



## Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

12 July 2012\*

(VAT — Directive 2006/112/ EC — Right to deduct — Limitation period for the exercise of the right to deduct VAT — Principle of effectiveness — Refusal of the right to deduct VAT — Principle of fiscal neutrality)

In Case C-284/11,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Varhoven administrativen sad (Bulgaria), made by decision of 25 May 2011, received at the Court on 8 June 2011, in the proceedings

**EMS-Bulgaria Transport OOD**

v

**Direktor na Direktsia ‘Obzhalfane i upravlentie na izpalnenieto’ Plovdiv,**

THE COURT (Second Chamber),

composed of J.N. Cunha Rodrigues (Rapporteur), President of the Chamber, U. Lõhmus, A. Ó Caoimh, A. Arabadjiev and C.G. Fernlund, Judges,

Advocate General: P. Mengozzi,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 21 March 2012,

after considering the observations submitted on behalf of:

- EMS-Bulgaria Transport OOD, by N. Nikolov, advokat,
- the Direktor na Direktsia ‘Obzhalfane i upravlentie na izpalnenieto’ Plovdiv, by E. Raycheva and G. Arnaudov, acting as Agents,
- the Bulgarian Government, by T. Ivanov and E. Petranova, acting as Agents,
- the European Commission, by L. Lozano Palacios and D. Roussanov, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

\* Language of the case: Bulgarian.

## Judgment

- 1 This reference for a preliminary ruling concerns the interpretation of Articles 179, 180 and 273 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1) ('the VAT Directive') and also of the principles of effectiveness and fiscal neutrality.
- 2 The reference has been made in proceedings brought by EMS-Bulgaria Transport OOD ('EMS'), the applicant in the main proceedings, against a tax assessment notice issued following the refusal, by the tax authorities, of the right to deduct input value added tax ('VAT').

### Legal context

#### *European Union law*

- 3 The first paragraph of Article 20 of the VAT Directive states:

“Intra-Community acquisition of goods” shall mean the acquisition of the right to dispose as owner of movable tangible property dispatched or transported to the person acquiring the goods, by or on behalf of the vendor or the person acquiring the goods, in a Member State other than that in which dispatch or transport of the goods began.’

- 4 Article 68 of that directive provides:

‘The chargeable event shall occur when the intra-Community acquisition of goods is made.

The intra-Community acquisition of goods shall be regarded as being made when the supply of similar goods is regarded as being effected within the territory of the relevant Member State.’

- 5 Article 69 of that directive provides:

‘1. In the case of the intra-Community acquisition of goods, VAT shall become chargeable on the 15th day of the month following that in which the chargeable event occurs.

2. By way of derogation from paragraph 1, VAT shall become chargeable on issue of the invoice provided for in Article 220, if that invoice is issued before the 15th day of the month following that in which the chargeable event occurs.’

- 6 Article 167 of the VAT Directive provides:

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

- 7 Article 168 of that 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:

...

(c) the VAT due in respect of intra-Community acquisitions of goods pursuant to Article 2(1)(b)(i);

...’

8 Article 179 of the VAT Directive provides:

‘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.

However, Member States may require that taxable persons who carry out occasional transactions, as defined in Article 12, exercise their right of deduction only at the time of supply.’

9 Article 180 of the VAT Directive provides:

‘Member States may authorise a taxable person to make a deduction which he has not made in accordance with Articles 178 and 179.’

10 Article 182 of that directive states:

‘Member States shall determine the conditions and detailed rules for applying Articles 180 and 181.’

11 Article 213 of the VAT Directive provides:

‘1. Every taxable person shall state when his activity as a taxable person commences, changes or ceases.

...

2. Without prejudice to the first subparagraph of paragraph 1, every taxable person or non-taxable legal person who makes intra-Community acquisitions of goods which are not subject to VAT pursuant to Article 3(1) must state that he makes such acquisitions if the conditions, laid down in that provision, for not making such transactions subject to VAT cease to be fulfilled.’

12 Article 214(1) of that directive provides:

‘Member States shall take the measures necessary to ensure that the following persons are identified by means of an individual number:

- (a) every taxable person, with the exception of those referred to in Article 9(2), who within their respective territory carries out supplies of goods or services in respect of which VAT is deductible, other than supplies of goods or services in respect of which VAT is payable solely by the customer or the person for whom the goods or services are intended, in accordance with Articles 194 to 197 and Article 199;
- (b) every taxable person, or non-taxable legal person, who makes intra-Community acquisitions of goods subject to VAT pursuant to Article 2(1)(b) and every taxable person, or non-taxable legal person, who exercises the option under Article 3(3) of making their intra-Community acquisitions subject to VAT;
- (c) every taxable person who, within their respective territory, makes intra-Community acquisitions of goods for the purposes of transactions which relate to the activities referred to in the second subparagraph of Article 9(1) and which are carried out outside that territory.’

13 Article 273 of the VAT Directive provides:

‘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.’

*Bulgarian law*

14 Article 6(2) of the Law on value added tax (Zakon za danak varhu dobavenata stoynost, DV No 63 of 4 August 2006), in the version applicable to the dispute in the main proceedings (‘the ZDDS’), states:

‘For the purposes of the present law, the following shall also be deemed to constitute a supply of goods:

1. the transfer of the right of ownership of or other right *in rem* in the goods as a consequence of a claim or act of a State or local authority or *ex lege* in return for compensation;
2. the actual handing over of goods pursuant to a contract which provides for the transfer of the right of ownership in the goods subject to a condition or time-limit having suspensory effect;
3. the actual handing over of goods pursuant to a leasing agreement which expressly provides for the transfer of the right of ownership in the goods; this provision shall not apply where only an option to transfer ownership of the goods was agreed in the leasing agreement;
4. the actual handing over of goods to a person who is acting in his own name and on behalf of another person.’

15 Article 13(1) of the ZDDS provides that intra-Community acquisition means the acquisition of the right to ownership of goods and, in the cases referred to in Article 6(2) of the ZDDS, the actual receipt of goods which are dispatched or transported to the territory of the State from another Member State if the supplier is a taxable person who is registered in another Member State for VAT purposes.

16 Article 25 of the ZDDS provides:

‘1. A “chargeable event” within the meaning of this law shall be a supply of goods or provision of services which is carried out by a taxable persons for the purposes of this law, an intra-Community acquisition and an import of goods within the meaning of Article 16.

2. The chargeable event shall occur on the date on which ownership of the goods is transferred or the service provided.

3. Except in the cases referred to in paragraph 2, the chargeable event shall occur:

- (1) on the date on which the goods are actually handed over in accordance with Article 6(2), except in the cases referred to in paragraph 6;

...

6. Where full or partial advance payment for a supply of goods or provision of services is made before the chargeable event within the meaning of paragraphs 2, 3 or 4 occurs, the tax shall become chargeable on receipt of the payment (on the amount received) unless the receipt of the payment occurs in connection with an intra-Community supply. In such cases it shall be assumed that the tax is included in the amount of the payment.'

17 Article 63 of the ZDDS provides:

'1. In the case of an intra-Community acquisition the chargeable event shall occur on the day on which the chargeable event would occur in the case of a supply within the territory of the State.

...

3. In the case of an intra-Community acquisition the tax shall become chargeable on the 15th day of the month following the month in which the chargeable event occurred pursuant to paragraphs 1 and 2.

4. By way of derogation from paragraph 3, the tax shall become chargeable on the day on which the invoice is issued if the invoice is issued before the 15th day of the month following the month in which the chargeable event occurred.'

18 It is apparent from Article 70(4) of the ZDDS that a person registered in accordance with Article 99 of the ZDDS is to have no right to deduct input VAT.

19 Article 71 of the ZDDS provides:

'A person shall exercise his right to deduct VAT if one of the following conditions is met:

...

5. he possesses a document meeting the requirements of Article 114, has issued a protocol within the meaning of Article 117 and has complied with the requirements of Article 86 (in the case of an intra-Community acquisition).'

20 Article 72 of the ZDDS provides:

'1. A person registered under this law may exercise the right to deduct VAT in the tax period in which that right arose or in one of the three subsequent tax periods.

2. The person shall exercise the right under paragraph 1 by:

(1) including the input VAT in the calculation of the result for the tax period referred to in paragraph 1 in the VAT return under Article 125 for the same tax period;

(2) listing the document pursuant to Article 71 in the purchase ledger under Article 124 for the tax period referred to in paragraph 1.'

21 Article 99 of the ZDDS states:

'1. All taxable persons, or non-taxable legal persons who are not registered in accordance with Articles 96, 97, 98, 100(1) and (3) and 102, and who make an intra-Community acquisition of goods must register under this law.

2. Paragraph 1 shall not apply if the total value of taxable intra-Community acquisitions for the current calendar year does not exceed BGN 20 000.
3. Persons exempted under paragraph 2 shall apply to register under this law at the latest seven days before the date of the chargeable event for an acquisition which causes the total value of taxable intra-Community acquisitions to exceed BGN 20 000. An intra-Community acquisition which causes the said threshold to be exceeded is taxable under this law.
4. The value mentioned in paragraph 2 shall be calculated as the total amount of taxable intra-Community acquisitions with the exception of acquisitions of new motor vehicles and goods subject to excise duty, less the VAT owed or paid in the Member State from which the goods were transported or dispatched.
5. Paragraph 1 shall not apply to:
- (1) persons under Article 168 acquiring new motor vehicles;
  - (2) Persons under Article 2(4) (carrying out intra-Community acquisitions of goods subject to excise duty).
6. A person registered under this article and in respect of whom the criteria for compulsory registration under Articles 96, 97 or 98 or voluntary registration under Article 100(1) or (3) arise shall register in accordance with the procedure and time-limit for compulsory or voluntary registration.'
- 22 Under Article 100(1) and (2) of the ZDDS, any taxable person who does not fulfil the conditions for compulsory registration under Articles 96(1) (taxable turnover of BGN 50 000 or more during a maximum period of the 12 consecutive months immediately preceding the current month) and 99(1) of the ZDDS respectively is entitled to register under that law.
- 23 Under Article 73a of the ZDDS, which has been in force since 1 January 2009:
- '1. In the case of supplies in which the tax is chargeable to the recipient, a right to deduct VAT also arises if the supplier of the goods has not issued a document meeting the requirements of Article 114 and/or the recipient does not possess a document within the meaning of Article 71(2), (4) or (5) and/or the recipient has not complied with the requirements of Article 72, provided that the supply has not been concealed and is documented in the recipient's accounts.
  2. In the cases referred to in paragraph 1 the right to deduct VAT shall be exercised during the tax period in which the tax became chargeable ...'
- 24 Section 18 of the transitional and concluding provisions of the Law amending and supplementing the ZDDS, which has also been in force since 1 January 2009 provides:
- '1. Registered persons who are recipients of a supply or importers to whom tax was chargeable in their capacity as taxable persons under Chapter 8 before the entry into force of this law and who before that date did not account for tax in accordance with Article 86(1) and/or did not exercise their right to deduct VAT may, within four months of the entry into force of this law, account for the tax or exercise their right to deduct input VAT.
  2. Persons referred to in paragraph 1 who deduct VAT only after expiry of the time-limit under Article 72(1) shall be assumed to have duly exercised their right to deduct input VAT.
  3. Paragraph 2 and Article 73a shall apply to administrative and judicial proceedings which are ongoing at the time when the Law enters into force.

...'

25 Article 72(1) of the ZDDS, in the version applicable since 1 January 2010, provides:

'A person registered under this law may exercise his right to deduct VAT in the tax period in which that right arose or in one of the twelve subsequent tax periods.'

### **The dispute in the main proceedings and the questions referred for a preliminary ruling**

26 It is apparent from the order for reference that Marcotran International Transport C.A., a company established in Spain, sold, on 14 November 2008, second-hand lorries and traction vehicles to EMS, established in Bulgaria. On that occasion, the Spanish supplier issued 10 invoices for the 'sale of second-hand lorries (traction vehicles)' and reported an intra-Community supply in the electronic database of the VAT Information Exchange System (VIES).

27 It is also apparent from that order that, on 22 December 2008, EMS applied for voluntary VAT registration in accordance with Article 100(1) of the ZDDS and that the registration was carried out on 12 January 2009.

28 In June 2009, EMS issued 10 protocols relating to intra-Community acquisitions in accordance with Article 117 in conjunction with Article 84 of the ZDDS. It accounted for the VAT and exercised the right to deduct. The rules of the reverse charge procedure were applied.

29 According to the order for reference, the tax authorities took the view that, on 14 November 2008, EMS had effected an intra-Community acquisition of goods which, as they were neither new means of transport nor goods subject to excise duty, were not covered by the exemption in Article 99(5) of the ZDDS. As the total value of the intra-Community acquisitions exceeded BGN 20 000 and the taxable value of the intra-Community acquisition was greater than BGN 20 000 in each of the 10 invoices, EMS was required to register for VAT purposes under Article 99(1) of the ZDDS and, under Articles 86 and 99(3) of that law, to account for VAT on the total value of the intra-Community acquisitions, namely, the sum of BGN 229 548,50. The settlement was effected in the month of June 2009 and not in the month of November 2008.

30 On account of that delay, EMS was required to pay a sum of BGN 18 250,38 by way of default interest.

31 Furthermore, the tax authorities refused EMS, under Article 70(4) of the ZDDS, the right to deduct VAT, on the grounds that that right was exercised outside the time-limit laid down in Article 72(1) of the ZDDS and that Section 18 of the transitional and concluding provisions of the Law amending and supplementing the ZDDS, which had been in force since 1 January 2009, was not applicable.

32 Both the administrative action before the Direktor na Direktsia 'Obzhelvane i upravlenie na izpalnenieto' Plovdiv (Director of the 'Appeals and the Administration of Enforcement' Office, Plovdiv) and that brought before the Administrativen sad — grad Plovdiv (Administrative Court, Plovdiv) were dismissed.

33 According to that last court, Article 73a of the ZDDS is a substantive provision which has applied since 1 January 2009. Its retroactive effect is provided for in Section 18(1) of the transitional and concluding provisions of the Law amending and complementing the ZDDS, which also entered into force on 1 January 2009. That section permits registered persons to account for the tax and exercise their right to deduct within four months of the entry into force of the amending Law, if the VAT was chargeable before the entry into force of that law. Since EMS was not registered when Section 18 of that law came into force, it cannot rely on that provision and does not therefore have the right to deduct the VAT.

- 34 The referring court however states that EMS was not refused the right to deduct VAT because it did not register for VAT purposes, but because it did not comply with the limitation period.
- 35 EMS appealed on a point of law against that judgment before the Varhoven administrativen sad (Supreme Administrative Court).
- 36 That court takes the view that there was an intra-Community acquisition and that the tax became chargeable on 14 November 2008 when the invoices were issued. The fact that, at that time, EMS was not registered in accordance with the ZDDS does not mean that no intra-Community acquisition took place.
- 37 The Varhoven administrativen sad states that the fact that persons have to be registered in accordance with the ZDDS to exercise the right to deduct VAT is based on, inter alia, Article 72(1) of that law.
- 38 Furthermore, it is apparent from the order for reference that, the intention of the Bulgarian legislature in passing the new Article 73a of the ZDDS, which came into effect on 1 January 2009, was to avoid excessively restricting the exercise of the right to deduct in cases involving the reverse charge procedure by allowing that right to be exercised even if the time-limit provided for in Article 72 of that law had not been complied with, so long as the tax authorities had the necessary information and the person concerned, as the recipient of the supply, was the person who had to pay the VAT. In the present case, the tax authorities undoubtedly have that information which is, moreover, documented in the EMS' accounts.
- 39 The referring court states, lastly, that the new period during which taxable persons may exercise their right to deduct resulting from the amendment to Article 72(1) of the ZDDS which entered into force on 1 January 2010 — namely 12 instead of 3 tax periods after the period in which the right to deduct arose — means that the previous limitation period was too short and made the exercise of the right to deduct difficult.
- 40 According to the referring court, that period was shortened in the present case since EMS had to register for VAT purposes before exercising its right to deduct although the limitation period had already begun to run. Consequently, according to that court, EMS had only one month in which to exercise its right to deduct.
- 41 In those circumstances the Varhoven administrativen sad decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
- '1. Are the first paragraph of Article 179, Article 180 and Article 273 of [the VAT] Directive and the principle of effectiveness in the field of indirect taxation, which is discussed in the judgment of 8 May 2008 in Joined Cases C-95/07 and C-96/07 *Ecotrade* [2008] ECR I-3457, to be interpreted as permitting a limitation period such as that in the present case under Article 72(1) of [the ZDDS] (2008 version), which period was extended — under Section 18 of the transitional and concluding provisions of the Law amending and supplementing [the ZDDS] — until the end of April 2009 solely for recipients of supplies who became taxable before 1 January 2009, taking into account the circumstances of the case, that is to say:
    - inasmuch as registration is a precondition for exercising the right to deduct input VAT, a person who has made an intra-Community acquisition of goods and who is not registered in accordance with [the ZDDS] must register voluntarily, even though that person does not meet the conditions for compulsory registration;



- the new legislative provision in Article 73a of [the ZDDS] (in force since 1 January 2009) whereby the right to deduct value added tax is to be granted irrespective of whether the time-limit under Article 72(1) of [the ZDDS] was complied with, if the tax is chargeable to the recipient of the supply, provided the supply was not concealed and is documented in the accounts;
  - the subsequent amendment of Article 72(1) of [the ZDDS] (in force since 1 January 2010), whereby the right to deduct input VAT may be exercised during the tax period in which that right arose or in one of the subsequent twelve tax periods?
2. Is the principle of tax neutrality as a fundamental principle, which is of importance for the establishment and functioning of the common system of VAT, to be interpreted as meaning that a tax assessment practice such as that at issue in the main proceedings, which acknowledges the late accounting for of value added tax, levies interest as a penalty and imposes an additional penalty of denial of the right to deduct input VAT, is permissible in the actual circumstances of the applicant's case, taking into account the fact that the transaction was not concealed, it was documented in the accounts, the tax authorities had the necessary information, no abuse occurred and the budget was not adversely affected?

### Consideration of the questions referred

#### *The first question*

- 42 By its first question the national court seeks, in essence, to know whether the first paragraph of Article 179, Article 180 and Article 273 of the VAT Directive are to be interpreted as meaning that they preclude a limitation period for the exercise of the right to deduct such as that at issue in the main proceedings.
- 43 It should be recalled at the outset that the deduction system established by the VAT Directive is meant to relieve the operator entirely of the burden of the VAT paid or payable in the course of all his economic activities. The common system of VAT seeks to ensure complete neutrality of taxation of all economic activities, whatever their purpose or results, provided that they are themselves subject, in principle, to VAT (see, inter alia, Case 268/83 *Rompelman* [1985] ECR 655, paragraph 19, and Case C-153/11 *Klub* [2012] ECR, paragraph 35).
- 44 The right to deduct forms an integral part of the VAT mechanism and in principle cannot be limited (see, inter alia, Joined Cases C-110/98 to C-147/98 *Gabalfrisa and Others* [2000] ECR I-1577, paragraph 43; *Ecotrade*, paragraph 39; and Case C-118/11 *Eon Aset Menidjmont* [2012] ECR, paragraph 68 and the case-law cited).
- 45 As is apparent from the wording of Article 167 and the first paragraph of Article 179 of the VAT Directive, the right to deduct is generally exercised during the same period as that during which it has arisen, namely, at the time the tax becomes chargeable.
- 46 Nevertheless, pursuant to Articles 180 and 182 of the VAT Directive, a taxable person may be authorised to make a deduction even if he did not exercise his right during the period in which the right arose, subject to compliance with certain conditions and procedures determined by national legislation (see, to that effect, *Ecotrade*, paragraphs 42 and 43).

- 47 In that regard, although the Member States may adopt, under Article 273 of the VAT Directive, measures to ensure the correct collection of VAT and to prevent evasion, those measures must not go further than is necessary to attain those objectives and must not undermine the neutrality of VAT (see Case C-385/09 *Nidera Handelscompagnie* [2010] ECR I-10385, paragraph 49, and *Klub*, paragraph 50).
- 48 It must also be stated that the possibility of exercising the right to deduct without any temporal limit would be contrary to the principle of legal certainty, which requires the tax position of the taxable person, having regard to his rights and obligations vis-à-vis the tax authority, not to be open to challenge indefinitely (*Ecotrade*, paragraph 44).
- 49 The Court has already held, in connection with the reverse charge procedure, that a limitation period the expiry of which has the effect of penalising a taxable person who has not been sufficiently diligent and has failed to claim deduction of input tax, by making him forfeit his right to deduct, cannot be regarded as incompatible with the regime established by the VAT Directive, in so far as, first, that limitation period applies in the same way to analogous rights in tax matters founded on domestic law and to those founded on European Union law (principle of equivalence) and, second, that it does not in practice render impossible or excessively difficult the exercise of the right to deduct (principle of effectiveness) (*Ecotrade*, paragraph 46 and the case-law cited).
- 50 The referring court enquires whether a limitation period, such as that at issue in the main proceedings, does not in practice render impossible or excessively difficult the exercise of the right to deduct by the taxable person.
- 51 According to the case-law of the Court, although it is for the national court to determine whether national measures are compatible with European Union law, in the present case with the principle of effectiveness (see, by analogy, Case C-188/09 *Profaktor Kulesza, Frankowski, Józwiak Orłowski* [2010] ECR I-7639, paragraph 30), it is however for the Court to provide it with any helpful guidance to resolve the dispute before it (see, to that effect, Case C-267/99 *Adam* [2001] ECR I-7467, paragraph 39, and *Eon Aset Menidjmont*, paragraph 49).
- 52 In order to assess such a limitation period, it is necessary to take into account its total duration, which amounts, in the present case, to three tax periods, in addition to the tax period during which the right to deduct arose. A tax period is equal, according to the national legislation applicable, to one month.
- 53 Although such a limitation period cannot, as such, in practice render impossible or excessively difficult the exercise of the right to deduct, given that Article 167 and the first paragraph of Article 179 of the VAT Directive permit Member States to require taxable persons to exercise their right to deduct during the period during which their right has arisen, whether it is compatible with the principle of effectiveness must be examined in the light of all the circumstances of the case.
- 54 Similarly, the reasons which led the national legislature to amend that period may be relevant particulars in so far as they are capable of showing that that legislature may have taken into consideration specific difficulties encountered by taxable persons when exercising their right to deduct.
- 55 In that regard, it may be pointed out that the Bulgarian legislature considerably extended the limitation period, first, by providing, in Article 73a of the ZDDS, that the right to deduct may be exercised, in the context of the reverse charge procedure, whether the period referred to in Article 72(1) of the ZDDS has been complied with or not, provided that the supply has not been concealed and is documented in the accounts and, secondly, by amending Article 72(1) in order to permit that right to deduct to be exercised in one of the 12 tax periods subsequent to the initial period.

- 56 Furthermore, it is for the national court to ascertain whether inclusion in the register of persons liable for VAT must necessarily be carried out in that same limitation period. If that proves to be the case, then that factor must be taken into consideration.
- 57 As is apparent from the order for reference, registration, as a condition for the exercise of the right to deduct, is regarded as having been effected as from the date on which the registration was issued and not as from the date of the application for registration.
- 58 Whether the exercise of the right to deduct in such a limitation period is not in practice rendered impossible or excessively difficult consequently depends on the duration of the registration procedure.
- 59 As stated in paragraph 40 above, in the main proceedings EMS had only one month after the date on which the registration was issued in which to exercise its right to deduct.
- 60 It must be recalled that the requirement for a taxable person to state when his activity commenced provided for in Articles 213 and 214 of the VAT Directive does not give rise to the right of deduction but constitutes a formal requirement for the purposes of verification (see *Nidra Handelscompagnie*, paragraph 50).
- 61 Furthermore, the formalities laid down by the Member State, which must be complied with by a taxable person in order to be able to exercise the right to deduct VAT, should not exceed what is strictly necessary for the purposes of verifying the correct application of the reverse charge procedure (Case C-392/09 *Uszodaépítő* [2010] ECR I-8791, paragraph 38).
- 62 It has also been held that the fundamental principle of VAT neutrality requires deduction of input tax to 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 right of that taxable person to deduct that tax, additional conditions which may have the effect of rendering that right ineffective for practical purposes (see *Ecotrade*, paragraphs 63 and 64; *Nidera Handelscompagnie*, paragraph 42; and Case C-438/09 *Dankowski* [2010] ECR I-14009, paragraph 35).
- 63 It follows that a taxable person cannot be deprived of his right to deduct on account of not being VAT registered if the substantive requirements for the enjoyment of that right are satisfied.
- 64 Consequently, the answer to the first question is that the first paragraph of Article 179, Article 180 and Article 273 of the VAT Directive must be interpreted as meaning that they do not preclude a limitation period for the exercise of the right to deduct, such as that at issue in the main proceedings, to the extent that it does not render the exercise of that right excessively difficult or impossible in practice. It is for the national court to carry out such an assessment and it may take into account, inter alia, a subsequent considerable extension of the limitation period and the duration of a VAT registration procedure which had to be completed within that same period for it to be possible to exercise that right to deduct.

#### *The second question*

- 65 By its second question, the national court seeks, in essence, to know whether the principle of fiscal neutrality precludes a penalty consisting in a refusal of the right to deduct VAT and the imposition of interest payments if the tax is accounted for out of time.
- 66 It must be stated at the outset that that question seems to disregard the issue of whether the limitation period for the exercise of the right to deduct is complied with or not.

- 67 In that regard, it is important to bear in mind that, although Member States may impose penalties in the event of non-compliance with obligations which seek to ensure that the tax is collected correctly and that evasion is prevented, those penalties must not go further than is necessary to attain the objective pursued (see, to that effect, *Ecotrade*, paragraphs 65 and 67, and *Dankowski*, paragraph 37).
- 68 As regards a penalty consisting of an absolute refusal of the right to deduct, it must be pointed out that the common system of VAT, as is apparent from paragraph 43 of this judgment, seeks to ensure complete neutrality of taxation of all economic activities, which presupposes that a taxable person may deduct the VAT paid or payable in the course of all his economic activities pursuant to Article 167 of the VAT Directive.
- 69 Member States must, in accordance with the principle of proportionality, employ means which, whilst enabling them effectively to attain the objective of preventing possible tax evasion and avoidance, are the least detrimental to the objectives and principles laid down by European Union legislation, which include the fundamental principle of the right to deduct VAT (see Case C-25/07 *Sosnowska* [2008] ECR I-5129, paragraph 23).
- 70 In view of the preponderant position which the right to deduct has in the common system of VAT, such a penalty appears disproportionate where no evasion or detriment to the budget of the State is ascertained.
- 71 As is apparent from the case-law referred to in paragraph 62 of this judgment, the deduction of input VAT must, as a rule, be allowed if the substantive requirements are satisfied, even if the taxable person has failed to comply with some of the formal requirements. The case may be different if non-compliance with such formal requirements effectively prevents the production of conclusive evidence that the substantive requirements have been satisfied (see, by analogy, Case C-146/05 *Collée* [2007] ECR I-7861, paragraph 31).
- 72 According to the order for reference, the intra-Community supply in the main proceedings was not concealed and is documented in the taxable person's accounts. The tax authorities have the information necessary to allow them, in principle, to ascertain whether the substantive requirements have actually been satisfied, and it is, in any event, for the national court to ascertain whether that is the case.
- 73 It is true that Member States may, in certain circumstances, treat the concealment of the existence of an intra-Community transaction as an attempt to evade VAT and impose, in such a case, fines or penalty payments prescribed by their domestic law, provided that they are proportionate to the gravity of the abuse (see, to that effect, *Collée*, paragraph 40).
- 74 However, a belated accounting for of VAT cannot, per se, be equated with evasion, which presupposes, first, that the transaction concerned, notwithstanding compliance with the conditions laid down by the relevant provisions of the VAT Directive and the national legislation transposing it, results in the accrual of a tax advantage the grant of which would be contrary to the purpose of those provisions and, secondly, that it is apparent from a number of objective factors that the essential aim of the transaction concerned is to obtain a tax advantage (see, to that effect, Case C-255/02 *Halifax and Others* [2006] ECR I-609, paragraphs 74 and 75, and *Klub*, paragraph 49).
- 75 The payment of default interest may constitute an adequate penalty, provided that it does not go further than is necessary to attain the objective, referred to in paragraph 67 of this judgment, of preventing evasion and ensuring the correct collection of VAT.

- 76 As is apparent from paragraphs 68 et seq. of this judgment, such a penalty would be disproportionate if the overall sum of interest demanded corresponded to the amount of tax deductible, which would effectively deprive the taxable person of his right to deduct. It is for the national court to assess whether the penalty is proportionate.
- 77 Consequently, the answer to the second question is that the principle of fiscal neutrality precludes a penalty consisting in a refusal of the right to deduct if VAT is accounted for belatedly, but does not preclude the payment of default interest, provided that that penalty complies with the principle of proportionality, which it is for the national court to determine.

### **Costs**

- 78 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

- 1. The first paragraph of Article 179, Article 180 and Article 273 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning that they do not preclude a limitation period for the exercise of the right to deduct, such as that at issue in the main proceedings, to the extent that it does not render the exercise of that right excessively difficult or impossible in practice. It is for the national court to carry out such an assessment and it may take into account, inter alia, a subsequent considerable extension of the limitation period and the duration of a value added tax registration procedure which had to be completed within that same period for it to be possible to exercise that right to deduct.**
- 2. The principle of fiscal neutrality precludes a penalty consisting in a refusal of the right to deduct if VAT is accounted for belatedly, but does not preclude the payment of default interest, provided that that penalty complies with the principle of proportionality, which it is for the national court to determine.**

[Signatures]