Reports of Cases

OPINION OF ADVOCATE GENERAL
TANCHEV
delivered on 30 May 2018[1]

Case C-664/16

Lucrețiu Hadrian Vădan
v
Agenția Națională de Administrare Fiscală — Direcția Generală de Soluționare a Contestațiilor Direcția Generală Regională a Finanțelor Publice Brașov — Administrația Județeană a Finanțelor Publice Alba

(Request for a preliminary ruling from the Curtea de Apel Alba Iulia (Court of Appeal, Alba Iulia, Romania))

(Reference for a preliminary ruling — Common system of value added tax (VAT) — Directive 2006/112/EC — Articles 167, 168, 178, 179 and 273 — Principle of VAT neutrality — Right to deduct input tax — Substantive requirements — Formal requirements — Absence of invoices)

I. Introduction

1. The invoice is an essential element of a taxable person's right to deduct input VAT under Council Directive 2006/112/EC on the common system of value added tax ('the VAT Directive').[2] Indeed, a properly drawn up invoice has been termed the 'ticket of admission'[3] to the right of deduction, given that it has an 'insurance function' for the national fiscal authority in linking input tax deduction to the payment of tax.[4]

2. In the circumstances of the main proceedings, may the right to deduct input VAT as provided for in the VAT Directive be refused by a national fiscal authority where the taxpayer fails to provide it with any invoices?

3. That is in substance the key issue that arises for the Court's consideration in the present reference for a preliminary ruling submitted by the Curtea de Apel Alba Iulia (Court of Appeal, Alba Iulia, Romania). The referring court takes the view that it entails interpretation of the right to deduct input tax as established in Articles 167, 168, 178, 179 and 273 of the VAT Directive, and consideration of the principles of proportionality and VAT neutrality. Moreover, the referring court queries whether, under the facts of the main proceedings, an indirect assessment method by means of a court-commissioned expert report for determining the right of deduction is permissible under EU VAT law in the absence of invoices.

1 Original language: English.
2 OJ 2006 L 347, p. 1.
3 Opinion of Advocate General Slynn in Joined Cases *Jeunehomme and EGI* (123/87 and 330/87, EU:C:1998:274, p. 4534).
4 Opinion of Advocate General Kokott in *Barlis 06 — Investimentos Imobiliários e Turísticos* (C-516/14, EU:C:2016:101, point 34).

4. Under the established case-law of the Court, subject to certain exceptions, national fiscal authorities must grant the taxable person the right to deduct input tax, as set down in the VAT Directive, where the substantive requirements such as those provided for in Chapter 1 of Title X of the VAT Directive (entitled ‘Origin and scope of right of deduction’) have been satisfied, even if the taxable person has failed to comply with some of the formal requirements related to the exercise of that right, which include invoicing.[5]

5. So far, that case-law has generally pertained to situations involving defects associated with an otherwise properly drawn up invoice,[6] or other matters that are relevant to whether or not such invoices can be presented to the tax authorities with a view to deducting input tax, such as limitation periods.[7] This case presents the Court with the opportunity to decide whether this approach should be followed in circumstances involving the taxable person’s failure to supply any invoices at all, and it is proposed to fill the evidential gap with an expert’s report.

II. Legal framework

A. EU law

6. Article 167 of the VAT Directive states:

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

7. Article 168(a) of the VAT Directive states:

‘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’.

8. Article 178(a) of the VAT Directive provides:

‘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’.

9. The first paragraph of Article 179 of the VAT Directive states:

‘The taxable person shall make the deduction 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.’

5 See e.g. judgments of 28 July 2016, *Astone* (C-332/15, EU:C:2016:614, paragraph 47), and of 19 October 2017, *Paper Consult* (C-101/16, EU:C:2017:775, paragraphs 40 and 41 and the case-law cited).

6 See e.g. judgment of 30 September 2010, *Uszodaépítő* (C-392/09, EU:C:2010:569).

7 See e.g. judgment of 12 April 2018, *Biosafe — Indústria de Reciclagens* (C-8/17, EU:C:2018:249).

10. Article 273 of the VAT Directive states:

‘Member States may impose other obligations which they deem necessary to ensure the correct collection of VAT and to prevent evasion, subject to the requirement of equal treatment as between domestic transactions and transactions carried out between Member States by taxable persons and provided that such obligations do not, in trade between Member States, give rise to formalities connected with the crossing of frontiers.

The option under the first paragraph may not be relied upon in order to impose additional invoicing obligations over and above those laid down in Chapter 3.’

B. Romanian law

11. Pursuant to Article 145(1) and (2)(a) and Article 146(1)(a) of Legea nr. 571/2003 privind Codul fiscal (Law No 571/2003 establishing the Tax Code), applicable as from 1 January 2007,[8] all taxable persons have the right to deduct VAT relating to purchases for taxable transactions; that right arises at the moment VAT becomes chargeable. In order to exercise the right to deduct in respect of VAT due or paid, the taxable person must possess an invoice issued in accordance with the requirements laid down by law.

12. Paragraph 46(1) of Hotărârea Guvernului nr. 44/2004 pentru aprobarea Normelor metodologice de aplicare a Legii nr. 571/2003 (Government Decree No 44/2004 approving the detailed rules for the implementation of Law No 571/2003), applicable as from 1 January 2007,[9] states:

‘Justification for deduction of the tax may be established only on the basis of the original of the documents referred to in Article 146(1) of the Tax Code or by means of other documents which contain as a minimum the information specified in Article 155(5) of the Tax Code, with the exception of the simplified invoices referred to in subparagraph 78. In the event of loss, removal or destruction of the original of a supporting document, the person benefiting from the right to deduct shall ask the supplier to issue a duplicate of the invoice on which it shall be indicated that that duplicate is a substitute for the original invoice.’

III. The facts in the main proceedings and the questions referred for a preliminary ruling

13. According to the order for reference, Mr Vădan (‘the applicant’) is a Romanian citizen and a property developer.

14. In his capacity as a natural person, the applicant built a residential complex containing 90 apartments, the construction of which took place between 6 June 2006 and 8 September 2008. The applicant is also the owner of other plots of land in respect of which urban sectoral plans had already been drawn up for the construction of single-family homes.

15. In 2006, the applicant carried out 29 transactions involving the sale of plots of land and buildings, 17 of which were prior to 1 August 2006.

16. From 1 January 2007 to 31 December 2009, the applicant carried out 70 transactions consisting of the sale of new buildings and, from 2008 to 2009, the sale of building land. The total value of the transactions was 19 234 596 Romanian lei (RON).

8 Official Journal of Romania, Part I, No 927 of 23 December 2003, as subsequently amended and supplemented, in the version in force from 1 January 2007.

9 Official Journal of Romania, Part I, No 112 of 6 February 2004, as subsequently amended and supplemented, in the version in force from 1 January 2007.

17. As the applicant's turnover in June 2006 was deemed to exceed the exemption threshold of RON 200 000, the Direcția Generală a Finanțelor Publice Alba (Directorate-General for Public Finances, Alba) took the view that the applicant was required to register for VAT purposes.

18. On 26 January 2011, the applicant was registered for VAT purposes by the tax authorities. He became a taxable person liable to VAT with effect from 1 August 2006.

19. On 28 January 2011, the Directorate-General for Public Finances, Alba, issued an assessment notice against the applicant for the period between 1 August 2006 and 31 December 2009 ('the notice'). The notice fixed the VAT payable as amounting to RON 3 071 069, plus interest amounting to RON 2 476 864 and periodic penalty payments amounting to RON 460 660, thereby totalling RON 6 008 593.

20. The applicant challenged the notice by way of an administrative complaint. By a decision issued on 19 August 2011 ('the decision'), the Direcția Generală de Soluționare a Contestațiilor (Directorate-General for the settlement of complaints) annulled the notice in part and ordered the fiscal authority to recalculate certain transactions, with the result that the total amount of tax payable was reassessed against the applicant as amounting to RON 5 735 741.

21. The applicant brought an action for annulment against the notice and the decision which was dismissed by the referring court by way of judgment in 2013.

22. The applicant lodged an appeal against the referring court's judgment before the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice, Romania) ('the High Court'). In its judgment of 3 December 2014, the High Court upheld his appeal and remitted the case back to the referring court for re-examination.

23. According to the order for reference, the High Court held that the applicant had acquired the status of taxable person on 1 August 2006 and that the transactions concluded by him, involving the sale of plots of land and the construction of buildings with various apartments followed by their sale, constituted economic activity.

24. Further, as regards the right to deduct, the High Court held that the referring court had erred in law because even though it had expressly stated in the judgment that the applicant, as a result of his registration as a taxable person for the purposes of VAT by the tax authorities, indisputably benefits from that right, it then decided that it could not make use of the findings of two expert reports solely on the ground that the applicant did not produce the originals of the documents relating to the purchases of the goods and services in relation to the buildings sold, despite the fact that the referring court had been aware of the absence of the original documents ever since the dispute was brought before it.

25. The High Court found that the referring court had dismissed, without providing any adequate reasons, the applicant's assertions that, since he was not registered as a taxable person for the purposes of VAT at the time that the buildings were constructed, he was not required to keep accounts of the VAT payments made to the providers of services and works for the possibility of his exercising the right to deduct that tax in the future, and the total sum which he paid by way of VAT to those providers exceeded the sum established by the tax authorities as due in respect of the real estate transactions.

26. The High Court also held that, by virtue of its active role, the referring court had the opportunity to ask the applicant for additional documentary evidence in order to properly assess whether he was under the obligation to demonstrate the right to deduct only by means of original supporting documents, or whether it was possible by means of other documents, thereby giving effect to the

principle that what matters is the reality of the economic transaction carried out and avoiding excessive formalism. The High Court considered that it would be useful for the resolution of the case if the referring court were to assess the need to order further expert reports on the basis of any documentation submitted.

27. Nonetheless, the referring court has expressed its reservations in the order for reference as to whether a property developer, such as the applicant, who did not first seek assurances that the transactions in question would not be subject to VAT, who did not register as a taxable person even though he was under an obligation to do so on the basis of the legislation in force at that time, from 1 August 2006, and who failed to keep an accounting record required of taxable persons, has the right to deduct the VAT relating to the cash invested in the construction of buildings in a situation where, although these buildings exist and have been transferred to the buyers, the supporting documents in the applicant's possession (namely, receipts, since the issuance of invoices for natural persons was not compulsory at that time) are illegible and not sufficient for the purposes of determining the extent of the right to deduct.

28. The referring court queries whether, on the basis of the Court's case-law, the applicant may exercise his right to deduct in a situation where he is unable to demonstrate that the conditions laid down in Article 178 of the VAT Directive, transposed into Romanian law by Article 146(1)(a) of Law No 571/2003, have been complied with, given that the applicant does not have the invoices in his possession. In the event that it is permissible to exercise the right to deduct, the referring court also wonders whether EU law precludes the use of an indirect assessment (a court-commissioned expert report) carried out by an independent expert and based on the amount of work/labour involved, in a situation where the supply of goods (building material) and the provision of services (labour relating to the construction of buildings) originate from taxable persons, for determining the extent of the right to deduct.

29. It was in these circumstances that the Curtea de Apel Alba Iulia (Court of Appeal, Alba Iulia) decided to stay the main proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) On a proper construction of Directive 2006/112 in general, and Articles 167, 168, 178, 179 and 273 in particular, and the principles of proportionality and neutrality, may a taxable person who satisfies the substantive requirements for the deduction of VAT exercise his right to deduct in a situation where, in a particular context such as that of the dispute in the main proceedings, he is unable to provide evidence, by way of invoices, of input tax for the supply of goods and provision of services?

(2) If the first question is answered in the affirmative, on a proper construction of Directive 2006/112 and the principles of proportionality and neutrality, is an indirect assessment method (assessment by means of a court-commissioned expert report), employed by an independent expert and based on the amount of work/labour involved in the construction of buildings as stated in the report, an acceptable and appropriate measure for determining the extent of the right to deduct in a situation where the supply of goods (building material) and the provision of services (labour relating to the construction of buildings) originate from taxable persons liable to VAT?'

30. Written observations were submitted to the Court by the applicant, the Romanian Government and the Commission. All of them also participated in the hearing held on 31 January 2018.

IV. Assessment

31. I have come to the conclusion that, in the circumstances of the main proceedings, Articles 167, 168, 178 and 226 of the VAT Directive, taking due account of the principles of VAT neutrality and proportionality, must be interpreted as precluding the exercise of the right of deduction by a taxable person who does not hold any invoices or any other suitable supporting documents attesting to his right to deduct input VAT. Such a taxable person is precluded from exclusive reliance on a court-appointed expert with a view to estimation of the value of supply of goods (building materials) and the provision of services (labour relating to the construction of buildings).

32. My analysis is divided into three parts. First, I will summarise the principal observations submitted by the parties to the Court. Second, I will make some preliminary remarks. Third, I will then answer the questions referred.[10]

A. Observations of the parties

33. The applicant observes that the High Court has imposed on the referring court the obligation to calculate the applicant's fiscal obligations in recognising his right to deduct input tax.

34. With respect to the first question, the applicant points out that, pursuant to the Court's case-law, the right to deduct provided for in Article 167 et seq. of the VAT Directive is an integral part of the VAT scheme and in principle may not be limited. The right to deduct is exercisable immediately in respect of all the taxes charged on transactions relating to inputs.[11]

35. The applicant further observes that, according to settled case-law, the right to deduct is a fundamental principle of the common system of VAT. That system is designed to relieve the trader entirely of the burden of the VAT due or paid in the course of all his economic activities. The common system of VAT consequently ensures that all economic activities, whatever their purpose or results, provided that they are themselves subject to VAT, are taxed in a wholly neutral way. Furthermore, the Court has already held that the fundamental principle of VAT neutrality requires that deduction of input VAT be allowed if the substantive requirements are satisfied, even if the taxable person has failed to comply with some of the formal requirements.[12]

36. Thus, once all the substantive requirements for the deduction of VAT are met, this right cannot be limited by the necessity to respect conditions as to form.

37. The applicant contends that his position is analogous to that considered by the Court in its judgment in *Salomie and Oltean*,[13] in which a compliance failure in relation to form was held not to result in the loss of the right to deduct VAT. The applicant argues that in the circumstances of the proceedings, where the substantive requirements have been satisfied, the production of an invoice is merely a formal requirement which should not undermine his right of deduction.

10 I note that with respect to intra-Community acquisition of goods, under Article 181 of the VAT Directive, Member States are permitted to authorise taxable persons who do not hold an invoice drawn up in accordance with Articles 220 to 236 to nonetheless make the deduction in respect of goods. This does not apply with respect to receipt of services. For a discussion, see Opinion of Advocate General Kokott in *Barlis 06 — Investimentos Imobiliários e Turísticos* (C-516/14, EU:C:2016:101, point 77).

11 The applicant refers to the judgment of 1 March 2012, *Polski Trawertyn* (C-280/10, EU:C:2012:107, paragraph 40). See also more recently e.g. judgments of 12 April 2018, *Biosafe — Indústria de Reciclagens* (C-8/17, EU:C:2018:249, paragraph 29 and the case-law cited), and of 7 March 2018, *Dobre* (C-159/17, EU:C:2018:161, paragraph 29 and the case-law cited).

12 In this respect, the applicant relies on the judgment of 9 July 2015, *Salomie and Oltean* (C-183/14, EU:C:2015:454, paragraphs 56 to 58). See also more recently e.g. judgments of 12 April 2018, *Biosafe — Indústria de Reciclagens* (C-8/17, EU:C:2018:249, paragraphs 27, 28 and 30 and the case-law cited), and of 7 March 2018, *Dobre* (C-159/17, EU:C:2018:161, paragraphs 28, 30 and 31 and the case-law cited).

13 Judgment of 9 July 2015 (C-183/14, EU:C:2015:454).

38. Finally, the applicant points out that the Court ruled in *Reisdorf*[14] that, in the absence of specific rules governing proof of the right to deduct input tax, the Member States have the power to require production of the original invoice in order to establish that right, as well as the power, where the taxable person no longer holds the original, to admit other evidence that the transaction in respect of which the deduction is claimed actually took place.[15]

39. The applicant contends that he is in the same situation as that considered by the Court in *Reisdorf*. The applicant underscores that the main proceedings do not concern whether or not he has the right to deduct input tax, but rather how to evaluate the amount of this right.

40. As regards the second question, the applicant submits that the only means of objective proof that may be used to determine his right to deduct is through a court-appointed expert which precludes any risk of fraud or prejudice to the State budget. Recourse to an expert would provide all the guarantees necessary to determine with objectivity and professionalism the amount of input VAT to be deducted.

41. The Romanian Government takes the opposite view.

42. With regard to the first question, the Romanian Government notes, inter alia, that, according to Article 167 of the VAT Directive, the right of deduction shall arise at the time the deductible tax becomes chargeable, but that, according to the Court's case-law, the right to deduct VAT relating to the goods or services in question must have a direct and immediate link with the taxable transaction.[16] In accordance with Article 178(a) of the VAT Directive, the exercise of the right of deduction is subject to the possession by the taxable person of an invoice drawn up in accordance with Article 226 of the VAT Directive,[17] or another document that can, in accordance with the criteria set by the Member State concerned, be considered as taking the place of the invoice.[18] The invoice allows the administrative authorities to check the payment of the tax by the issuer of the invoice,[19] and justifies the right of deduction by the recipient of the invoice.[20]

43. The Romanian Government acknowledges that the Court has held that the principle of VAT neutrality requires that deduction of input tax be allowed if the substantive requirements are satisfied, even if the taxable person has failed to comply with some of the formal requirements. Where the tax authority has the information necessary to establish that the taxable person is, as the recipient of the supplies in question, liable to VAT, it cannot impose, in relation to the taxable person's right to deduct that tax, additional conditions which may have the effect of rendering that right ineffective.[21]

44. However, the Court's case-law features an exception that is relevant to the main proceedings. This is where non-compliance with formal requirements would effectively prevent the production of conclusive evidence that the substantive requirements have been satisfied.[22]

14 Judgment of 5 December 1996 (C-85/95, EU:C:1996:466).

15 Judgment of 5 December 1996, *Reisdorf* (C-85/95, EU:C:1996:466, paragraph 30).

16 The Romanian Government refers to the judgment of 6 April 1995, *BLP Group* (C-4/94, EU:C:1995:107, paragraphs 18 and 19).

17 In this regard, the Romanian Government refers, inter alia, to the judgment of 22 October 2015, *PPUH Stehcemp* (C-277/14, EU:C:2015:719, paragraph 29). See further and more recently judgment of 12 April 2018, *Biosafe — Indústria de Reciclagens* (C-8/17, EU:C:2018:249, paragraphs 32 and 33).

18 The Romanian Government refers to the judgment of 29 April 2004, *Terra Baubedarf-Handel* (C-152/02, EU:C:2004:268, paragraph 32).

19 The Romanian Government refers to the judgments of 31 January 2013, *Stroy trans* (C-642/11, EU:C:2013:54, paragraphs 31 and 32), and *LVK* (C-643/11, EU:C:2013:55, paragraphs 35 and 36).

20 The Romanian Government refers to the judgment of 15 September 2016, *Barlis 06 — Investimentos Imobiliários e Turísticos* (C-516/14, EU:C:2016:690, paragraph 27), and Opinion of Advocate General Kokott in *Barlis 06 — Investimentos Imobiliários e Turísticos* (EU:C:2016:101, point 34). See also points 36 to 39 of that Opinion on the function of the invoice with respect to deduction of input VAT.

21 The Romanian Government refers, inter alia, to the judgment of 1 March 2012, *Polski Trawertyn* (C-280/10, EU:C:2012:107, paragraph 43).

22 The Romanian Government refers to the judgments of 27 September 2007, *Collée* (C-146/05, EU:C:2007:549, paragraph 31), and of 11 December 2014, *Idexx Laboratories Italia* (C-590/13, EU:C:2014:2429, paragraph 39). See more recently judgment of 7 March 2018, *Dobre* (C-159/17, EU:C:2018:161, paragraph 35).

45. In the view of the Romanian Government, that is the case in the main proceedings. The absence of invoices or any other suitable documents prevents the establishment of proof that the substantive requirements of the right to deduct input tax have been satisfied.[23]

46. The Romanian Government asserts that Article 178(a) of the VAT Directive, requiring the taxpayer to hold invoices as a pre-requisite to the right to deduct input VAT, is applicable to the main proceedings,[24] particularly when the absence of such invoices is exclusively caused by the applicant's passivity. Pursuant to Article 242 of the VAT Directive, every taxable person is to keep accounts in sufficient detail to permit VAT to be applied and its application checked by the tax authority.[25]

47. The Romanian Government argues that its position is in conformity with the principle of fiscal neutrality. It points out that the principle of proportionality allows Member States, in conformity with Article 273 of the VAT Directive, to impose obligations that they judge to be necessary to ensure the exact calculation of VAT and to avoid fraud. However the measures which the Member States may adopt under Article 273 of the VAT Directive to ensure the correct collection of VAT and to prevent evasion must not go further than is necessary to attain those objectives and must not undermine the neutrality of VAT.[26] In any event, the Romanian authorities have not, pursuant to Article 273 of the VAT Directive, asked the applicant to satisfy obligations other than those imposed by Article 178(a) of the VAT Directive.

48. As regards the second question, the Romanian Government notes that the invoice is the document that provides all the information relevant to the regime of VAT that is applicable. It is not the final value of the buildings that have been constructed that determines the amount of VAT that can be deducted, but each transaction to purchase goods and services. Recourse to an indirect assessment method would compromise the principle of VAT neutrality.

49. The Commission takes the view that, by posing the two questions referred, the referring court is essentially asking whether Articles 167, 168, 178 and 226 of the VAT Directive must be interpreted in the sense that a taxable person who has not retained invoices attesting to his right to deduct VAT relative to the supply of goods or the provision of services can provide proof of these transactions on the basis of a report established by experts appointed by the national referring court to estimate the value of real property, account being taken of the fact that a considerable period of time has passed since the new buildings concerned formed the subject of transactions.

50. Like the applicant, the Commission also points out that, according to settled case-law, the right of deduction of input tax envisaged by Article 167 et seq. of the VAT Directive is a fundamental principle of the common system of VAT, which in principle may not be limited, and which is exercisable immediately in respect of all the taxes charged on transactions relating to inputs.[27] The Commission

23 The Romanian Government refers to the judgments of 12 July 2012, *EMS-Bulgaria Transport* (C-284/11, EU:C:2012:458, paragraph 71), and of 11 December 2014, *Idexx Laboratories Italia* (C-590/13, EU:C:2014:2429, paragraph 39).

24 The Romanian Government refers to the judgments of 22 October 2015, *PPUH Stehcemp* (C-277/14, EU:C:2015:719, paragraph 40), of 13 February 2014, *Maks Pen* (C-18/13, EU:C:2014:69, paragraph 47), and of 8 May 2013, *Petroma Transports and Others* (C-271/12, EU:C:2013:297, paragraphs 25 to 36). See more recently judgment of 12 April 2018, *Biosafe — Indústria de Reciclagens* (C-8/17, EU:C:2018:249, paragraphs 32 and 33 and the case-law cited).

25 The Romanian Government refers to the judgment of 13 February 2014, *Maks Pen* (C-18/13, EU:C:2014:69, paragraph 41 and the case-law cited).

26 The Romanian Government refers to the judgment of 9 July 2015, *Salomie and Oltean* (C-183/14, EU:C:2015:454, paragraph 62).

27 The Commission refers to the judgment of 22 October 2015, *PPUH Stehcemp* (C-277/14, EU:C:2015:719, paragraph 26). See also judgments of 12 April 2018, *Biosafe — Indústria de Reciclagens* (C-8/17, EU:C:2018:249, paragraphs 27 and 29 and the case-law cited), and of 7 March 2018, *Dobre* (C-159/17, EU:C:2018:161, paragraphs 28 and 29 and the case-law cited).

acknowledges that the deduction system is intended to relieve the trader entirely of the burden of the VAT due or paid in the course of all his economic activities. The common system of VAT therefore ensures that all economic activities, whatever their purpose or results, provided that they are, in principle, themselves subject to VAT, are taxed in a neutral way.[28]

51. However, the Commission underscores that the prevention of tax evasion, avoidance and abuse is an objective recognised and encouraged by the VAT Directive. It is therefore for the authorities and national courts to refuse the right of deduction if it is shown, in the light of objective factors, that that right is being relied on for fraudulent or abusive ends.[29]

52. The Commission acknowledges that the principle of fiscal neutrality requires that deduction of input VAT be allowed if the substantive requirements are satisfied, even if the taxable person has failed to comply with some of the formal requirements.[30]

53. However, like the Romanian Government, the Commission underscores that the case is different if non-compliance with such formal requirements effectively prevents the production of conclusive evidence that the substantive requirements have been satisfied.[31]

54. The Court has held that it follows from the wording of Article 168(a) of the VAT Directive that, as regards the material conditions which must be met before the right to deduct can be availed of, the interested party must first be a taxable person within the meaning of that directive and, second, the goods or services relied on to give entitlement to that right must be used by the taxable person for the purposes of his own taxed output transactions, and that, as inputs, those goods or services must be supplied by another taxable person.[32]

55. However, formal requirements for the right to deduct are those which govern its exercise and monitoring thereof and the smooth functioning of the VAT system, such as the obligations relating to accounts, invoicing and filing returns.

56. It is therefore apparent from Article 178(a) of the VAT Directive that the exercise of the right to deduct is subject to holding an invoice drawn up in accordance with Article 226 of that directive.[33]

57. Like the Romanian Government, the Commission points out that the objective of the details which must be shown in an invoice as provided by Article 226 of the VAT Directive is to allow the tax authorities to monitor payment of the tax due and, if appropriate, the existence of the right to deduct VAT. The date of supply of the services which are the subject of the invoice makes it possible to check when the chargeable event occurs, and hence determination of the tax provisions which must apply, from a temporal point of view, to the transaction to which that document relates.[34] The burden is on the taxable person seeking deduction of VAT to establish that he meets the conditions for eligibility.[35]

28 The Commission refers to the judgment of 22 October 2015, *PPUH Stehcemp* (C-277/14, EU:C:2015:719, paragraph 27). See also judgments of 12 April 2018, *Biosafe — Indústria de Reciclagens* (C-8/17, EU:C:2018:249, paragraph 28 and the case-law cited), and of 7 March 2018, *Dobre* (C-159/17, EU:C:2018:161, paragraph 30).

29 In the context of fraud, the Commission refers to the judgment of 22 October 2015, *PPUH Stehcemp* (C-277/14, EU:C:2015:719, paragraphs 47 and 48). See further judgments of 12 April 2018, *Biosafe — Indústria de Reciclagens* (C-8/17, EU:C:2018:249, paragraph 38 and the case-law cited), and of 7 March 2018, *Dobre* (C-159/17, EU:C:2018:161, paragraphs 36 and 40 and the case-law cited).

30 The Commission refers to the judgment of 9 July 2015, *Salomie and Oltean* (C-183/14, EU:C:2015:454, paragraphs 58 and 59).

31 The Commission refers to the judgment of 28 July 2016, *Astone* (C-332/15, EU:C:2016:614, paragraph 46). See also judgment of 7 March 2018, *Dobre* (C-159/17, EU:C:2018:161, paragraph 35 and the case-law cited).

32 The Commission refers to the judgment of 22 October 2015, *PPUH Stehcemp* (C-277/14, EU:C:2015:719, paragraph 28). See further judgments of 12 April 2018, *Biosafe — Indústria de Reciclagens* (C-8/17, EU:C:2018:249, paragraph 31 and the case-law cited), and of 7 March 2018, *Dobre* (C-159/17, EU:C:2018:161, paragraph 39 and the case-law cited).

33 The Commission refers to the judgment of 15 September 2016, *Barlis 06 — Investimentos Imobiliários e Turísticos* (C-516/14, EU:C:2016:690, paragraph 41). See further judgment of 12 April 2018, *Biosafe — Indústria de Reciclagens* (C-8/17, EU:C:2018:249, paragraphs 32 and 33).

34 Judgment of 15 September 2016, *Barlis 06 — Investimentos Imobiliários e Turísticos* (C-516/14, EU:C:2016:690, paragraphs 27 and 30).

35 Judgment of 15 September 2016, *Barlis 06 — Investimentos Imobiliários e Turísticos* (C-516/14, EU:C:2016:690, paragraph 46).

58. The Commission submits that, in the circumstances of the main proceedings, the tax authorities are not in possession of the necessary information to establish that the substantive requirements were met. This is so, given that in the consecutive years 2007 to 2009, the applicant did not register for VAT purposes, did not pay VAT, did not declare the beginning of his economic activities, did not present a tax declaration, did not collect invoices nor store them either for 10 years pursuant to the Romanian tax legislation or at the very least until the end of the 5-year limitations period. With the exception of retention of illegible receipts, the applicant did not comply with the requirement to keep accounts.

59. The Commission contends that it is indispensable to be able to identify each supplier, not only for the purpose of verifying the conditions for deduction of input tax, but also to allow the national fiscal authorities to verify the taxable person's accounts and determine if there is fraud with respect to transactions relating to inputs.

60. The Commission recalls that the Court has held that a failure to keep accounting records which would allow VAT to be applied and monitored by the tax authorities, and the failure to record the invoices issued and paid are liable to prevent the correct collection of that tax and, therefore, to compromise the proper functioning of the common system of VAT.[36]

61. The Commission contends that it is difficult to understand how an expert would be able to identify each supply of goods and services that has been made to the applicant for the purposes of writing a report that qualifies as conclusive evidence with regard to the substantive requirements for the right to deduct. The order for reference refers to the elements provided by the expert reports as estimates. However, nothing in the wording of Article 168(a) of the VAT Directive, referring to the deduction of VAT on upstream transactions, permits the conclusion that a taxable person may benefit from the right to deduct on the basis of estimates. The Commission recalls that it is settled case-law that VAT applies to each transaction by way of production or distribution after deduction of the VAT directly borne by the various cost components.[37] Thus, the value of construction materials and construction services provided at the time to the applicant by his suppliers has to be distinguished from the value of the buildings at the time of preparation of an expert report, which entails in the main proceedings a 10-year gap.

B. Preliminary remarks

62. First, it is settled case-law that the Court has jurisdiction to interpret EU law only as regards its application in a new Member State with effect from the date of that State's accession to the European Union.[38] The Court does not have jurisdiction to interpret the EU directives on VAT where the period of tax collection in question precedes the date of accession of the Member State concerned.[39]

63. In the present case, the disputed tax assessment concerns the period from 1 August 2006 to 31 December 2009. Consequently, the Court has jurisdiction to interpret the EU law provisions requested as regards their application to the main proceedings as from the date of Romania's accession to the European Union on 1 January 2007, and hence excludes the period of 1 August 2006 to 31 December 2006.

36 The Commission refers to the judgment of 5 October 2016, *Maya Marinova* (C‑576/15, EU:C:2016:740).

37 The Commission refers to the judgment of 22 October 2015, *PPUH Stehcemp* (C‑277/14, EU:C:2015:719, paragraph 35).

38 See e.g. judgment of 15 April 2010, *CIBA* (C‑96/08, EU:C:2010:185, paragraph 14 and the case-law cited), and order of 11 May 2017, *Exmitiani* (C‑286/16, not published, EU:C:2017:368, paragraph 12 and the case-law cited). This was pointed out in the written observations of the Romanian Government and the Commission.

39 See e.g. order of 11 May 2017, *Exmitiani* (C‑286/16, not published, EU:C:2017:368, paragraph 13 and the case-law cited).

64. Second, to the extent to which there is any implication in the written observations of the applicant (reproduced at point 33 above) that the referring court should apply the ruling of the High Court and assess the applicant's entitlement to deduct input VAT on the basis of expert reports, rather than make recourse to Article 267 TFEU to interpret relevant provisions of EU law, I refer to my observations in my Opinion in *C.K. and Others.*[40] There, I noted that the Court held in *Križan and Others*[41] that a rule of national law under which the legal rulings of a higher court are binding on another court cannot take away from the latter court the discretion to refer to the Court of Justice questions of interpretation of the points of EU law concerned by such legal rulings.[42]

65. Third, I accept arguments made by the Commission to the effect that the two questions referred can be considered together. In my view, the referring court is essentially asking whether Articles 167, 168, 178 and 226 of the VAT Directive must be interpreted in the sense that a taxable person who has not retained invoices attesting to his right to deduct VAT relative to the supply of goods or the provision of services can provide proof of these transactions on the basis of a report established by experts appointed by the referring court to estimate the value of building materials and labour relating to the construction of the buildings, account taken of the fact that a considerable period of time has passed since the new buildings concerned formed the subject of transactions.

66. I will now turn to answering the questions referred on this basis.

C. Proposed answer to questions referred

67. I reject at the outset the applicant's arguments that the situation in which he finds himself is comparable with the problems considered by the Court in its judgments in *Salomie and Oltean*[43] and *Reisdorf.*[44]

68. *Salomie and Oltean* concerned the application of VAT to sales of immovable property carried out in Romania in 2009. From 2007 to 2009, the claimants in that case carried out various real estate transactions which were not declared as being subject to VAT, but following an audit by the tax authorities, VAT notices were imposed, thereby prompting litigation between the claimants and the national fiscal authority.[45]

69. In its judgment, the Court held that, despite the fact that the national fiscal authorities had not made property transactions subject to VAT in a systematic manner, this did not in principle provide the claimants with precise assurances within the meaning of the Court's case-law that VAT would not be levied on the property transactions at issue. Given the scale of those transactions involving the construction and sale of four buildings totalling more than 130 apartments, a prudent and well-informed trader could not reasonably have concluded that such a transaction would not be subject to VAT without having received, or at least sought, express assurances to that effect from the competent fiscal authorities.[46]

70. No question, however, of breach of legitimate expectations arises in the main proceedings. Indeed, the Court's observations in *Salomie and Oltean* with respect to prudent and well-informed traders might rather be taken as supporting the position of the Romanian Government and the Commission rather than the applicant.

40 Opinion of Advocate General Tanchev (C-578/16 PPU, EU:C:2017:108, point 34).
41 Judgment of 15 January 2013 (C-416/10, EU:C:2013:8).
42 Judgment of 15 January 2013, *Križan and Others* (C-416/10, EU:C:2013:8, paragraph 68).
43 Judgment of 9 July 2015 (C-183/14, EU:C:2015:454).
44 Judgment of 5 December 1996 (C-85/95, EU:C:1996:466).
45 Judgment of 9 July 2015, *Salomie and Oltean* (C-183/14, EU:C:2015:454, paragraphs 19 to 24).
46 Judgment of 9 July 2015, *Salomie and Oltean* (C-183/14, EU:C:2015:454, paragraphs 47 to 49).

71. The Court's ruling in *Salomie and Oltean* also concerned the question whether the VAT Directive precluded national rules refusing the right to deduct for 'the sole reason' that the taxable person was not identified for VAT purposes when he carried out the relevant transactions. However, identification for VAT purposes is not a pertinent element of the main proceedings.[47]

72. Likewise, *Reisdorf*[48] is distinguishable from the facts of the main proceedings.

73. In that case, the taxpayer was refused the right to deduct because he presented copies of various invoices, but not the originals.[49] Consequently, the case concerned the question whether the requirement to hold an invoice for the purposes of exercising the right of deduction, then set forth in Article 18(1)(a) of the 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,[50] permits the Member States to regard as an invoice not only the original, but also other documents such as carbon copies, duplicates or photocopies, and whether a taxable person who no longer holds the original invoice may be allowed to prove the right to deduct input tax by other means.

74. Consequently, *Reisdorf* stands for the proposition that taxable persons no longer holding invoices may provide 'other cogent evidence' that the transaction in respect of which the deduction is claimed actually took place.[51] It does not concern the role of experts' reports in this process.

75. Turning to the Court's case-law on non-compliance with the formal requirements concerned with invoicing, the Court has upheld the right of deduction of input tax in respect of circumstances involving various defects related to the invoice. Yet, it would seem that the case-law in this context has not squarely addressed the absence of any invoices at all,[52] or any other suitable supporting documents.

76. For example, *Uszodaépítő*[53] concerned amendment to the content of the invoices and the submission of a supplementary declaration. *Polski Trawertyn*[54] concerned an invoice drawn up before the registration and identification of a partnership for the purposes of VAT which was issued in the name of the future partners of that partnership. *Idexx Laboratories Italia*[55] addressed a situation in which the taxable person failed to record in the VAT register certain invoices in the context of a reverse-charge procedure.[56] *Senatex* was concerned with correction of an invoice.[57]

47 Judgment of 9 July 2015, *Salomie and Oltean* (C-183/14, EU:C:2015:454, paragraphs 62 to 65).

48 Judgment of 5 December 1996 (C-85/95, EU:C:1996:466).

49 Judgment of 5 December 1996, *Reisdorf* (C-85/95, EU:C:1996:466, paragraph 9).

50 OJ 1977 L 145, p. 1.

51 Judgment of 5 December 1996, *Reisdorf* (C-85/95, EU:C:1996:466, paragraph 29).

52 I note that the judgment of 28 July 2016, *Astone* (C-332/15, EU:C:2016:614), concerned a situation in which a taxable person was not able to produce any invoices of his own with a view to deducting input tax, so the taxable person purported to present third party invoices in support of the same.

53 Judgment of 30 September 2010 (C-392/09, EU:C:2010:569).

54 Judgment of 1 March 2012 (C-280/10, EU:C:2012:107).

55 Judgment of 11 December 2014 (C-590/13, EU:C:2014:2429).

56 I note that invoice production and deduction of input tax in the context of the reverse charge procedure is subject to discrete rules that are not relevant to the main proceedings. See e.g. judgments of 6 February 2014, *Fatorie* (C-424/12, EU:C:2014:50), and of 11 December 2014, *Idexx Laboratories Italia* (C-590/13, EU:C:2014:2429, paragraph 38). See also Opinion of Advocate General Kokott in *Barlis 06 — Investimentos Imobiliários e Turísticos* (C-516/14, EU:C:2016:101, points 81 and 82).

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

77. In his Opinion in *Vámos*,[58] Advocate General Wahl remarked that '[i]n the cases where the Court rejected a formalistic approach, the aim was to ensure that, despite a *minor procedural error* committed by the taxable person, transactions would still be taxed according to their objective characteristics. Member States cannot penalise a failure to adhere strictly to formal requirements in a manner which risks undermining the neutrality of the system, for example treating competing undertakings differently, or rendering ineffective key provisions of the VAT Directive.'[59]

78. I further underscore that, pursuant to Article 242 of the VAT Directive, every taxable person is to keep accounts in sufficient detail for VAT to be applied and its application checked by the tax authorities. Article 244 of that directive requires taxable persons to ensure that copies of the invoices issued and received by them are stored. Under Article 250(1) of the same directive, taxable persons must submit a VAT return setting out all the information needed to calculate the tax due to the State.[60]

79. Indeed, it is established in the Court's case-law that Member States are not precluded from treating failure to keep accounting records as tax evasion.[61]

80. In the main proceedings, non-compliance with a formal requirement, the retention of invoices, has led to the refusal of the right to deduct because non-compliance effectively prevents the production of conclusive evidence that the substantive requirements have been satisfied.[62] There is a lack of information necessary to establish that the substantive requirements have been met, rather than failure to comply with a formal requirement.[63] Or, as one Advocate General has recently observed, it is 'perfectly logical' to refuse to deduct input tax where the infringement of formal requirements 'is so great that it makes it impossible or overly difficult to ascertain whether the substantive conditions for entitlement to a deduction have been met'.[64]

81. Thus, the main proceedings reflect one of the two exceptions to the prevalence of substance over form, the other being participation in tax evasion.[65]

82. Therefore, while it cannot be excluded that circumstances might arise in which the substantive conditions for the deduction of input tax might be ascertainable by reference to expert reports in the absence of invoices, a question which would be for the referring court to decide,[66] such circumstances do not in my view arise in the main proceedings.

83. The case-law supports arguments made by the Romanian Government and the Commission to the effect that the lack of minimal diligence by the applicant in retention of the relevant invoices with respect to deduction of input tax is a factor to be taken into account.[67] This is also so with respect to delay, the Court having held that Member States are entitled to impose reasonable temporal limitations

58 C-566/16, EU:C:2017:895, judgment pending.

59 Opinion of Advocate General Wahl in *Vámos* (C-566/16, EU:C:2017:895, point 47). My emphasis.

60 See e.g. Opinion of Advocate General Wahl in *Fontana* (C-648/16, EU:C:2018:213, point 32), judgment pending.

61 E.g. judgment of 5 October 2016, *Maya Marinova* (C-576/15, EU:C:2016:740, paragraph 39 and the case-law cited). Note also the obligations of Member States stemming from Article 4(3) TEU, Article 325 TFEU, and Articles 2, 250(1) and 273 of the VAT Directive. See judgment of 19 October 2017, *Paper Consult* (C-101/16, EU:C:2017:775, paragraph 47).

62 See e.g. judgment of 19 October 2017, *Paper Consult* (C-101/16, EU:C:2017:775, paragraph 42).

63 See e.g. judgment of 7 March 2018, *Dobre* (C-159/17, EU:C:2018:161, paragraph 35 and the case-law cited): 'Refusal of the right to deduct depends more on the lack of information necessary to establish that the substantive requirements have been satisfied than it does on failure to comply with a formal requirement.'

64 Opinion of Advocate General Mengozzi in *Paper Consult* (C-101/16, EU:C:2017:413, point 39). See also judgment of 7 March 2018, *Dobre* (C-159/17, EU:C:2018:161, paragraph 35 and the case-law cited).

65 Opinion of Advocate General Saugmandsgaard Øe in *Plöckl* (C-24/15, EU:C:2016:204, points 80 and 81). See also judgment of 20 October 2016, *Plöckl* (C-24/15, EU:C:2016:791, paragraphs 43 to 46).

66 Judgment of 7 March 2018, *Dobre* (C-159/17, EU:C:2018:161, paragraph 38).

67 E.g. judgments of 21 March 2018, *Volkswagen* (C-533/16, EU:C:2018:204, paragraphs 47 and 51), and of 12 April 2018, *Biosafe — Indústria de Reciclagens* (C-8/17, EU:C:2018:249, paragraph 43).

on the right to deduct input tax in the interests of legal certainty.[68] The facts arising in the main proceedings are distinguishable from those of the recent ruling of the Court in *Volkswagen*[69] on several bases, and most notably due to the fact that there was no lack of due diligence on the part of the applicant in that case and there was no doubt that the applicant had a right to deduct input tax, the sum being quantifiable by late invoicing.[70] Similarly, input tax was held to be deductible in *Biosafe*[71] because it was objectively impossible for the taxable person to exercise its right to deduct before a VAT adjustment was made by another taxable person in the chain of supply.

84. Above all, there is nothing in the case file before the Court to suggest that, in the light of a 10-year lapse of time and the lack of any invoices or usable equivalent documents, an expert report could accurately re-record each relevant transaction with respect to which deduction of input tax is claimed.

85. Thus, in the circumstances of the main proceedings, the principle of fiscal neutrality cannot be legitimately invoked by a taxable person who purports to jeopardise the operation of the common system of VAT through failure to keep the records required under the VAT Directive for a sustained period of time.[72]

V. Conclusion

86. I therefore propose that the Court answer the questions referred by the Curtea de Apel Alba Iulia (Court of Appeal, Alba Iulia, Romania) as follows:

On the facts of the main proceedings, Articles 167, 168, 178 and 226 of Council Directive 2006/112/EC on the common system of value added tax must be interpreted in the sense that a taxable person who has not retained invoices attesting to his right to deduct value added tax relative to the supply of goods or the provision of services cannot provide proof of these transactions on the basis of a report established by experts appointed by the referring court to estimate the value of building materials and labour relating to the construction of buildings, account taken of the fact that a considerable period of time has passed since the new buildings concerned formed the subject of taxable transactions.

68 See e.g. judgment of 28 July 2016, *Astone* (C-332/15, EU:C:2016:614, paragraph 33 and the case-law cited).

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

70 As pointed out in the Opinion of Advocate General Campos Sánchez-Bordona in *Volkswagen* (C-533/16, EU:C:2017:823, point 69), what in effect occurred was late payment of VAT.

71 Judgment of 12 April 2018, *Biosafe — Indústria de Reciclagens* (C-8/17, EU:C:2018:249).

72 See, by analogy, with the preclusion of the right to deduct in the context of tax evasion, judgment of 28 July 2016, *Astone* (C-332/15, EU:C:2016:614, paragraph 58).