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OPINION OF ADVOCATE GENERAL

KOKOTT

delivered on 17 November 2011 (1)

Case C-414/10

Véleclair SA

v

Ministre du budget, des comptes publics et de la réforme de l’Etat

(Reference for a preliminary ruling from the Conseil d’État (France))

?Common system of value added tax — Sixth Directive — Value added tax on importation — Right to deduct — National provision pursuant to which the right to deduct is conditional upon the actual payment of the value added tax on importation’

I – Introduction

1.

The present reference for a preliminary ruling relates to the interpretation of the Sixth VAT Directive. (2) It essentially concerns the question of whether a Member State may make the right to deduct, which the Directive (3) grants taxable persons in the event of the importation of goods, conditional upon the fact that the taxable person has actually paid the value added tax on importation beforehand.

2.

This question arises in the context of a legal dispute in which a business would like to have the value added tax on importation which it itself owes refunded as input VAT, although it has not paid it (4) and will not pay it in future. Insolvency proceedings have in fact been opened in respect of the assets of the business and the State’s claim for tax has lapsed as a result of late declaration.

II – Legal framework

A – European Union (‘EU’) law

3.

Article 10 of the Sixth Directive is worded as follows:

(a)

“Chargeable event” shall mean the occurrence by virtue of which the legal conditions necessary for tax to become chargeable are fulfilled;

(b)

The tax becomes “chargeable” when the tax authority becomes entitled under the law at a given moment to claim the tax from the person liable to pay, notwithstanding that the time of payment may be deferred.

...

3. The chargeable event shall occur and the tax shall become chargeable when the goods are imported ...

However, where imported goods are subject to customs duties, to agricultural levies or to charges having equivalent effect established under a common policy, the chargeable event shall occur and the tax shall become chargeable when the chargeable event for those Community duties occurs and those duties become chargeable.

...’

4.

Article 17 of the Directive provides for the origin and scope of the right to deduct. In the version of Article 28f(1) (5) it reads in extract as follows:

‘1. The right to deduct shall arise at the time when the deductible tax becomes chargeable.

2. In so far as the goods and services are used for the purposes of his taxable transactions, the taxable person shall be entitled to deduct from the tax which he is liable to pay:

(a)

value added tax due or paid in respect of goods or services supplied or to be supplied to him by another taxable person liable for the tax within the territory of the country;

(b)

value added tax due or paid in respect of imported goods within the territory of the country;

...

(d)

value added tax due pursuant to Article 28a(1)(a).

...’

5.

Article 18 of the Sixth Directive, entitled ‘Rules governing the exercise of the right to deduct’, provides as follows:

‘1. To exercise his right to deduct, the taxable person must:

(a)

in respect of deductions under Article 17(2)(a), hold an invoice, drawn up in accordance with

Article 22(3);

(b)

in respect of deductions under Article 17(2)(b), hold an import document, specifying him as consignee or importer, and stating or permitting calculation of the amount of tax due;

...

2. The taxable person shall effect the deduction by subtracting from the total amount of value added tax due for a given tax period the total amount of the tax in respect of which, during the same period, the right to deduct has arisen and can be exercised under the provisions of paragraph 1.

...

3. Member States shall determine the conditions and procedures whereby a taxable person may be authorised to make a deduction which he has not made in accordance with the provisions of paragraphs 1 and 2.

...'

6.

Under the heading 'Adjustments of deductions', Article 20(1) provides:

'The initial deduction shall be adjusted according to the procedures laid down by the Member States, in particular:

(a)

where that deduction was higher or lower than that to which the taxable person was entitled;

(b)

where after the return is made some change occurs in the factors used to determine the amount to be deducted, in particular where purchases are cancelled or price reductions are obtained; however, adjustment shall not be made in cases of transactions remaining totally or partially unpaid and of destruction, loss or theft of property duly proved or confirmed, nor in the case of applications for the purpose of making gifts of small value and giving samples specified in Article 5(6). However, Member States may require adjustment in cases of transactions remaining totally or partially unpaid and of theft.'

7.

Article 21, entitled 'Persons liable to pay tax to the authorities' provides as follows:

'... the following shall be liable to pay value added tax:

...

2. on importation: the person or persons designated or accepted as being liable by the Member States into which the goods are imported.'

8.

Under the heading ‘Obligations in respect of imports’, the second paragraph of Article 23 provides:

In particular, Member States may provide that the value added tax payable on importation of goods by taxable persons or person liable to tax or certain categories of these two need not be paid at the time of importation, on condition that the tax is mentioned as such in a return to be submitted under Article 22(4).’

9.

The transitional provision in Article 28(3) of the Directive provides:

‘During the transitional period referred to in paragraph 4, Member States may:

…

(d)

continue to apply provisions derogating from the principle of immediate deduction laid down in the first paragraph of Article 18(2);...’

B – French law

10.

The Code général des impôts (General Tax Code, ‘CGI’), in the version in force on 31 December 1997, provides in its Article 271(II)(1):

‘In so far as the goods and services are used for their taxable transactions, and provided that VAT is deductible on those transactions, the tax which the persons liable may deduct is [inter alia]:

...

(b)

the tax which is levied on importation

...’

III – Facts and question referred

11.

The reference for a preliminary ruling is based on a legal dispute between Véleclair and the French Budget Ministry.

12.

In the period from 1992 to 1995, Véleclair imported bicycles into the Community from third countries in order to resell them; since the customs authorities considered the declaration of origin made by Véleclair to be false, it imposed on Véleclair supplementary customs duties and anti-dumping duties in the amount of EUR 4 million. That sum was itself in turn liable to value added tax (‘VAT’) on importation in the amount of EUR 735 437.

13.

This tax had not yet been paid when insolvency proceedings were opened in respect of the assets of Véleclair. By a final and non-appealable order of 12 February 1999, the bankruptcy court held that the claim for tax had lapsed, since it had not been definitively declared within 12 months of the publication of Véleclair’s insolvency.

14.

In the main proceedings Véleclair seeks the refund of VAT. It is of the opinion that the VAT on importation which was assessed on a supplementary basis entitles it to the deduction of the corresponding sum as input VAT.

15.

However, the tax authorities proceed on the basis that the deductibility of VAT on importation is conditional upon its prior payment by the taxable person.

16.

Against this background, the Conseil d’État (Council of State), which must decide the case within the context of the appeal proceedings, has referred the following question to the Court:

Does Article 17(2)(b) of the Sixth Directive permit a Member State to make the right to deduct VAT on importation conditional, regard being had in particular to the risk of tax evasion, upon the actual payment of that tax by the taxable person, where the taxable person for the purposes of VAT on importation and the holder of the corresponding right to deduction are, as in France, the same person?

17.

Véleclair, the French, German, Dutch and the Portuguese Governments and the European Commission participated in the proceedings before the Court, although the German, Dutch and Portuguese Governments only submitted written observations.

IV – Legal assessment

18.

First of all, it must be stated that the present case is to be assessed under the Sixth Directive, since it took place before 31 December 2006, the point in time at which the latter was repealed and replaced by the Directive on the VAT system.

19.

Article 17 of the Sixth Directive governs the right to deduct. As the Court has already emphasised on several occasions, that right is an integral part of the common system of VAT. (6) It serves to relieve businesses entirely of the burden of the VAT due or paid in the course of all their economic

activities (7) and in principle may not be limited. (8) In particular, it may be exercised immediately in respect of all the taxes charged on input transactions. (9) Any limitation on the right to deduct affects the level of the tax burden and must be applied in a similar manner in all the Member States. Consequently, derogations are permitted only in the cases expressly provided for in the directive. (10) The question referred must be answered taking this case-law into account.

20.

A national provision such as that at issue in the present case, which makes the right to deduct conditional upon the prior payment of the tax, sets narrow limits on the possibility to deduct.

21.

However, in the view of the German, French, Portuguese and Dutch Governments, the Directive does permit such a provision. As grounds for this, in addition to the principle of neutrality of VAT, it is also asserted that a risk of tax evasion would otherwise exist. The German, Dutch and Portuguese Governments also rely on the connection with Article 23(2) of the Directive. They are of the view that Article 17(2)(b) of the Directive permits the Member States to make the right to deduct conditional upon prior payment in all the cases in which a Member State has not made use of the option in Article 23(2) and consequently the VAT on importation already has to be paid at the time of importation.

22.

I do not share that view. I will explain below that, in particular having regard to the principle of neutrality of VAT, a literal, systematic and purposive interpretation suggests that a provision such as the French CGI is not compatible with the Directive. There is also no risk of tax evasion which would call for another interpretation and therefore the question referred must in principle be answered in the negative. However, this does not preclude it being permissible to continue to apply such a provision for a transitional period.

23.

In view of the submissions of the German and the Dutch Governments, after my assessment of the question referred, I will examine whether the right to deduct is rendered invalid if the State's claim for VAT on importation has been extinguished or is no longer enforceable.

A – Literal interpretation

24.

It is apparent from its very wording that a provision such as the French CGI is not compatible with the Sixth Directive. Under Article 17(1) of the Directive, the right to deduct arises at the time when the deductible tax becomes chargeable. Under Article 17(2)(b) of the Directive, in the event of the importation of goods the deductible tax is the 'VAT due or paid in respect of imported goods within the territory of the country.'

25.

Pursuant to Article 10(3) of the Directive, the State's right to 'the tax', that is the VAT on importation, arises at the time of the importation or, in cases such as the case at issue in which the imported goods are subject to customs duties, at the time at which the chargeable event for customs duties occurs and those duties become chargeable. Therefore under Article 17(1) of the Directive the taxable person's right to deduct arises at the same time. In order for that right to

arise, neither Article 17(1) nor Article 17(2) of the Directive requires that the taxable person has already paid the VAT on importation. On the contrary, Article 17(2)(b) of the Directive expressly allows it to be sufficient that the VAT on importation is only due.

26.

Nor does wording ‘due or paid’ suggest, as in particular the Portuguese Government asserts, that the Member States had a right of choice in this respect. In Article 17(1) and 17(2) of the Directive the requirements for the origin and scope of the right to deduct are in fact set out precisely. They do not leave the Member States any discretion as regards their implementation. (11) This is also confirmed by the fact that where it intends to open up legislative discretion for the Member States, the Sixth Directive expressly says this, such as, for instance, in the third subparagraph of Article 10(2) or in Article 11B(6) of the Directive.

27.

The case-law of the Court on Article 17(2)(a) of the Directive, which is also based on the ‘VAT due or paid’, (12) is clear in this respect. Only recently, the Court decided that where Article 17(2)(a) applies the creation and exercise of the right to deduct are, in principle, independent of whether or not the consideration, including VAT, due for a transaction has already been paid. (13) It is equally irrelevant whether the VAT on the earlier sale of the goods concerned to the end-user has or has not been paid to the tax authority. (14)

28.

It is of course correct, as the governments which are participating in the proceedings assert, that where Article 17(2)(a) of the Directive applies there are always two different people involved who remit VAT and claim the right to deduct, whilst in the present case the same person is involved. However, in the end there may be the same result in factual and economic terms in both cases.

29.

On the one hand, as the German Government also mentions in its observations, even in the event of the importation of goods the possibility exists on the basis of Article 21(2) of the Directive that the taxable person for the purposes of VAT on importation and the holder of the right to deduction are two different people. However, in these circumstances too it must also be ensured that the right to deduct of one of them is not restricted by the possible failure to pay the VAT on importation on the part of the other. The situation corresponds in this respect to that in Article 17(2)(a) of the Directive.

30.

However, even where the taxable person for the purposes of VAT on importation and the holder of the right to deduction are the same person, in economic terms the situation is comparable with that in Article 17(2)(a) of the Directive. In respect of the domestic transaction regulated in that provision, the supplier (15) must remit the VAT to the tax authority regardless of whether his customer has already paid him the purchase price including VAT. (16) However, the customer who is also liable to pay tax may deduct the VAT owed to his supplier but not yet actually paid directly from his own tax debt to the State. (17) The Directive accepts the associated cash-flow advantage for the holder of the right to deduction. (18)

31.

However, in the same way there are also no consequences for the taxable person if the supplier

does not remit the VAT. (19) The taxable person may nevertheless deduct the input VAT. Consequently, in such circumstances, the State may end up having to refund tax which it has not yet collected, as in the present case of importation. It is accordingly intrinsic to the provision in Article 17(2)(a) of the Directive that cash-flow advantages are possible for the taxable person at the cost of the tax authority or the supplier. (20)

32.

Accordingly, due to the comparable nature of the situations in economic terms, the fact that in the domestic transaction which is regulated under Article 17(2)(a) the taxable person and the holder of the right to deduction are two different people does not preclude the clear case-law on the wording ‘due or paid’ in relation to Article 17(2)(a) being applied to the corresponding wording in Article 17(2)(b) of the Directive. In that provision too, the right to deduct is already recognised when the VAT on importation is merely due.

B – Systematic interpretation

33.

The scheme of the Directive does not call for any other interpretation. In this respect, in particular I do not share the view of the German, Dutch and Portuguese Governments that the wording ‘due’ refers merely to the cases in which a Member State has made use of the option in Article 23(2) of the Sixth Directive.

34.

Under Article 23(2) of the Sixth Directive, the Member States may provide that the VAT on importation need not be paid at the time of importation but must only be mentioned for the purposes of the usual VAT return. In this way, it is possible to arrive at a direct set-off of the VAT on importation and the corresponding input VAT amount. According to the governments participating in the proceedings, only in such a case is it justified not to require any prior payment of the VAT on importation for the right to deduct.

35.

Even if the interest underlying that argumentation is comprehensible, there are however no grounds in the Sixth Directive to suggest that the word ‘due’ in Article 17(2)(b) solely relates to the cases in Article 23(2) of the Directive.

36.

Neither does such a conclusion follow from the fact that in the predecessor provision to Article 17(2)(b) of the Sixth Directive, namely in Article 11(1)(b) of the Second VAT Directive, (21) only the VAT on importation paid is mentioned in the context of the right to deduct and that Directive did not contain any provision corresponding to Article 23(2) of the Sixth Directive.

37.

This is shown, in particular, by Article 18 of the Directive, which lays down the rules governing the exercise of the right to deduct. It does not require that the taxable person produces proof of payment. On the contrary, under Article 18(1)(b), the taxable person must merely hold an import document, specifying him as consignee or importer, and stating or permitting calculation of the amount of tax due. Accordingly, both the creation and the exercise of the right to deduct are independent of actual payment.

C – Purposive interpretation

1. Principle of neutrality

38.

The objective of the right to deduct confirms the conclusion reached up to this point. The deduction of input VAT is intended to ensure that VAT remains economically neutral for businesses. (22) In the view of the French Government the fact that a taxable person deducts an amount of VAT on importation as input VAT which he has not actually remitted endangers this neutrality, since in this way the taxable person obtains an unjustified enrichment.

39.

However, the deduction of VAT on importation which is merely due as input VAT does not necessarily lead to enrichment in the normal case, or at least not to long-term enrichment. As has already been stated, the taxable person's right to deduct leads at most to a temporary cash-flow disadvantage for the State, which can arise in the same way in relation to domestic transactions. However, in both cases, this cash-flow disadvantage for the State is in a way compensated for by the claim for VAT arising from the resales, which essentially already arises at the point in time of the supply. The corresponding sum must be declared by the seller regardless of whether he has already collected the purchase price including VAT.

40.

As far as the present case is concerned, in which the State can no longer successfully enforce its claim for tax as a result of late declaration in the insolvency proceedings, it must be emphasised that it is a very special situation and therefore it is not capable of being decisive for the quite general question of whether the right to deduct may be made conditional upon the prior payment of the VAT on importation.

41.

The neutrality of VAT for businesses which import goods would be endangered in particular if one were to permit, without restriction, a provision like that in the French CGI. The taxable person would then always have to make payment in advance, at least when the Member State concerned has not made use of the option in Article 23(2) of the Directive. He would first of all have to pay the VAT on importation to the customs authorities and could only deduct the sum paid in his VAT declaration for the relevant taxation period, which might be considerably later.

42.

Consequently, the taxable person would not only suffer a cash-flow disadvantage, but also be disadvantaged as compared to other taxable persons who acquire comparable goods in the internal market or in their own country. Under Article 17(2)(d) of the Directive, for intra-Community acquisition there is in fact in the first place only a set-off of the VAT which has to be paid for the

acquisition and deductible input VAT. Therefore a cash-flow disadvantage for the business is excluded in that regard. For domestic transactions, it is even possible, under Article 17(2)(a) of the Directive, to deduct input VAT in a VAT declaration although none of the underlying invoices have been paid and consequently the taxable person has not yet suffered any VAT burden at all in relation to his own purchases.

43.

Accordingly, the principle of neutrality militates against the admissibility of a provision which only permits deduction after payment of the VAT on importation.

2. Risk of tax evasion

44.

Preventing tax evasion, avoidance and abuse is an objective recognised and encouraged by the Sixth Directive . EU law cannot be relied on for abusive or fraudulent ends. Where the tax authorities find that the right to deduct has been exercised fraudulently, they are permitted to claim repayment of the deducted sums retroactively. It is a matter for the national court to refuse to allow the right to deduct where it is established, on the basis of objective evidence, that that right is being relied on for fraudulent ends. (23)

45.

However, as far as the levying of VAT on importations is concerned, it is not apparent why an increased risk of tax evasion should generally exist in relation to this which could make it necessary to make the right to deduct conditional upon the prior payment of VAT on importation in every case. As the Commission and also Véleclair correctly state, the actual physical entry of the goods into the Union is an event which is easily traceable and obvious for the Member States and which forms the basis of taxation. The import document, which the taxable person must submit pursuant to Article 18(1)(b) of the Directive in order to be able to deduct the input VAT and which specifies him as being liable for VAT and at least permits the calculation of the amount due, also reduces the risk of fraud.

46.

Therefore the risk of tax evasion suggested by the Member States is not capable of justifying the right to deduct expressly provided for in Article 17(2)(b) of the Directive both for VAT on importation which has been paid and that which is only due being limited, generally, to cases where it has actually been paid.

D – Interim conclusion

47.

For the reasons explained, Article 17(2)(b) of the Sixth Directive must be interpreted as not permitting a Member State to make the right to deduct VAT on importation conditional upon the actual payment of that tax by the taxable person, and indeed even where the taxable person and the holder of the corresponding right to deduction are the same person.

E – Transitional provisions

48.

The Portuguese and German Governments further assert that a national provision, which in relation to VAT on importation makes the right to deduct conditional upon prior payment, is permissible under Article 28(3)(d) of the Sixth Directive as an old provision which continues to apply at least for a transitional period.

49.

Under this provision, during the transitional period referred to in paragraph 4, Member States may continue to apply provisions derogating from the principle of immediate deduction laid down in the first paragraph of Article 18(2). As the title of Article 18 of the Directive shows, the question of 'when' the right may be exercised is included in the 'rules governing the exercise of the right to deduct'. The transitional period had not expired during the period in which the Sixth Directive applied. On the contrary, Article 372 of the Directive on the VAT system provides that Member States which, at 1 January 1978, applied provisions derogating from the principle of immediate deduction laid down in the first paragraph of Article 179 may continue to apply those provisions.

50.

Article 271 of the CGI makes the right to deduct conditional upon its prior payment. If one understands this provision as meaning that the right to deduct does not even arise prior to payment, it must be judged exclusively in the light of Article 17 of the Directive, which regulates the origin and scope of that right. As I have explained, such a provision is not compatible with the Directive. However, a provision like Article 271 of the CGI could also be understood as meaning that it merely regulates the timing of the exercise of the right to deduct and therefore comes within the first paragraph of Article 18(2) in conjunction with Article 28(3)(d) of the Directive. Of course, for the taxable person such an interpretation would have the same effect as the right to deduct failing to arise prior to payment of the VAT on importation. However, shifting the timing of the exercise of the right to a later time is expressly permitted by the Directive within the context of an old national provision which continues to be tolerated for a transitional period. It is for the national court to establish whether an interpretation of Article 271 (II)(1) of the CGI is possible, pursuant to which this provision regulates the rules governing the exercise of the right to deduct within the meaning of Article 18 of the Directive and whether it also constitutes an old provision which had been applied at 1 January 1978.

F – Claim for tax which is extinguished or is no longer enforceable

51.

Finally, the German and the Dutch Governments express the view in the present proceedings that even if the intention was to allow VAT on importation which is merely due to suffice for the origin of the right to deduct arising, that right would become invalid in any case if the State's claim for tax has been extinguished or is no longer enforceable.

52.

In this respect, the Dutch Government points out that the effect of the lapsing of the State's claim for tax as a result of late declaration is not discernible from the order for reference, namely whether the tax liability has been extinguished or is no longer enforceable. At the hearing, the French Government stated that according to its understanding and obviously also the understanding of the referring court, in a case such as the one at issue, the claim for tax is not extinguished but transformed into a natural obligation. Accordingly, it submits that the claim continues to exist but is no longer judicially enforceable. If the taxable person nevertheless pays,

this payment is therefore not made without a legal basis.

53.

This problem raised by the German and Dutch Governments in fact goes beyond the actual question referred. However, it appears to be necessary to consider it in order to give a useful answer to the referring court.

54.

As is apparent from Article 17(2)(b) of the Directive, ‘the taxable person shall be entitled to deduct ... VAT due or paid in respect of imported goods’. (24) It is apparent even from the wording that it is not sufficient that the VAT on importation (which has not yet been paid) was once due in order to be able to deduct it as input VAT. On the contrary, it depends on whether the VAT on importation is actually still due. The relevant time for these purposes must be the time when it is finally decided whether the right to deduct claimed by the taxable person actually exists. If at this time the State’s claim for tax has been extinguished without already having been fulfilled there can no longer be a right to deduct either. Such an interpretation is also required by the spirit and purpose of the right to deduct, which is to relieve taxable persons entirely of the economic burden of VAT. (25) If this burden no longer exists, there is no need to relieve it by means of the deduction of input VAT.

55.

In addition, the question arises as to whether the VAT on importation should be regarded as no longer being ‘due’ within the meaning of Article 17(2)(b) of the Directive even if — as is apparent in the case at issue — the State’s claim for tax still exists but is no longer enforceable. The answer to this question cannot be left to the relevant national law. On the contrary, in order to ensure the uniform application of the common VAT system the term ‘due’ within the meaning of Article 17(2)(b) of the Directive must be given an autonomous interpretation. (26)

56.

The term ‘due’ does not preclude an interpretation that it requires the legal enforceability of the State’s claim for tax. According to the spirit and purpose of the right to deduct, such an interpretation appears plainly to be required. Just as in relation to the State’s claim for tax having been extinguished, if that claim is not enforceable, there is no need to relieve the taxable person of a burden which he must in fact no longer bear at all.

57.

The need for a uniform application of the common VAT system also point towards such an interpretation. If a case such as the one at issue depended upon the legal consequences under the relevant national insolvency law in the event of late declaration of a claim for tax, such uniform application in comparable cases would not be ensured.

58.

Accordingly, the term ‘due’ within the meaning of Article 17(2)(b) of the Directive must be interpreted as meaning that it requires that the taxable person has a legally enforceable obligation to pay the amount of VAT which he seeks to deduct as input VAT. If there is no such an obligation, then he cannot be entitled to a right to deduct in respect of VAT on importation which has not yet been paid.

V – Conclusion

59.

I therefore propose that the Court answer the question referred by the Conseil d'État as follows:

1)

Article 17(2)(b) of the Sixth Directive does not permit a Member State to make the right to deduct VAT on importation conditional upon the actual payment of that tax by the taxable person, even where the taxable person and the holder of the corresponding right to deduction are the same person. However, subject to the conditions in Article 28(3)(d) of the Sixth Directive, a Member State may retain such a provision for a transitional period.

2)

VAT is only "due" within the meaning of Article 17(2)(b) of the Sixth Directive if the taxable person has a legally enforceable obligation to pay the amount of VAT which he seeks to deduct as input VAT. If there is no such obligation, then he cannot be entitled to a right to deduct in respect of VAT on importation which has not yet been paid.

(1) Original language: German.

(2) Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1) ('the Sixth Directive' or 'the Directive').

(3) In Article 17(2)(b).

(4) Whilst Véleclair SA disputed this in the proceedings before the Court, according to the order for reference this is a finding of fact by the courts ruling on the substance of the case, upon which the assessment to be carried out here must consequently be based.

(5) Inserted by Article 1(22) of Council Directive 91/680/EEC of supplementing the common system of value added tax and amending Directive 77/388/EEC with a view to the abolition of fiscal frontiers (OJ 1991 L 376, p. 1).

(6) See Case C-62/93 BP Soupergaz [1995] ECR I-1883, paragraph 18; Case C-414/07 Magoora sp. zo. o. [2008] ECR I-10921, paragraph 28; and Case C-274/10 Commission v Hungary [2011] ECR I-7289, paragraph 43.

(7) C-37/95 Ghent Coal Terminal [1998] ECR I-1, paragraph 15; Case C-90/02 Bockemühl [2004] ECR I-3303, paragraph 39; and Case C-174/08 NCC Construction Danmark [2009] ECR I-10567, paragraph 27.

(8) See Magoora sp. zo. o. (cited in footnote 6, paragraph 28); Case C-368/09 Pannon Gép Centrum [2010] ECR I-7467, paragraph 37) and Commission v Hungary (cited in footnote 6, paragraph 43).

(9) BP Soupergaz (cited in footnote 6, paragraph 18); Case C-392/09 Uszodaépít? [2010] ECR I-8791, paragraph 34); and Commission v Hungary (cited in footnote 6, paragraph 43).

(10) BP Soupergaz (cited in footnote 6, paragraph 18) and Magoora sp. zo. o. (cited in footnote 6, paragraph 28); see also Commission v Hungary (cited in footnote 6, paragraph 52).

(11) BP Soupergaz (cited in footnote 6, paragraph 35); Case C-33/03 Commission v United Kingdom [2005] ECR I-1865, paragraph 16; and Case C-74/08 PARAT Automotive Cabrio [2009] ECR I-3459, paragraph 32.

(12) In other language versions, for instance the French or Italian, the wording of (a) and (b) is completely identical in this respect: 'la taxe sur la valeur ajoutée due ou acquitée', 'l'imposta sul valore aggiunto dovuta o assolta'.

(13) Commission v Hungary (cited in footnote 6, paragraph 48).

(14) Joined Cases C-354/03, C-355/03 and C-484/03 Optigen and others [2006] ECR I-483, paragraph 54 and Joined Cases C-439/04 and C-440/04 Kittel and Recolta Recycling [2006] ECR I-6161, paragraph 49.

(15) This is intended to mean the trader from whom the taxable person purchases a service for which he pays VAT together with the purchase price.

(16) See Commission v Hungary (cited in footnote 6, paragraph 46). In the event of ultimate non-payment by the taxable person there is the possibility of correcting the supplier's tax debt: see Article 11 C(1) of the Sixth Directive. However, such correction constitutes an optional provision for the Member States.

(17) The fact that this is a problem in particular for small and medium-sized businesses is well known. The Commission has already given its attention to this topic in the accompanying document to the 'Greenpaper on the future of VAT — Towards a simpler, more robust and efficient VAT system', SEC(2010) 1455, p. 43 et seq. That document contemplates the possible solution of only permitting deduction after the actual payment of the input VAT. However, the existing provision in the Sixth Directive does not yet provide for this possibility.

(18) In the event of ultimate non-payment, in principle the Directive does not even provide for a correction of the right to deduct, see the first sentence of Article 20(1)(b) of the Directive. Such a correction may only be made if the Member States require it, see the second sentence of Article 20(1)(b) of the Directive.

(19) See the case-law cited in footnote 14.

(20) See also Ben Terra/Julie Kajus, Introduction to European VAT, 2011, Volume 1, Chapter 17.2, p. 1000.

(21) Second Council Directive 67/228/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes — Structure and procedures for application of the common system of value added tax (OJ, English special edition 1967 (I), p. 16).

(22) Case C-408/98 Abbey National [2001] ECR I-1361, paragraph 24; Case C-465/03 Kretztechnik [2005] ECR I-4357, paragraph 34; and Case C-277/09 RBS Deutschland Holdings [2010] ECR I-13805 paragraph 38.

(23) Case C-255/02 Halifax and Others [2006] ECR I-1609, paragraph 68-71 and Kittel (cited in footnote 14, paragraphs 54 et seq. and the case-law cited there).

(24) Emphasis added.

(25) See the judgments cited in footnotes 7 and 22.

(26) See Case C-433/08 Yaesu Europe [2009] ECR I-11487, paragraph 18 and Case C-540/09 Skandinaviska Enskilda Banken [2011] ECR I-1509, paragraph 19.