

Provisional text

JUDGMENT OF THE COURT (Fourth Chamber)

21 November 2018 (*)

(Reference for a preliminary ruling — Common system of value added tax — Directive 2006/112/EC — Articles 167, 168, 178 and 273 — Scope of the right of deduction — Absence of invoices — Recourse to a court-commissioned expert report — Burden of proof of the right of deduction — Principles of fiscal neutrality and proportionality)

In Case C-664/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Curtea de Apel Alba Iulia (Court of Appeal, Alba Iulia, Romania), made by decision of 10 November 2016, received at the Court on 21 December 2016, in the proceedings

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,

THE COURT (Fourth Chamber),

composed of T. von Danwitz, President of the Seventh Chamber, acting as President of the Fourth Chamber, K. Jürimäe, C. Lycourgos, E. Juhász (Rapporteur) and C. Vajda, Judges,

Advocate General: E. Tanchev,

Registrar: I. Illéssy, Administrator,

having regard to the written procedure and further to the hearing on 31 January 2018,

after considering the observations submitted on behalf of:

- Mr Vădan, by M. Bejenaru-Drăgoș, C.D. Căbleșan, C.A. Păun, T.V. Căpușan, D. Feldrihan and D.F. Pascu, lawyers,
- the Romanian Government, by C.-R. Căstner, O.-C. Ichim, E. Gane and C.M. Florescu, acting as Agents,
- the European Commission, by R. Lyal, G.-D. Balan and by L. Lozano Palacios, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 30 May 2018,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation 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’), in particular Articles 167, 168, 178 and 273, and the principles of neutrality of value added tax (‘VAT’) and proportionality.

2 The request has been made in proceedings between (i) Mr Lucrețiu Hadrian Vădan and (ii) the Agenția Națională de Administrare Fiscală — Direcția Generală de Soluționare a Contestațiilor (National Tax Administration Office — Directorate-General for the settlement of complaints, Romania) and the Direcția Generală Regională a Finanțelor Publice Brașov — Administrația Județeană a Finanțelor Publice Alba (the Regional Directorate-General of Public Finances of Brașov — Alba Public Finance Administration, Romania) regarding the refusal to grant the appellant in the main proceedings the right to deduct VAT in respect of the goods and services which he used for his own transactions because he was unable to produce the invoices relating to those goods and services.

Legal context

European Union law

3 Title X of the VAT directive, entitled ‘Deductions’, includes Chapter 1, entitled ‘Origin and scope of right of deduction’, which comprises Articles 167 to 172 of the directive. Article 167 provides:

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

4 Under Article 168 of that directive:

‘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 and services, carried out or to be carried out by another taxable person;

...’

5 Chapter 4 of Title X, entitled ‘Rules governing exercise of the right of deduction’, comprises Articles 178 to 183 of the VAT Directive. Article 178 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 Articles 220 to 236 and Articles 238, 239 and 240;

...’

6 Article 179 of that 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.'

7 Title XI of that directive, entitled 'Obligations of taxable persons and certain non-taxable persons' contains Chapter 2, entitled 'Identification', which comprises Articles 213 to 216 of the directive. Article 213(1) provides:

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

...'

8 Chapter 3 of Title XI, relating to invoicing, comprises Articles 217 to 240 of the VAT Directive. Article 220 of the directive provides:

'Every taxable person shall ensure that, in respect of the following, an invoice is issued, either by himself or by his customer or, in his name and on his behalf, by a third party:

(1) supplies of goods or services which he has made to another taxable person or to a non-taxable legal person;

...'

9 Under Article 226 of that directive:

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

(1) the date of issue;

(2) a sequential number, based on one or more series, which uniquely identifies the invoice;

(3) the VAT identification number referred to in Article 214 under which the taxable person supplied the goods or services;

(4) the customer's VAT identification number, as referred to in Article 214, under which the customer received a supply of goods or services in respect of which he is liable for payment of VAT, or received a supply of goods as referred to in Article 138;

(5) the full name and address of the taxable person and of the customer;

(6) the quantity and nature of the goods supplied or the extent and nature of the services rendered;

(7) the date on which the supply of goods or services was made or completed or the date on which the payment on account referred to in points (4) and (5) of Article 220 was made, in so far as that date can be determined and differs from the date of issue of the invoice;

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

(9) the VAT rate applied;

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

...'

10 Chapter 4 of Title XI, entitled 'Accounting', comprises Articles 241 to 249 of that directive. Article 242 of the directive provides:

'Every taxable person shall keep accounts in sufficient detail for VAT to be applied and its application checked by the tax authorities.'

11 Under Article 244 of the VAT Directive:

'Every taxable person shall ensure that copies of the invoices issued by himself, or by his customer or, in his name and on his behalf, by a third party, and all the invoices which he has received, are stored.'

12 Article 250(1) of that directive, in Chapter 5 of Title XI, relating to declarations, provides:

'Every taxable person shall submit a VAT return setting out all the information needed to calculate the tax that has become chargeable and the deductions to be made including, in so far as is necessary for the establishment of the basis of assessment, the total value of the transactions relating to such tax and deductions and the value of any exempt transactions.'

13 In Chapter 7 of Title XI of that directive, Article 273 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.'

Romanian law

14 Article 127 of Legea nr. 571/2003 privind Codul fiscal (Law No 571/2003 establishing the Tax Code, *Monitorul Oficial al României*, Part I, No 927, of 23 December 2003, 'the Tax Code') provides:

(1) "Taxable person" shall mean any person who, independently, carries out in any place an economic activity as referred to in paragraph 2, whatever the purpose or results of that activity.

(2) Pursuant to this Title, any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions, shall be regarded as "economic activity". The exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as an economic activity.

...'

15 Article 145 of that code provides:

‘(1) A right of deduction shall arise at the time the deductible tax becomes chargeable.

(2) All taxable persons have the right to deduct tax relating to purchases if they are used for the purposes of the following transactions:

(a) taxable transactions;

...’

16 Under Article 146 of that code:

‘(1) In order to exercise the right of deduction, a taxable person must meet the following conditions:

(a) for tax due or paid on goods supplied or to be supplied to him, or on services supplied or to be supplied to him by a taxable person, he must hold an invoice in accordance with the provisions of Article 155;

...’

17 Paragraph 46 in Title VI of the Hotărârea Guvernului nr. 44/2004 pentru aprobarea Normelor metodologice de aplicare a Legii 571/2003 privind Codul fiscal (Government Decision No 44/2004 approving the detailed rules for the implementation of Law No 571/2003 establishing the Tax Code, *Monitorul Oficial al României*, Part I, No 112 of 6 February 2004) provided, on 1 January 2007:

‘(1) 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, theft 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.

...’

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

18 Mr V?dan, a Romanian national, undertook a construction project for a residential complex of 16 buildings for single-family and community housing, containing 90 apartments, which was completed between 6 June 2006 and 8 September 2008. In that period, he was also the owner of several other plots of land which had received administrative approval for the construction of single-family homes.

19 Mr V?dan carried out 29 real estate transactions in 2006 and 70 real estate transactions during 2007 to 2009. He also sold building land between 2008 and 2009. The total value of those transactions was 19 234 596 Romanian lei (RON) (approximately EUR 4 104 163).

20 Since the turnover of the appellant in the main proceedings had, from June 2006, exceeded the statutory VAT exemption threshold, the tax authorities took the view that he was a taxable person liable to VAT and that, consequently, he had to register as such, with effect from 1 August

2006.

21 In the absence of any registration for VAT purposes and in the absence of submission of a VAT return to the tax authorities, the Direc²ia General² a Finan²elor Publice Alba (Directorate-General of Public Finances of Alba, Romania) charged Mr V²dan, by tax assessment notice No 59/28.01.2011, the sum of RON 3 071 069 (approximately EUR 655 826) in respect of VAT payable for the period between 1 August 2006 and 31 December 2009, interest in the sum of RON 2 476 864 (approximately EUR 528 498) and late payment penalties of RON 460 660 (approximately EUR 98 292). The total amount claimed amounts to RON 6 008 593 (approximately EUR 1 282 077).

22 Mr V²dan contested that assessment before the administrative authorities which, by decision of 19 August 2011, upheld in part his claims, setting the total amount of tax payable at RON 5 735 741 (EUR 1 223 858), comprising RON 2 909 546 (EUR 620 821) VAT, interest of RON 2 389 763 (EUR 509 913) and late payment penalties of RON 436 432 (EUR 93 123).

23 Mr V²dan brought an action before the Curtea de Apel Alba Iulia (Court of Appeal, Alba Iulia, Romania) seeking the annulment of that tax assessment notice and of the decision of 19 August 2011.

24 In that regard, he submitted that he was not under the obligation to register as a taxable person for VAT purposes, nor to keep any accounts, because he had paid that tax at the time he made the acquisitions and because he had never collected VAT from his purchasers.

25 By judgment No 42/2013, the Curtea de Apel Alba Iulia (Court of Appeal, Alba Iulia) dismissed all of the claims of the appellant in the main proceedings.

26 By judgment of 3 December 2014, the Înalta Curte de Casa²ie ²i Justi²ie (High Court of Cassation and Justice, Romania), on the ground that the Curtea de Apel Alba Iulia (Court of Appeal, Alba Iulia) had incorrectly refused to apply the taxable person's right to deduct VAT, overturned that court's judgment and referred the case back to it for re-examination.

27 The Înalta Curte de Casa²ie ²i Justi²ie (High Court of Cassation and Justice) held that the appeal court, after having noted that Mr V²dan had the right of deduction because he had registered for VAT of his own accord, had incorrectly found that Mr V²dan could not rely on certain documents, in this case the conclusions of two experts reports, on the ground that he had not submitted the originals of the documents concerning the purchases of goods and services relating to the constructions sold, even though he had stated in his application before that court that he was unable to produce those documents.

28 The Înalta Curte de Casa²ie ²i Justi²ie (High Court of Cassation and Justice) also criticised the appeal court for having failed to assess whether the extent of the right to deduct VAT could be determined using documents other than original invoices 'to give effect to the principle that what matters is the reality of the economic transaction carried out and avoiding excessive formalism'. In that regard, it noted that the documents relating to the services provided and the works carried out by the constructor(s) of the buildings at issue are also relevant.

29 The Curtea de Apel Alba Iulia (Court of Appeal, Alba Iulia) notes that, following the judgment on appeal, Mr V²dan produced to the Court a letter of 15 February 2008 to the Camera Notarilor Publici Bucure²ti (Chamber of Notaries Public, Bucharest, Romania), by which the National Tax Administration Office interpreted the provisions of the Tax Code as being applicable to natural persons not registered for VAT who, from 1 January 2008, have sold new constructions, parts thereof, or building land. In that regard, Mr V²dan argues that, between 2006 and 2008, no natural

person was able to register as a taxable person for VAT purposes and that, in addition, it was not compulsory to issue invoices, since the absence of invoices was compensated for by the production of till receipts, which are now illegible because of the poor quality of the ink used.

30 In its order for reference, the Curtea de Apel Alba Iulia (Court of Appeal, Alba Iulia) indicates that the question before it concerns whether a property developer who, without having made initial enquiries with the competent tax authority, has not registered as a taxable person for VAT purposes even though he was under an obligation to do so, and who has failed to keep an accounting record, is entitled to benefit from VAT reductions relating to the funds invested in the construction of buildings sold, in a situation where, he is unable to produce tax invoices, the other documents produced are illegible and, consequently, they are insufficient for the purposes of determining the existence and the extent of the right of deduction.

31 Referring to the judgment of the Court of Justice of 9 July 2015, *Salomie and Oltean* (C-183/14, EU:C:2015:454), it asks whether the application of the principle of VAT neutrality enables the exercise of the right of deduction when, in circumstances such as those of the main proceedings in which, in particular, the issue of invoices to natural persons was not compulsory at that time, the taxable person is unable to produce invoices, and whether the principle of proportionality precludes a measure restricting the right to deduct VAT in those circumstances.

32 If those principles were to be interpreted as meaning that a taxable person can benefit from the right to deduct VAT, even though that taxable person is unable to produce invoices for that purpose, the Curtea de Apel Alba Iulia (Court of Appeal, Alba Iulia) asks whether it is possible to grant such a right by an indirect assessment, in the present case by ordering a court-commissioned expert report, giving the expert the task of assessing how much VAT is deductible, on the basis of the amount of work carried out or the labour used by that taxable person, necessary for the construction of the buildings which he has sold.

33 In view of all of those elements, 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 of Justice for a preliminary ruling:

‘(1) On a proper construction of the VAT Directive 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 the [VAT] Directive and the principles of proportionality and neutrality, is an indirect assessment method (by means of a court-commissioned expert report), carried out 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?’

Consideration of the questions referred

34 It should be recalled that, according to settled case-law, 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 (order of 11 May 2017, *Exmitiani*, C-286/16, not published, EU:C:2017:368, paragraph 12).

35 Thus, in the main proceedings, the Court has jurisdiction to answer the questions asked by the referring court only in so far as they concern transactions subject to VAT carried out from 1 January 2007, the date of Romania's accession to the European Union.

36 By its two questions, which should be examined together, the referring court asks, in essence, whether the VAT Directive, in particular Articles 167, 168, 178(a) and 179, and the principles of VAT neutrality and proportionality, must be interpreted as meaning that, in circumstances such as those at issue in the main proceedings, a taxable person who is unable to provide evidence of the amount of input VAT he has paid, by producing invoices or any other document, can benefit from a right to deduct VAT solely on the basis of an assessment resulting from an expert report commissioned by a national court.

37 According to settled case-law of the Court, the right to deduct VAT is a fundamental principle of the common system of VAT, which in principle may not be limited, and is exercisable immediately in respect of all the taxes charged on the taxable person's input transactions (judgment of 9 July 2015, *Salomie and Oltean*, C?183/14, EU:C:2015:454, paragraph 56 and the case-law cited).

38 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 (judgment of 9 July 2015, *Salomie and Oltean*, C?183/14, EU:C:2015:454, paragraph 57 and the case-law cited).

39 Under Article 167 of the VAT Directive, a right of deduction arises at the time the deductible tax becomes chargeable. The substantive conditions which must be met in order for the right to arise are set out in Article 168(a) of that directive. Thus, for that right to be available, first, the person concerned must be a taxable person within the meaning of that directive and, secondly, the goods or services relied on to give entitlement to the right of deduction must be used by the taxable person for the purposes of his own taxed output transactions and those goods or services must be supplied by another taxable person as inputs (judgment of 15 September 2016, *Senatex*, C?518/14, EU:C:2016:691, paragraph 28 and the case-law cited).

40 As regards the formal conditions for the right of deduction, it is apparent from Article 178(a) of the VAT Directive that the exercise of that right is subject to holding an invoice drawn up in accordance with Article 226 of that directive (judgment of 15 September 2016, *Senatex*, C?518/14, EU:C:2016:691, paragraph 29 and the case-law cited).

41 The Court has held that the fundamental principle of the neutrality of VAT requires deduction of input VAT to be allowed if the substantive requirements are satisfied, even if the taxable persons have failed to comply with some formal conditions. It follows that the tax authorities cannot refuse the right to deduct VAT on the sole ground that an invoice does not satisfy the conditions required by Article 226(6) and (7) of the VAT Directive if they have available all the information to ascertain whether the substantive conditions for that right are satisfied (judgment of 15 September 2016, *Barlis 06 — Investimentos Imobiliários e Turísticos*, C?516/14, EU:C:2016:690, paragraphs 42 and 43).

42 Thus, the strict application of the substantive requirement to produce invoices would conflict with the principles of neutrality and proportionality, inasmuch as it would disproportionately prevent the taxable person from benefiting from fiscal neutrality relating to his transactions.

43 Nevertheless, it is for the taxable person seeking deduction of VAT to establish that he

meets the conditions for eligibility (judgment of 15 September 2016, *Barlis 06 — Investimentos Imobiliários e Turísticos*, C-516/14, EU:C:2016:690, paragraph 46 and the case-law cited).

44 Accordingly, the taxable person is required to provide objective evidence that goods and services were actually provided as inputs by taxable persons for the purposes of his own transactions subject to VAT, in respect of which he has actually paid VAT.

45 That evidence may include, inter alia, documents held by the suppliers or service providers from whom the taxable person has acquired the goods or services in respect of which he has paid VAT. An assessment based on an expert report commissioned by a national court may, if necessary, supplement that evidence or reinforce its credibility, but may not replace it.

46 In the present case, it is apparent from the information in the order for reference that, as he was unable to produce the invoices, Mr V?dan submitted other documents which are, however, illegible and, according to the referring court, are not sufficient to determine the existence and scope of the right of deduction.

47 As regards the evidence by way of a court-commissioned expert report, such as that at issue in the main proceedings, that court states that the expert would have the task of assessing how much VAT is deductible on the basis of the amount of work carried out or the labour used by that taxable person that were necessary for the construction of the buildings which he has sold. In that regard, it must, however, be noted that such an expert report would not be able to establish that Mr V?dan actually paid that tax in respect of the input transactions carried out for the purposes of constructing those buildings.

48 In the light of all of the foregoing considerations, the answer to the questions referred is that the VAT Directive, in particular Articles 167, 168, 178(a) and 179, and the principles of VAT neutrality and proportionality, must be interpreted as meaning that, in circumstances such as those at issue in the main proceedings, a taxable person who is unable to provide evidence of the amount of input tax he has paid, by producing invoices or any other document, cannot benefit from a right to deduct VAT solely on the basis of an assessment resulting from an expert report commissioned by a national court.

Costs

49 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 (Fourth Chamber) hereby rules:

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, in particular Articles 167, 168, 178(a) and 179, and the principles of the neutrality of value added tax (VAT) and proportionality, must be interpreted as meaning that, in circumstances such as those at issue in the main proceedings, a taxable person who is unable to provide evidence of the amount of input VAT he has paid, by producing invoices or any other document, cannot benefit from a right to deduct VAT solely on the basis of an assessment resulting from an expert report commissioned by a national court.

[Signatures]

* Language of the case: Romanian.