Provisional text

JUDGMENT OF THE COURT (Seventh Chamber)

12 April 2018 (*)

(Reference for a preliminary ruling — Value added tax (VAT) — Directive 2006/112/EC — Articles 63, 167, 168, 178 to 180, 182 and 219 — Principle of fiscal neutrality — Right to deduct VAT — Period allowed by national law for exercising that right — Deduction of additional VAT paid to the State that was the subject of documents rectifying the initial invoices following a tax adjustment — The date from which the period starts to run)

In Case C?8/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Supremo Tribunal de Justiça (Supreme Court, Portugal), made by decision of 2 January 2017, received at the Court on 9 January 2017, in the proceedings

Biosafe — Indústria de Reciclagens SA

v

Flexipiso — Pavimentos SA,

THE COURT (Seventh Chamber),

composed of A. Rosas, President of the Chamber, C. Toader and E. Jaraši?nas (Rapporteur), Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Biosafe — Indústria de Reciclagens SA, by M. Torres and A.G. Schwalbach, advogados,

– the Portuguese Government, by L. Inez Fernandes, M. Figueiredo and R. Campos Laires, acting as Agents,

– the European Commission, by L. Lozano Palacios and M. Afonso, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 30 November 2017,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 63, 167, 168, 178 to 180, 182 and 219 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 principle of fiscal neutrality.

2 The request has been made in proceedings between Biosafe — Indústria de Reciclagens SA (‘Biosafe’) and Flexipiso — Pavimentos SA (‘Flexipiso’) concerning the latter’s refusal to reimburse Biosafe the additional value added tax (VAT) that it had paid following a tax adjustment.

Legal context

EU law

3 Article 63 of the VAT Directive provides:

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

4 Title X of that directive, concerning deductions, includes Chapter 1, entitled ‘Origin and scope of right of deduction’, which is composed of Articles 167 to 172 thereof. Article 167 provides:

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

5 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:

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

… ’

6 Chapter 4 of Title X, entitled ‘Rules governing exercise of the right of deduction’, contains Articles 178 to 183 of the VAT Directive. Under Article 178 of that directive:

‘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;

… ’

7 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.

… ’

8 Article 180 of that directive states:

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

9 Under Article 182 of that directive, ‘Member States shall determine the conditions and detailed rules for applying Articles 180 and 181’.

10 Article 219 of the VAT Directive is worded as follows:

‘Any document or message that amends and refers specifically and unambiguously to the initial invoice shall be treated as an invoice.’

Portuguese law

11 Article 7 of the Código do Imposto sobre o Valor Acrescentado (Value Added Tax Code), in the version applicable to the dispute in the main proceedings (‘the CIVA’), entitled ‘Chargeable event and chargeability of the tax’, provides:

‘1. Without prejudice to the following paragraphs, the tax shall become due and chargeable:

(a) Upon transfer of goods, when the goods are made available to the purchaser.

… ’

12 Article 8 of the CIVA is worded as follows:

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

(a) If the deadline for issuing the invoice or equivalent document is observed, on the date of issue;

… ’

13 Article 19(2) of the CIVA, entitled ‘Right of deduction’, provides:

‘Only tax mentioned in the following documents, issued in the name of the taxable person and in his possession, shall confer the right of deduction:

(a) Invoices and equivalent documents issued in the correct legal form;

… ’

14 Under Article 22(1) of the CIVA:

‘The right of deduction shall arise at the time when the deductible tax becomes chargeable, as set out in Articles 7 and 8, by deducting from the total amount of tax due from the taxable transactions of the taxable person, during a return period, the amount of the deductible tax that becomes due during that period.’

15 Article 29(7) of the CIVA provides:

‘An invoice or equivalent document shall also be issued when the taxable amount of a transaction or the corresponding tax is adjusted for any reason, including inaccuracy.’

16 Article 36(1) of the CIVA states that the invoice or equivalent document referred to in Article 29 of the CIVA must be issued at the latest on the fifth working day following that on which the tax is due in accordance with Article 7 thereof. However, in the case of payments relating to a transfer of goods or services not yet completed, the date of issue of the supporting document must always coincide with the date of receipt of such amount.

17 Under Article 37(1) of the CIVA:

‘The amount of the tax paid must be added to the value of the invoice or equivalent document, so that it may be claimed from the purchasers of the goods or users of the services.’

18 Article 79(1) of the CIVA provides:

‘A purchaser of taxable goods or services who is a taxable person as referred to in Article 2(1)(a), acting as such and not exempt, shall be jointly and severally liable with the supplier for payment of the tax when the invoice or equivalent document, the issuing of which is obligatory under Article 29, has not been issued, contains an inaccurate statement as to the name or address of the intervening parties, the nature or quantity of the goods or services provided, the price or the amount of tax due.’

19 Under Article 98(2) of the CIVA:

‘Without prejudice to special provisions, the right of deduction or reimbursement of overpaid tax may be exercised for a period of four years only, from the date on which the right of deduction or payment of the overpaid tax has arisen, respectively.’

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

20 During the period from February 2008 to May 2010, Biosafe sold Flexipiso, which is liable to VAT, rubber granules manufactured from recycled tyres worth EUR 664 538.77 in total, on which Biosafe applied VAT at a reduced rate of 5%.

21 Following a tax inspection in 2011, relating to the tax years 2008 to 2010, the Portuguese tax authorities found that the standard VAT rate of 21% should have been applied and issued revised VAT assessments amounting to EUR 100 906.50 in total.

22 Biosafe paid that amount and claimed reimbursement from Flexipiso by sending debit notes to that undertaking. Flexipiso refused to pay that additional VAT on the ground that, in particular, it could not make a deduction because the period of four years laid down by Article 98(2) of the CIVA had expired, in respect of the transactions carried out up to 24 October 2008, before receipt of the debit notes of 24 October 2012, and that it was not for it to bear the consequences of an error for which Biosafe was solely responsible.

23 Following that refusal, Biosafe brought an action seeking an order that Flexipiso reimburse it for the amount that it had paid, together with interest for late payment. That action was rejected by the court of first instance and the appeal court which found that, although there was an obligation to pass on the VAT, the purchaser of goods could be required to pay that tax only if the invoices or equivalent documents were issued in time for him to make the deduction of that tax. Those courts took the view that, with regard to the debit notes received by Flexipiso more than four years after the initial invoices were issued, Biosafe could not pass on the VAT relating to those invoices to

Flexipiso as the latter no longer had the right to deduct VAT and as it was clear that the error regarding the applicable tax rate was attributable to Biosafe.

24 Biosafe then brought an appeal on a point of law before the referring court, the Supremo Tribunal de Justiça (Supreme Court, Portugal). That court states that there is some doubt as to whether Articles 63, 167, 168, 178 to 180, 182 and 219 of the VAT Directive and the principle of fiscal neutrality preclude national legislation the effect of which is that, in circumstances such as those in the main proceedings, the period in which the purchaser may deduct additional VAT starts to run from the date of issue of the initial invoices and not from the date of issue or receipt of the rectifying documents. According to that court, there is also some doubt as to whether the purchaser, in such circumstances, may refuse to pay additional VAT owing to the impossibility of deducting it.

25 In those circumstances, the Supremo Tribunal de Justiça (Supreme Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Does [the VAT Directive], and in particular Articles 63, 167, 168, 178 to 180, 182 and 219 thereof, and the principle of neutrality, preclude legislation the effect of which is that, when the seller of the goods, liable to VAT, was subject to a tax inspection which found that the VAT rate that he applied in a given situation was less than the due rate, paid to the State the additional tax and seeks to obtain the respective payment from the purchaser, also liable to VAT, the period in which the latter may deduct that additional tax starts to run from the date of issue of the initial invoices and not from the date of issue or receipt of the rectifying documents?

(2) If not, do the abovementioned articles of that directive and the principle of neutrality preclude legislation the effect of which is that, once documents rectifying the initial invoices are received, issued following the tax inspection and payment to the State of the additional tax, for the purpose of obtaining payment of that additional tax, at a time when the period for exercising the right of deduction has already elapsed, it is legitimate for the purchaser to refuse to pay, on the grounds that refusal of the passing on of tax is justified when it is impossible to deduct that additional tax?’

Consideration of the questions referred

The first question

26 By its first question, the referring court asks, in essence, whether Articles 63, 167, 168, 178 to 180, 182 and 219 of the VAT Directive and the principle of fiscal neutrality must be interpreted as precluding legislation of a Member State pursuant to which, in circumstances such as those at issue in the main proceedings in which, following a tax adjustment, additional VAT was paid to the State and was the subject of documents rectifying the initial invoices several years after the supply of the goods in question, the right to deduct VAT is to be refused on the ground that the period laid down by that legislation for the exercise of that right started to run from the date of issue of those initial invoices and had expired.

27 In that regard, it should be recalled that, according to settled case-law of the Court, the right of taxable persons to deduct the VAT due or already paid on goods purchased and services received as inputs from the VAT which they are liable to pay is a fundamental principle of the common system of VAT established by EU legislation (judgment of 21 March 2018, *Volkswagen*, C?533/16, EU:C:2018:204, paragraph 37 and the case-law cited).

28 The deduction system is intended to relieve the operator 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 neutrality of taxation of all economic activities, whatever their purpose or results, provided that they are in principle themselves subject to VAT (judgment of 21 March 2018, *Volkswagen*, C?533/16, EU:C:2018:204, paragraph 38 and the case-law cited).

29 As the Court has repeatedly held, the right to deduct provided for in Article 167 et seq. of the VAT Directive is an integral part of the VAT scheme and may not, in principle, be limited. In particular, the right to deduct is exercisable immediately in respect of all the taxes charged on input transactions (judgment of 21 March 2018, *Volkswagen*, C?533/16, EU:C:2018:204, paragraph 39 and the case-law cited).

30 The right to deduct VAT is, however, subject to compliance with both substantive requirements or conditions and formal requirements or conditions (judgment of 21 March 2018, *Volkswagen*, C?533/16, EU:C:2018:204, paragraph 40 and the case-law cited).

31 With regard to the substantive requirements or conditions, it is apparent from the wording of Article 168(a) of the VAT Directive that, in order to have the right to deduct, it is necessary, first, that the interested party be a ‘taxable person’ within the meaning of that directive and, second, that the goods or services relied on to confer entitlement to the right to deduct VAT be used by the taxable person for the purposes of his own taxed output transactions, and that, as inputs, those goods or services be supplied by another taxable person (judgment of 21 March 2018, *Volkswagen* , C?533/16, EU:C:2018:204, paragraph 41 and the case-law cited).

32 As to the detailed rules governing the exercise of the right to deduct VAT, which may be considered formal requirements or conditions, Article 178(a) of the VAT Directive provides that the taxable person must hold an invoice drawn up in accordance with Articles 220 to 236 and Articles 238 to 240 of that directive (judgment of 21 March 2018, *Volkswagen*, C?533/16, EU:C:2018:204, paragraph 42 and the case-law cited).

33 It follows from the foregoing that, although, under Article 167 of the VAT Directive, the right to deduct VAT arises on the date on which the tax becomes chargeable, Article 178 of that directive provides that, in principle, it can be exercised only once the taxable person holds an invoice (judgment of 21 March 2018, *Volkswagen*, C?533/16, EU:C:2018:204, paragraph 43 and the case-law cited).

34 According to Article 167 and the first paragraph of Article 179 of the VAT Directive, the right to deduct VAT is generally exercised during the same period as that during which it has arisen, namely, at the time the tax becomes chargeable.

35 Nevertheless, pursuant to Articles 180 and 182 of the VAT Directive, a taxable person may be authorised to make a VAT deduction even if he did not exercise his right during the period in which the right arose, subject, however, to compliance with certain conditions and procedures determined by national legislation (judgment of 21 March 2018, *Volkswagen*, C?533/16, EU:C:2018:204, paragraph 45 and the case-law cited).

36 However, the possibility of exercising the right to deduct VAT 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 (judgment of 21 March 2018, *Volkswagen*, C?533/16, EU:C:2018:204, paragraph 46 and the case-law cited).

37 The Court has already held 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 the input VAT, by making him forfeit his right to deduct VAT, 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 EU law (principle of equivalence) and, second, that it does not in practice render impossible or excessively difficult the exercise of the right to deduct VAT (principle of effectiveness) (judgment of 21 March 2018, *Volkswagen*, C?533/16, EU:C:2018:204, paragraph 47 and the case-law cited).

38 In addition, under Article 273 of the VAT Directive, the Member States may impose other obligations which they deem necessary for the correct collection of VAT and for the prevention of evasion. The prevention of tax evasion, avoidance and abuse is a recognised objective and is encouraged by that directive. However, the measures that the Member States may adopt under Article 273 of that directive must not go further than is necessary to attain such objectives. Therefore, they may not be used in such a way that they would have the effect of systematically undermining the right to deduct VAT and, consequently, the neutrality of VAT (judgment of 21 March 2018, *Volkswagen*, C?533/16, EU:C:2018:204, paragraph 48 and the case-law cited).

39 Since the refusal of the right of deduction is an exception to the application of the fundamental principle constituted by that right, it is incumbent upon the competent tax authorities to establish, to the requisite legal standard, that the objective evidence establishing the existence of a fraud or abuse is present. It is for the national courts subsequently to determine whether the tax authorities concerned have established the existence of such objective evidence (judgment of 28 July 2016, *Astone*, C?332/15, EU:C:2016:614, paragraph 52 and the case-law cited).

40 In the present case, it is clear from the order for reference that, following a tax inspection that took place in 2011, the Portuguese tax authorities issued adjusted VAT notices concerning the supplies of goods which took place between February 2008 and May 2010 in respect of which Biosafe had incorrectly applied a reduced VAT rate instead of the normal rate. Biosafe therefore made a VAT adjustment by paying the additional VAT and by issuing debit notes, which constitute, according to the referring court, documents rectifying the initial invoices.

41 The Portuguese Government takes the view that Biosafe and Flexipiso have intentionally and consistently, over at least two and a half years, put into effect systematic practices of tax evasion and avoidance. Indeed, the existence of such practices cannot be excluded in such a situation. However, in proceedings under Article 267 TFEU, which are based on a clear separation of functions between the national courts and tribunals and the Court of Justice, any assessment of the facts falls with the jurisdiction of the national courts and tribunals. In particular, the Court of Justice is empowered to rule only on the interpretation or the validity of European Union acts on the basis of the facts placed before it by the national court or tribunal (judgment of 8 May 2008, *Danske Svineproducenter*, C?491/06, EU:C:2008:263, paragraph 23, and order of 14 November 2013, *Krejci Lager & Umschlagbetrieb*, C?469/12, EU:C:2013:788, paragraph 28). In the present case, the referring court states that the error as regards the choice of applicable VAT rate is clearly attributable to Biosafe.

42 In those circumstances it seems that it was objectively impossible for Flexipiso to exercise its right to deduct before the VAT adjustment carried out by Biosafe, since beforehand it did not possess the documents rectifying the initial invoices and did not know that additional VAT was due.

43 Indeed, it was only following that adjustment that the substantive and formal conditions giving rise to a right to deduct VAT were met and that Flexipiso could therefore request to be relieved of the VAT burden due or paid in accordance with the VAT Directive and the principle of fiscal neutrality. Accordingly, since Flexipiso did not show any lack of diligence before the receipt of the debit notes, and failing any abuse or fraudulent collusion with Biosafe, a period which

started to run from the date of issue of the initial invoices and which, for certain transactions, expired before this adjustment, could not validly be used to deny Flexipiso the exercise of the right to deduct VAT (see, to that effect, judgment of 21 March 2018, *Volkswagen*, C?533/16, EU:C:2018:204, paragraph 50).

44 Consequently, the answer to the first question is that Articles 63, 167, 168, 178 to 180, 182 and 219 of the VAT Directive and the principle of fiscal neutrality must be interpreted as precluding legislation of a Member State pursuant to which, in circumstances such as those at issue in the main proceedings in which, following a tax adjustment, additional VAT was paid to the State and was the subject of documents rectifying the initial invoices several years after the supply of the goods in question, the right to deduct VAT is to be refused on the ground that the period laid down by that legislation for the exercise of that right started to run from the date of issue of those initial invoices and had expired.

The second question

45 By its second question, the referring court asks, in essence, whether, if the first question is answered in the negative, the purchaser may, in circumstances such as those in the main proceedings, refuse to pay the supplier the additional VAT paid by the latter, on the ground that the purchaser is no longer entitled to deduct that additional VAT due to the expiry of the period laid down by national law for the exercise of the right to deduct.

46 It follows from the answer to the first question that, in such circumstances, a taxable person may not be refused the right to deduct additional VAT on the ground that the period laid down by national law for the exercise of that right has expired. In the light of that answer, the second question need not be answered.

Costs

47 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 (Seventh Chamber) hereby rules:

Articles 63, 167, 168, 178 to 180, 182 and 219 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, and also the principle of fiscal neutrality, must be interpreted as precluding legislation of a Member State pursuant to which, in circumstances such as those at issue in the main proceedings in which, following a tax adjustment, additional value added tax (VAT) was paid to the State and was the subject of documents rectifying the initial invoices several years after the supply of the goods in question, the right to deduct VAT is to be refused on the ground that the period laid down by that legislation for the exercise of that right started to run from the date of issue of those initial invoices and had expired.

[Signatures]

* Language of the case: Portuguese.