanair* (C-249/17, EU:C:2018:301, points 16 and 26).

94. The 'VAT due or paid' referred to in Article 168(a) of the VAT Directive therefore refers – contrary to the view taken by the Commission – to the VAT due from or paid by the supplier to the Member State concerned.

*2. VAT element of the price for a service presumed to be exempt*

95. A different question, which is to be distinguished therefrom, is whether the price due from (or paid by) the recipient of the supply includes a VAT element due from the supplier, even if it assumed, alone or together with its contracting partner (and possibly with the tax authorities), that the supply was exempt. However, this question is answered not by Article 168(a) of the VAT Directive, but by Articles 73 and 78 thereof, taking into account Article 90 thereof.

96. It follows from Article 73 of the VAT Directive that the taxable amount includes everything which constitutes consideration obtained or to be obtained by the supplier of goods or services for transactions with the purchaser, customer or a third party. Article 78 of that directive lists certain items which are to be included in the taxable amount. Article 78(a) provides that VAT is not to be included in the taxable amount.

97. Therefore, if someone pays 100 for a taxable supply, that sum already includes VAT – the applicant's statements are correct in that respect. This follows from Article 78(a) of the VAT Directive. However, since, according to Articles 93 and 96 of that directive, the rate of tax is applied to the taxable amount, and that does not include VAT, the price received must be broken down. Therefore, at a rate of 20%, the 100 received is divided into the taxable amount (100/120 of 100 = 83.33) and the VAT payable by the supplier (20/120 of 100 = 16.66). The rate of 20% applied to the taxable amount of 83.33 in accordance with Articles 93 and 96 of the VAT Directive then results in VAT of exactly 16.66. This calculation method is always the same and is independent of the contractual agreements or a mistake regarding the correct rate of tax.

98. This is because, in accordance with the general rule set out in Article 73 of the VAT Directive, the taxable amount for the supply of goods or services for consideration is the consideration actually received for them by the taxable person. That consideration is the subjective value, that is to say, the value actually received, and not a value estimated according to objective criteria.[53] That rule must be applied in accordance with the basic principle of the VAT Directive: that the VAT system is aimed at taxing only the end consumer.[54]

99. The Court therefore rightly emphasises in its case-law that when a contract of sale has been concluded without reference to VAT, in a situation where the supplier has no means under national law of recovering from the purchaser the VAT claimed subsequently by the tax authorities, taking the total price, without deducting the VAT, as the taxable amount on which the VAT is to be levied, leads to a situation where it is the supplier which bears the VAT burden. This therefore conflicts, in turn, with the principle that VAT is a tax on consumption to be borne by the end consumer.[55] Taking that amount as the taxable amount also conflicts with the rule that

[53] Judgments of 7 November 2013, *Tulică and Plavoşin* (C-249/12 and C-250/12, EU:C:2013:722, paragraph 33); of 26 April 2012, *Balkan and Sea Properties* (C-621/10 and C-129/11, EU:C:2012:248, paragraph 43); and of 5 February 1981, *Coöperatieve Aardappelenbewaarplaats* (154/80, EU:C:1981:38, paragraph 13).

[54] Judgments of 7 November 2013, *Tulică and Plavoşin* (C-249/12 and C-250/12, EU:C:2013:722, paragraph 34), and of 24 October 1996, *Elida Gibbs* (C-317/94, EU:C:1996:400, paragraph 19).

[55] Judgment of 7 November 2013, *Tulică and Plavoşin* (C-249/12 and C-250/12, EU:C:2013:722, paragraph 35).

the tax authorities may not charge a VAT amount exceeding the amount paid by the taxable person.[56] The corollary of this is that (all) the consideration actually received already includes the VAT provided for under EU law.

100. However, it appears to me to be doubtful whether – as stated by the Court at times[57] – the situation is in fact otherwise simply because the supplier has the possibility under national law of adding to the agreed price a supplement equal to the tax applicable to the transaction and recovering it from the purchaser of the good. In accordance with both Article 90 of the VAT Directive and the case-law of the Court, the taxable amount for the supply of goods or services for consideration is ultimately the consideration *actually* received for them by the taxable person.[58]

101. If the amount of consideration (that is to say, the price) subsequently changes due to an adjustment of the contract, Article 90 of the VAT Directive allows for an adjustment, which – as the Court has already stated – can lead to both a lower and, subsequently, a higher tax liability (this already follows from Article 73 of the VAT Directive).[59] However, the mere possibility to recover something does not mean that the recipient of the supply actually has the recoverable amount at his or her disposal. This can ultimately be left open here, however, since such a recovery is no longer possible in the present case due to the expiry of the limitation period under civil law.

102. It is therefore clear that Article 168(a) of the VAT Directive refers to the VAT due from the supplier and that it follows from Articles 73, 78 and 90 of the VAT Directive that any amount actually received includes the VAT provided for by law. This is to be distinguished from the question answered above (section B.), as to whether that inherent VAT has also been passed on to the contracting partner with the result that the latter has a right of deduction.

### *3. VAT due from the supplier in abstract terms or concrete terms?*

103. Thus, the 'only' matter that remains to be clarified is whether, in respect of a deduction of input tax – and going beyond the necessity of an invoice – the concept of VAT due from the supplier refers to the VAT due in concrete terms. This would not be the case here, as it is clear that, given that the limitation period under tax law has now expired, the VAT that is actually due (at least under EU law) can no longer be collected.

104. The concept of VAT due could otherwise refer in the abstract to the VAT actually due (here at least under EU law). At a rate of tax of 20%, this would then have to be deducted from the price received at a proportion of 20/120 in the United Kingdom.

[56] Judgments of 7 November 2013, *Tulică and Plavoşin* (C-249/12 and C-250/12, EU:C:2013:722, paragraph 36); of 26 April 2012, *Balkan and Sea Properties* (C-621/10 and C-129/11, EU:C:2012:248, paragraph 44); of 3 July 1997, *Goldsmiths* (C-330/95, EU:C:1997:339, paragraph 15); and of 24 October 1996, *Elida Gibbs* (C-317/94, EU:C:1996:400, paragraph 24).

[57] Judgment of 7 November 2013, *Tulică and Plavoşin* (C-249/12 and C-250/12, EU:C:2013:722, paragraph 37).

[58] See, expressly, judgments of 7 November 2013, *Tulică and Plavoşin* (C-249/12 and C-250/12, EU:C:2013:722, paragraph 33); of 26 April 2012, *Balkan and Sea Properties* (C-621/10 and C-129/11, EU:C:2012:248, paragraph 43); and of 3 July 1997, *Goldsmiths* (C-330/95, EU:C:1997:339, paragraph 15).

[59] See, in that regard, 23 November 2017, *Di Maura* (C-246/16, EU:C:2017:887, paragraph 27), and my Opinion in *Di Maura* (C-246/16, EU:C:2017:440, point 63 et seq.).

105. In that regard, it follows clearly and unambiguously from the case-law of the Court that the right of deduction of the recipient of the supply is independent of the actual treatment and enforcement of the tax claim of the supplier. In that regard, the Court has held in settled case-law that the question of whether the VAT payable on the prior or subsequent sales of the goods concerned has or has not been paid to the public purse is irrelevant to the right of the taxable person to deduct input VAT. VAT applies to each transaction by way of production or distribution after deduction of the VAT directly borne by the various cost components. [60]

106. That case-law shows that the actual deduction of input tax by the recipient of the supply is independent of the actual tax liability of the supplier. Therefore, it is also irrelevant whether or not the latter would have a successful defence against subsequent taxation in the present case (Question 4(a)).

107. If that is the case, the concept of VAT due from the supplier, which has been passed on to the recipient of the supply via the price and which the recipient can neutralise by means of the deduction of input tax, must in principle also be considered in the abstract. That concept therefore refers to the VAT actually due (in abstract terms). Neither the mutual error of the contracting parties (including the error of the tax authorities) nor the fact that the tax authorities waived or had to waive a subsequent tax assessment for reasons pertaining to the rule of law and for reasons of practicality, and that the period of limitation in respect of the tax liability of the supplier has now expired, has any influence on that outcome.

### *4. Conclusion*

108. Consequently, the concept of 'VAT due or paid' in Article 168(a) of the VAT Directive refers, from a dogmatic viewpoint, to the VAT due from the supplier in the abstract and in the correct amount, which is already included in the price actually received.

109. However, this only becomes practically relevant for the recipient of the supply when he or she receives a corresponding invoice stating the VAT, which demonstrates the passing on of that tax to the recipient of the supply. However, in the case of a mutual error, the supplier will issue such an invoice only if he or she alone must bear the risk of the correct assessment under VAT law or if the recipient of the supply subsequently pays the VAT that has not yet been passed on due to the mutual error, that is to say, the price is adjusted accordingly.

## VI. Conclusion

110. I therefore propose that the Court answer the questions referred by the Supreme Court of the United Kingdom as follows:

1. The 'VAT due or paid' referred to in Article 168(a) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax covers the VAT actually due from or paid by the supplier to the Member State.

[60] Judgments of 6 December 2012, *Bonik* (C-285/11, EU:C:2012:774, paragraph 28); of 21 June 2012, *Mahagében* (C-80/11 and C-142/11, EU:C:2012:373, paragraph 40); and of 12 January 2006, *Optigen and Others* (C-354/03, C-355/03 and C-484/03, EU:C:2006:16, paragraph 54); and order of 3 March 2004, *Transport Service* (C-395/02, EU:C:2004:118, paragraph 26).

2. It follows from Articles 73 and 78, taking into account Article 90 of Directive 2006/112, that the taxable amount for the supply of goods or services for consideration is the consideration actually received for them by the taxable person, which already includes VAT.

3. However, the right of deduction under Article 168(a) of Directive 2006/112 presupposes the supply of the goods or services and the possession of an invoice (Article 178(a) of Directive 2006/112) documenting the passing on of VAT. By contrast, a deduction of input tax is not possible without possession of an invoice stating the VAT separately.

4. The recipient of a supply who has not endeavoured to obtain a corresponding invoice stating the VAT separately within the limitation period under civil law cannot claim to deduct input tax against the tax authorities without such an invoice.

5. Since the right of deduction of the recipient of a supply is independent of the actual taxation of the service provider, it is irrelevant whether the supplier had a successful defence to its own taxation.