Neutral Citation Number: [2022] EWCA Civ 998

Case No: CA-2021-000551

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)
MR JUSTICE FANCOURT and JUDGE HERRINGTON
[2021] UKUT 30 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/07/2022

Before :

LORD JUSTICE LEWISON
LORD JUSTICE SNOWDEN
and
SIR LAUNCELOT HENDERSON

- -

Between :

TOWER BRIDGE GP LIMITED	**Appellant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Respondents**

- -
- -

Nicola Shaw QC and **Michael Jones QC** (instructed by **Pinsent Masons LLP**) for the **Appellant**
James Puzey, Howard Watkinson and **Joshua Carey** (instructed by **HMRC Solicitor's Office**) for the **Respondents**

Hearing date : 5 July 2022

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Approved Judgment

Remote hand-down: This judgment was handed down remotely at 09.00 on 18 July 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Lord Justice Lewison:

Introduction

1. The issue on this appeal is whether a taxable person (in this case Tower Bridge GP Ltd) is entitled to exercise a right to deduct input tax despite the fact that it held (and holds) no valid VAT invoice in respect of the supply in relation to which it claims to make the deduction. It says that it is entitled to make the deduction either as of right; or because HMRC unlawfully exercised their discretion to refuse to allow the deduction to be made. Both the FTT (Judge Jones) and the UT (Fancourt J and Judge Herrington) found against the taxable person. This appeal is brought with the permission of the UT. The UT promulgated its decision on 12 February 2021. It may be found at [2021] UKUT 0030 (TCC), [2021] STC 522. The decision of Judge Jones is at [2019] UKFTT 176 (TCC).

The facts

2. The relevant facts are as follows. Tower Bridge GP Limited ("Tower Bridge") is the representative member of the Cantor Fitzgerald Group VAT group ("CFG VAT Group"). Cantor Fitzgerald Europe Ltd ("CFE") was a broker in equities, equity derivatives, foreign exchange markets and contracts for differences and Cantor CO2e Ltd ("CO2e") provided brokerage, information and consulting services for products related to environmental markets, including selling carbon credits 'over the counter'. Both CFE and CO2e were members of the CFG VAT Group. CO2e arranged and undertook the relevant transactions, whereas CFE executed the transactions, and received and issued the invoices. I refer to CFE and CO2e collectively as "CFE" unless distinguishing between the two is relevant. At all material times, CFE was a taxable person.

3. In March 2009, CFE began trading in carbon credit transactions that were connected to VAT fraud. The FTT found that CFE neither knew nor should have known that the transactions it entered into before 15 June 2009 were connected to VAT fraud but that it should have known that its transactions were connected to VAT fraud from 15 June 2009. This appeal relates only to transactions entered into before that date.

4. Between 18 May 2009 and 3 June 2009, CFE purchased carbon credits from Stratex Alliance Limited ("Stratex") in 17 separate transactions. The carbon credits were supplied to CFE and used for the purposes of its taxable business. The carbon credits supplied to CFE were to be used by CFE for the purpose of its own onward (taxable) transactions in carbon credits.

5. Given the volume and nature of its trades, Stratex was also a "taxable person" for the purposes of Directive 2006/112/EC (the Principal VAT Directive or "PVD"). Accordingly, VAT was due in respect of the supplies by Stratex to CFE of carbon credits.

6. The Stratex invoices, which were issued to CFE in respect of the 17 transactions, included amounts of VAT totalling £5,605,119.74, which CFE duly paid. Tower

Bridge then claimed a deduction in respect of that input VAT in its VAT return for the period 06/09 (April-June 2009).

7. The Stratex invoices were not valid VAT invoices. They did not show a VAT registration number ("VRN") for Stratex, nor did they name CFE as the customer. Although Stratex was a taxable person, it transpired that Stratex was not registered for VAT (and therefore could not include a valid VRN on the Stratex invoices) and that it fraudulently defaulted on its obligation to account to HMRC for the sums charged as VAT on the Stratex invoices.

8. At the time of transacting with Stratex, CFE did not know that Stratex was not registered for VAT or that it was a fraudulent trader.

9. CFE had its own internal invoicing, tax, legal and credit departments. The FTT found, in the absence of any evidence for why the Stratex invoices were processed and paid without query, that there was no effective checking by CFE of the validity of the invoices nor of the VRN or VAT registration of Stratex.

10. On 3 June 2009 CFE requested Stratex's VRN. CFE also sought corrected invoices. Despite assurances being given by Stratex to CFE that it would provide CFE with details of its application for VAT registration, in the event no such documentation was ever received from Stratex and the invoices to CFE were not rectified.

11. On 2 September 2009 CFE first confirmed to HMRC that it had not been provided with Stratex's VRN. HMRC Officers visited Stratex on 9 September 2009. They found that its Companies House registered address was the premises of a corporate service provider. A representative of the service provider informed the Officers that it was purely an agent for Stratex, who had come to them from a representative in Russia. Despite HMRC's attempts no contact could be made with Stratex. Thus, by the time that Tower Bridge filed its VAT return and made its claim for deduction, Stratex could not be traced; and the VAT for which it should have accounted could not be recovered.

12. In a decision dated 6 December 2012 HMRC denied Tower Bridge the recovery of the input tax on the Stratex invoices on the basis that the invoices did not meet the formal legal requirements to be valid VAT invoices. HMRC also refused to exercise their discretion to allow recovery of the input tax on the basis that: (i) Stratex was not registered for VAT; (ii) the transactions were connected to fraud; and (iii) CFE failed to conduct reasonable due diligence in relation to the transactions.

13. HMRC's decision was varied by a review in a decision dated 12 April 2013 and by an amendment to the review decision on 25 June 2013, although the review upheld the decision to deny input tax relating to the Stratex invoices on the basis that those invoices were invalid.

The legislative framework

14. The European source of legislation about VAT is the Principal VAT Directive.

15. A "taxable person" is any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity: article 9. Although

a taxable person is, in principle, required to be registered, the definition is satisfied even if that taxable person is not registered. The supply of goods for a consideration within the territory of a member state by a taxable person acting as such, is subject to VAT: article 2. The VAT is payable by the taxable person carrying out a taxable supply of goods or services: article 193. Every taxable person who carries out supplies of goods or services in respect of which VAT is deductible must be identified by an individual number: article 214. Where a taxable person makes a taxable supply, he must issue an invoice: article 220.

16. The recipient of a taxable supply, if he is also a taxable person, is entitled to deduct the amount of VAT he paid in relation to that supply. Thus article 167 provides:

> "A right of deduction shall arise at the time the deductible tax becomes chargeable."

17. Article 168 (a) provides:

> "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…"

18. These articles establish the principle. Other articles deal with how the right to deduct is to be exercised. Article 178 relevantly 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…
>
> (f) when required to pay VAT as a customer where Articles 194 to 197 or Article 199 apply, he must comply with the formalities as laid down by each Member State."

19. The articles referred to in article 178 (f) include cases in which the reverse charge procedure applies or where there is an intra-community supply. In those cases it is not a requirement of the PVD that the taxable person must hold an invoice that complies with article 226. He need only comply with national formalities.

20. Article 179 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."

21. Article 180 provides:

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

22. Article 182 provides:

> "Member States shall determine the conditions and detailed rules for applying Articles 180 and 181."

23. Chapter 3 section 2 of the PVD deals with invoices. Article 217 defines what is meant by an invoice; and article 219 provides:

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

24. The contents of the invoice are laid down by article 226 which relevantly provides:

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

25. Article 228 provides:

> "Member States in whose territory goods or services are supplied may allow some of the compulsory details to be omitted from documents or messages treated as invoices pursuant to Article 219."

26. The PVD is transposed into domestic law by the Value Added Tax Act 1994 ("VATA") and regulations made under it. The relevant regulations for the purposes of this appeal are the VAT Regulations 1995 ("VATR").

27. Section 24(1)(a) VATA defines "input tax" in relation to a taxable person as:

> "VAT on the supply to him of any goods or services ...being (in each case) goods or services used or to be used for the purpose of any business carried on or to be carried on by him."

28. Section 24(6)(a) VATA provides that regulations may provide for VAT to be treated as input tax:

> "...only if and to the extent that the charge to VAT is evidenced and quantified by reference to such documents [or other information] as may be specified in the regulations or the Commissioners may direct either generally or in particular cases or classes of cases"

29. Section 25(2) VATA provides that a taxable person shall be:

> "... entitled at the end of each prescribed accounting period to credit for so much of his input tax as is allowable under section 26, and then to deduct that amount from any output tax that is due from him."

30. Section 26 VATA relevantly provides as follows:

> "(1) The amount of input tax for which a taxable person is entitled to credit at the end of any period shall be so much of the input tax for the period (that is input tax on supplies, acquisitions and importations in the period) as is allowable by or under regulations as being attributable to supplies within subsection (2) below.
>
> (2) The supplies within this subsection are the following supplies made or to be made by the taxable person in the course or furtherance of his business—
>
> (a) taxable supplies;..."

31. Regulation 29 VATR provides:

> "(1) Subject to paragraph (2) below, and save as the Commissioners may otherwise allow or direct either generally or specially, a person claiming deduction of input tax under section 25(2) of the Act shall do so on a return made by him for the prescribed accounting period in which the VAT became chargeable.
>
> (2) At the time of claiming deduction of input tax in accordance with paragraph (1) above, a person shall, if the claim is in respect of-
>
> (a) a supply from another taxable person, hold the document, which is required to be provided under regulation 13;…
>
> provided that where the Commissioners so direct, either generally or in relation to particular cases or classes of cases, a claimant shall hold, instead of the document or invoice (as the case may require) specified in sub-paragraph (a)…above, such other documentary evidence of the charge to VAT as the Commissioners may direct."

32. Regulation 13(2) VATR provides that the particulars of the VAT chargeable on a supply of goods must be provided on a document containing the particulars prescribed in Regulation 14(1) VATR. Regulation 14(1) VATR states, in so far as is relevant:

> "(1) Subject to paragraph (2) below and regulation 16 save as the Commissioners may otherwise allow, a registered person providing a VAT invoice in accordance with regulation 13 shall state thereon the following particulars—
>
> …
>
> (d) the name, address and registration number of the supplier,
>
> (e) the name and address of the person to whom the goods or services are supplied,
>
> [...]
>
> (g) a description sufficient to identify the goods or services supplied,
>
> (h) for each description, the quantity of the goods or the extent of the services, and the rate of VAT and the amount payable, excluding VAT, expressed in [any currency]
>
> …
>
> (l) the total amount of VAT chargeable, expressed in sterling,

…"

Deduction as of right

33. The argument for the CFG VAT Group, presented by Ms Shaw QC, is that the right to deduct under article 168 (a) of the PVD has direct effect. That right is an integral part of the common system of VAT. The substantive conditions that must be met in order for the right to deduct to arise are:

    i) The person claiming the right is a taxable person; and

    ii) The goods or services supplied to him are supplied for the purposes of his own taxable transactions and supplied by him to another taxable person.

34. Those conditions are satisfied on the facts of this case. If the taxable person can demonstrate that the substantive conditions for deduction are met, then the fact that it cannot comply with formal requirements does not detract from the directly enforceable right to deduct. In order to evaluate that argument, it is necessary to examine the case-law both of the CJEU and also of the national courts.

EU case-law

35. In principle, where the right to deduction arises, the taxable person's ability to exercise that right is not affected if another supplier in the chain of transactions fails to account for his own VAT, even if that failure is fraudulent: *Optigen Ltd v Customs & Excise Commissioners* (Joined Cases C-354/03, C-355/03 C-484/03), [2006] Ch 281. But the right to deduct may be refused if the taxable person knew or should have known that by his purchase he was participating in a transaction connected with fraud: *Kittel v Belgium* (Joined Cases C-439/04, C-440/04), [2008] STC 1537.

36. Before turning to the case law about the formalities required in order to exercise the right to deduct, it is necessary to refer to the provisions of the Sixth Directive (EC Council Directive 77/388) which was the governing directive considered by most of the early cases. Article 18 (1) (a) provided that in order to exercise the right to deduct the taxable person must hold an invoice drawn up in accordance with article 22 (3). Article 22 (3) (a) required a taxable person to issue an invoice in respect of all supplies. The only part of the directive which addressed the contents of the invoice was article 22 (3) (b) which provided:

> "The invoice shall state clearly the price exclusive of tax and the corresponding tax at each rate as well as any exemptions."

37. All other conditions for the exercise of the right to deduct were left to member states under article 18 (3). Thus EU law at that time was far less prescriptive about the contents of an invoice than the PVD.

38. In *Jorion née Jeunehomme v Belgian State* (Joined Cases C-123/87 and C-330/87) the question for the court was whether provisions of Belgian legislation prescribing the contents of the invoice necessary to exercise the right to deduct were compatible with EU law, even though they went beyond the contents prescribed by article 22 of the Sixth Directive. The case did not concern the question whether it was necessary to

comply with the requirements about the contents of the invoice laid down by the directive itself. In the course of his opinion Advocate General Slynn said:

> "…it seems to me that the invoice which "must" be held by a taxable person in order to exercise his right to deduction is an important part of the machinery and that Member States are entitled, in the absence of further harmonizing rules, to adopt rules as to the content of an invoice which are reasonably necessary to allow adequate verification and fiscal control."

39. He continued:

> "An invoice which complies with the rules is the "ticket of admission" to the right to deduct, subject to its subsequently being shown by the tax authorities to be false; if the invoice does not comply, it may be that the taxpayer can prove the genuineness of the transaction and that his supplier accounted for the VAT which he has paid as "input tax", but if the invoice is incomplete in a material respect the onus is on him to establish his right to deduct.
>
> The requirements laid down must not, however, go beyond what is reasonably necessary for the purposes of verification and fiscal control. If a Member State wishes in particular areas to go further then it must have recourse to Article 27 of the Sixth Directive. Rules laid down which go beyond what is reasonably necessary cannot be relied on to defeat the exercise of the right to deduct."

40. The Advocate General thus recognised that even if an invoice was incomplete in a material respect, the taxable person might have the opportunity to establish his right to deduct. The court formulated the question before it at [12]:

> "By its questions the national court essentially seeks to determine whether Articles 18 (1) (a) and 22 (3) (a) and (b) of the Sixth Directive allow Member States to make the exercise of the right to deduction subject to possession of an invoice which must contain certain particulars intended to ensure the application of value-added tax and permit supervision by the tax authorities."

41. It went on to say at [14] that in order to be entitled to make the deduction "a taxable person must hold an invoice drawn up in accordance with Article 22 (3) of the Sixth Directive." Its answer to the question referred at [18] was:

> "The reply to the questions of the national court should therefore be that Articles 18 (1) (a) and 22 (3) (a) and (b) of the Sixth Council Directive (77/388/EEC) of 17 May 1977 allow Member States to make the exercise of the right to deduction subject to the holding of an invoice which must contain certain particulars which are necessary in order to ensure the levying of

> value-added tax and permit supervision by the tax authorities. Such particulars must not, by reason of their number or technical nature, render the exercise of the right of deduction practically impossible or excessively difficult."

42. From the answer that the court gave to the question, it seems to me to follow that if a member state did make the exercise of the right to deduct subject to the holding of a compliant invoice, then if the taxable person did not hold such an invoice the exercise of the right to deduction could be refused. Moreover on its way to reaching its conclusion on Belgian law, the court emphasised that the taxable person must hold an invoice that complied with the directive.

43. In *Reisdorf v Finanzamt Köln-West* (Case C-85/95), [1997] STC 180 the question was whether the German tax authorities were entitled to refuse to permit a deduction where the taxable person did not present the original invoice but only a copy of it. On the facts found by the national court, the original invoices were available and accessible. It does not appear from the report of the case that any of the information that an invoice was required to contain was missing from the copy. The argument for Mr Reisdorf was that while the existence of an invoice constitutes an important proof in the exercise of a right to deduct, continued possession of it cannot constitute a precondition to the enjoyment of that right, and that a duplicate or copy of the invoice should be regarded as being capable of providing the same evidence. In the course of his opinion Advocate General Fennelly said at [16] that the various provisions of the Sixth Directive governing the exercise of the right to deduct were all expressed in mandatory terms. He continued at [18]:

> "The role of the invoice in the operation of the VAT system is pivotal. It must be issued by each supplier of goods or services to a purchaser who is a taxable person; it must be held by the taxable person at the time he claims the right to make a deduction of the VAT shown thereby to have been paid by him to the supplier. No issue of the content of the invoice arises in the present case."

44. It is clear from this that what the invoice must contain was not a question considered by the court. At [19], referring to previous case-law he said:

> "The court has left no room for doubt as to the necessity for the taxable person "in order to be entitled to deduct the value-added tax payable or paid in respect of goods delivered or to be delivered or services supplied or to be supplied by another taxable person [to] hold an invoice drawn up in accordance with art 22(3) of the Sixth Directive"…"

45. At [21] he discussed the discretion allowed to member states to accept alternative documents other than the original invoice. In that connection he said:

> "Clearly, for example, any such alternative document would have to record the minimum information required by art 22(3)(b). Furthermore, the need to counter irregularity or fraud would have to be borne in mind."

46. The Advocate General's opinion is clear: in order to exercise the right to deduct the taxable person had to have an invoice (or alternative documentation) compliant with the Sixth Directive. As we have seen, that only required the invoice to state the price exclusive of tax and the corresponding tax at each rate as well as any exemptions.

47. The court considered the questions referred together. At [22] it said (in a passage on which Ms Shaw relies):

> "It is apparent from art 18(1)(a), read in conjunction with art 22(3), that exercise of the right to deduct input tax is normally dependent on possession of the original of the invoice or of the document which, under the criteria determined by the member state in question, may be considered to serve as an invoice. As pointed out by the Advocate General (Fennelly) in para 17 of his opinion, the different language versions of those provisions which were authentic at the time of adoption of the Sixth Directive confirm that interpretation, even though the wording of art 22(3)(c) in the German text does not indicate as clearly that the task of the member states is to lay down the criteria determining whether another document may serve as an invoice."

48. It is true that the court said that exercise of the right to deduct is "normally" dependent on possession of the invoice. But what the court was considering was whether only the *original* invoice would do. It was not saying anything about an invoice that was defective in the sense of not containing the particulars required by article 23 (3) (b) of the Sixth Directive.

49. *Albert Collée v Finanzamt Limburg an der Lahn* (Case C-146/05), [2008] STC 757 concerned an intra-community supply of cars. Following an investigation, the German tax authorities refused to allow the taxable person to deduct input tax invoiced on a particular transaction on the grounds that the sale was a sham. In the light of that decision, the taxable person amended its accounts so as to show the sale proceeds as exempted intra-Community supplies and recorded the transaction thus in its VAT return. The Sixth Directive required a taxable person to issue an invoice in respect of goods supplied under an intra-community supply, but made no provision about the contents or timing of such an invoice. German VAT regulations required the taxable person to produce supporting documents of any intra-Community supply and that the evidence "must be clear and easily verifiable from the supporting documents produced." National case-law interpreted that requirement as requiring that accounts must be updated regularly and immediately after the relevant transactions. When the revised return was presented, the tax authorities refused to allow a tax exemption in respect of that supply on the basis that the prescribed records had not been updated regularly and completed immediately after the relevant transaction. It is important to note that this was a requirement of German law; not EU law. In the course of her opinion Advocate General Kokott referred to the principle that intra-Community supplies were exempt from VAT; and pointed out at [20] that the Sixth Directive did not include any specific rules as to the taxable person's evidence of such a supply. At [30] she made it clear that the case did not concern the interpretation of the directive itself; but the national case law and administrative practice adopted by the German authorities. She went on to say at [39]:

> "If it is established that an intra-Community supply has in fact taken place, exemption from tax can still be refused where the requisite national formalities have not been adhered to, provided that they serve the purpose of the directive, namely the prevention of tax evasion and the correct levying and collection of the tax, in particular the correct and straightforward application of the exemptions. Moreover such formal requirements may not go further than is necessary to attain those objectives."

50. So the only question was whether non-compliance with national formalities could deprive the taxable person of the exemption from VAT.

51. The court also emphasised at [24] that none of the provisions of the directive related directly to the question of what evidence needed to be supplied by the taxable person. In the course of its judgment the court said at [29]:

> "As regards, first, the question whether the tax authority can refuse to allow an intra-Community supply to be exempt from VAT solely on the ground that the accounting evidence of that supply was belatedly produced, it should be noted that a national measure which, in essence, makes the right of exemption in respect of an intra-Community supply subject to compliance with formal obligations, without any account being taken of the substantive requirements and, in particular, without any consideration being given as to whether those requirements have been satisfied, goes further than is necessary to ensure the correct levying and collection of the tax."

52. This, too, emphasises that what the court was concerned with was a national measure rather than the directive itself. It continued at [31]:

> "In the main case, therefore, since it is apparent from the order for reference that there is no dispute about the fact that an intra-Community supply was made, the principle of fiscal neutrality requires—as the Commission of the European Communities also correctly submits—that an exemption from VAT be allowed if the substantive requirements are satisfied, even if the taxable person has failed to comply with some of the formal requirements. The only exception is if non-compliance with such formal requirements would effectively prevent the production of conclusive evidence that the substantive requirements have been satisfied. However, that does not appear to be so in the main case."

53. When, therefore, the court gave its ruling that the exemption was available even if the taxable person had failed to comply with "some of the formal requirements", it was concerned with a national measure only. Moreover the court limited non-compliance to "some" of the formal requirements. Since there were no EU formalities that had to be complied with, this case does not support an argument that EU formalities can simply be disregarded.

54. The court went on to consider whether the fact that the taxable person concealed the occurrence of the intra-Community supply was relevant to the question referred. As to that, the court said at [35] that the national legal system must allow for corrections where the person issuing the invoice acted in good faith and that he has "wholly eliminated the risk of any loss in tax revenues". It continued at [36]:

> "It is therefore for the national court to verify, taking into account all the relevant circumstances of the case which has been brought before it, whether the delay in the production of the accounting evidence could lead to a loss in tax revenues or jeopardise the levying of VAT."

55. This, in my judgment, is much the same point as that which the Advocate General made in her opinion at [39].

56. In *Ecotrade SpA v Agenzia delle Entrate* (Joined Cases C-95/07 and C-96/07), [2008] STC 2626 the taxable person made a mistake about the operation of the reverse charge procedure. It registered the supplies in question as exempt. The net effect of the taxable person's mistake was nil. The same amount of VAT would have been payable if they had been correctly analysed. Once again, EU law prescribed no relevant formalities that had to be complied with. Following an inspection the Italian tax authorities assessed the transactions to output VAT but refused to allow the taxable person to deduct input VAT on those same transactions. The reason for that was Italian national legislation which precluded the exercise of the right to deduct after two years, while at the same time permitting the tax authorities four years in which to claim underpaid VAT. Once again, therefore, it was national legislation rather than EU legislation that was in issue.

57. The court first considered whether the directive permitted the introduction of a limitation period for the exercise of the right to deduct; and held that it did. The principle of effectiveness was not infringed merely because the tax authorities had a longer period in which to recover unpaid VAT. At [63] the court said that the principle of fiscal neutrality required the deduction to be made if the substantive requirements were satisfied even if the taxable person had failed to comply "with some of the formal requirements". It cross-referred to *Albert Collée* which, as we have seen, was concerned with a national formality. It continued at [64]:

> "Therefore, where the tax authority has the information necessary to establish that the taxable person is, as the recipient of the supply of services in question, liable to VAT, it cannot, in relation to the right of that taxable person to deduct that tax, impose additional conditions which may have the effect of rendering that right ineffective for practical purposes (see *Bockemühl* (para 51))."

58. That paragraph opens with the word "Therefore". The conclusion that the court reached is accordingly based on the premise in the preceding paragraph, namely that national legislation cannot impose additional formal criteria which must be satisfied before the exercise of the right to deduct is permitted. Likewise, the reference to "additional" conditions means additional conditions imposed by national law, which go beyond what EU law positively requires. The same point is made in the paragraph

of the case to which the court referred at the end of [64]. Nothing in that case supports the proposition that formalities laid down by EU law itself can be disregarded.

59. In *Polski Trawertyn v Dyrektor Izby Skarbowej w Poznaniu* (Case C-280/10), [2012] STC 1085 two individuals who intended to form a partnership bought a quarry intended to be exploited by the partnership. The invoice relating to that purchase was issued to the intending partners. The partnership claimed to deduct the VAT on that purchase as input tax. The Polish tax authorities refused to allow the deduction on the ground that the expenditure had been incurred by the intending partners rather than the partnership who, under national law, were different taxable persons than the partnership. A second invoice for legal fees incurred in setting up the partnership was issued to the partnership, but before it had been registered. The Polish tax authorities refused to allow a deduction of the VAT on that invoice on the ground that at the date of issue, the partnership did not exist and therefore the invoice was issued to a non-existent entity. The essence of the problem was that, under Polish law, the intending partners and the partnership were regarded as different taxable persons.

60. Advocate General Cruz Villalón reviewed the court's case-law on the form and content of invoices. He referred to article 222 and, in particular, article 222 (5) which required the invoice to state the full name and address of the taxable person and the customer. He then said that the court had interpreted the requirements "fairly loosely". He continued at [69]:

> "It is this approach that has led the Court of Justice to limit the member states' discretion and to restrict their ability to require that invoices should contain information *beyond that contemplated in the directive*. Similarly, the Court of Justice has taken the view that where invoices contain errors or defects *which are capable of correction*, the taxable person must be allowed to try to make the correction before being denied the right of deduction. In other words, member states cannot use the formalities inherent in the invoicing process as a pretext for obstructing the exercise of the right of deduction and, essentially, challenging the principle of fiscal neutrality by taxing economic activity rather than final consumption." (Emphasis added)

61. I would infer from this that where an invoice does not contain the information required by the directive itself, or contains an error in that information which is incapable of correction, the right to deduct cannot be exercised. The court said:

> "41. As regards the formal requirements of that right, it is apparent from art 178(a) of Directive 2006/112 that its exercise is subject to the holding of an invoice. Art 226 of Directive 206/112 states that, without prejudice to the particular provisions of that directive, *only the details set out in that article are required for VAT purposes on invoices issued pursuant to art 220 of that directive*. Under art 226(1) and (5) of the directive, the date of issue of the invoice and the full name as well as the address of the taxable person and of the customer must thus appear on the invoice.

> 42. It follows that it is not open to member states to make the exercise of the right to deduct VAT dependent on compliance with *conditions relating to the content of invoices which are not expressly laid down by the provisions of Directive 2006/112.* Under art 273 of that directive, member states may impose obligations which they deem necessary to ensure the correct collection of VAT and to prevent evasion, but cannot rely on that power in order to impose additional obligations *over and above those laid down by that directive* (see *Pannon Geìp Centrum* (para 40)).
>
> 43. In addition, the court has held that the principle of VAT neutrality requires that deduction of input tax be allowed if the substantive requirements are satisfied, even if the taxable person has failed to comply with some of the formal requirements. Where the tax authority has the information necessary to establish that the taxable person is, as the recipient of the supplies in question, liable to VAT, it cannot impose, in relation to the taxable person's right to deduct that tax, *additional* conditions which may have the effect of rendering that right ineffective (see, as regards the reverse charge procedure, *Nidera Handelscompagnie BV v Valstybinė mokesčių inspekcija prie Lietuvos Respublikos finansų ministerijos* (C-385/09) [2010] All ER (D) 160 (Nov), para 42)." (Emphasis added)

62. Reading those paragraphs together, it seems to me that the court was dealing with national legislation imposing formalities additional to those required by the PVD itself. That is what, in context, "some of the formalities" means in paragraph [43] in which the court refers expressly to "additional" conditions. I do not interpret this decision as derogating from the need to comply with conditions laid down by the PVD itself. On the contrary it is implicit in paragraph [42] that member states may make the exercise of the right to deduct dependent on conditions relating to the content of invoices which *are* expressly laid down by the directive.

63. At [45] the court noted that the inability of Polski Trawertyn to exercise the right of deduction arose from the fact that at the date of the invoice it was not yet registered. But it went on to say that because the national court found that those who paid the input tax and those who made up Polski Trawertyn "are one and the same person, that inability must be considered to result from a purely formal obligation". They then agreed with the Advocate General that to deny the right of deduction in that situation would have the result of making the right to deduct ineffective. It was because of those special facts that the right to deduct was exercisable.

64. Ms Shaw placed some reliance on *Bonik EOOD v Direktor* (Case C-285/11), [2013] STC 773. But that was a case in which the taxable person had invoices in proper form and the issue was whether the underlying transactions they purported to record had taken place at all. I do not consider that it has any bearing on what we have to decide.

65. In *Petroma Transport SA v Belgium* (Case C-271/12), [2013] STC 1466 the Belgian tax authorities denied the exercise of the right of deduction on the ground that the

relevant invoices were defective. Petroma provided intra-group services to other companies, employing staff for that purpose. The invoices were defective in that they did not include a break-down of the unit price or the number of hours worked by the staff of the service-providing companies, thereby making it impossible for the tax authority to determine the exact amount of tax collected. Although additional information was subsequently provided, the tax authorities did not regard it as sufficient partly because it was submitted late, and partly because of its informal character. At [21] the court formulated the question as being whether the Sixth Directive precluded national legislation under which the right to deduct VAT might be refused to taxable persons who were recipients of services and were in possession of invoices which were incomplete, in the case where those invoices were then supplemented by the provision of information seeking to prove the occurrence, nature and amount of the transactions invoiced. The court set out the general principles as follows:

> 25. With regard to the rules governing the exercise of the right to deduct, art 18(1)(a) of the Sixth Directive provides that the taxable person must hold an invoice drawn up in accordance with art 22(3) of that directive.
>
> 26. Under art 22(3)(b) of the Sixth Directive the invoice must state clearly the price exclusive of tax and the corresponding tax at each rate, as well as any exemptions. Article 22(3)(c) provides for member states to determine the criteria for considering whether a document serves as an invoice. Furthermore, art 22(8) allows member states to impose other obligations which they deem necessary for the correct collection of the tax and for the prevention of evasion.
>
> 27. It follows that, with regard to the exercise of the right to deduct, the Sixth Directive does no more than require an invoice containing certain information, and member states may provide for the inclusion of additional information to ensure the correct levying of VAT and to permit supervision by the tax authority (see, to that effect, *Jorion (neé Jeunehomme) v Belgium* (Joined cases 123/87 and 330/87) [1988] ECR 4517, para 16).
>
> 28. However, the requirement that the invoice should contain particulars other than those set out in art 22(3)(b) of the Sixth Directive, as a condition for the exercise of the right to deduct, must be limited to what is necessary to ensure the levying of VAT and to permit supervision by the tax authority. Moreover, such particulars must not, by reason of their number or technical nature, make the exercise of the right to deduct practically impossible or excessively difficult (*Jeunehomme and EGI*, para 17)."

66. These paragraphs emphasise the need to have an invoice which complies with article 23 (3)(b) of the Sixth Directive (the formal requirements of which, as I have noted,

were sparse). They do not lend any support to the submission that compliance with formalities laid down by the directive are, in some sense, optional.

67. At [29] the court noted that the Belgian legislation did impose requirements additional to those in the directive itself; and that it was for the national court to decide whether those additional requirements satisfied the principle set out at [28]. At [31] it pointed out that it was not open to member states to make the exercise of the right to deduct VAT dependent on compliance with conditions relating to the content of invoices which are not expressly laid down by the provisions of the Sixth Directive itself. Again, it is implicit that member states may make the exercise of the right to deduct dependent on conditions relating to the content of invoices which *are* expressly laid down by the directive itself. The court continued at [34]:

> "It should be noted that the common system of VAT does not prohibit the correction of incorrect invoices. Accordingly, where all of the material conditions required in order to benefit from the right to deduct VAT are satisfied and, before the tax authority concerned has made a decision, the taxable person has submitted a corrected invoice to that tax authority, the benefit of that right cannot, in principle, be refused on the ground that the original invoice contained an error."

68. What precluded refusal of the right to deduct was the provision of a corrected invoice before the tax authority had made its decision. Thus the tax authorities were entitled to refuse to allow the deduction to be made when claimed because of a failure to comply with a formal requirement imposed by national law. That case does not, therefore, state that the right to deduct may be exercised on the basis of an invoice with does not satisfy article 222 and which cannot be corrected so as to comply.

69. *Barlis 06 — Investimentos Imobiliários e Turísticos SA v Autoridade Tributária e Aduaneira* (Case C-516/14) was another case about an allegedly defective invoice. Legal services had been supplied to the taxable person, but the invoices were said by the Portuguese tax authorities to contain an inadequate break-down and description of them. As paragraph [2] of her opinion Advocate General Kokott said that EU law provides that the invoice must contain "certain minimum" information; and at [22] she said that the mandatory contents of an invoice were laid down "in a binding and exhaustive manner" by Article 226 of the PVD. She identified two questions that needed to be considered: (a) whether the invoices complied with article 222 and (b) the consequences for the right of deduction if the particulars they contained were found to be inadequate. The particulars in question were those in article 226 (6) and (7); namely the nature of the supply and the date of the supply. She described the purpose of the invoice as follows:

> "32. An invoice is intended first to enable a check on whether the person issuing the invoice has paid the tax.
>
> 33. This follows from Article 178(a) of the VAT Directive. It provides that in order to exercise the right of deduction, the recipient of a supply must hold an invoice. According to the case-law, this requirement is intended to ensure that VAT is levied and supervised. This is because, pursuant to this

> provision, deduction of input tax is allowed *only if, in the form of the invoice*, the tax authority can at the time obtain access to a document which, *because of the particulars required by Article 226 of the VAT Directive*, contains the information necessary to ensure the corresponding payment of VAT by the person who issued the invoice. This access to the person who issued the invoice is supported by Article 203 of the VAT Directive. According to it, the VAT shown in an invoice is payable by the person who issued it, regardless of whether a liability to tax has actually arisen, and in particular of whether any supply has actually been made. In such cases this saves the tax authority from requiring other evidence." (Emphasis added)

70. On that basis, the inclusion of the supplier's VRN is an obvious component of the tax authority's ability to check on whether the supplier has paid VAT. If a person is not registered for VAT, he is far less likely to have paid it. Likewise, the inclusion of the customer's name is critical, because otherwise there is the possibility that the same invoice may be used in support of a claim to deduct more than once by different taxable persons. She went on to say that the invoice was a type of insurance for the tax authority and said that without an invoice no input deduction can be made. She continued at [35]:

> "However, this insurance function requires only certain details to be in an invoice, in particular the complete name and address of the taxable person who makes the supply (Article 226(5) of the VAT Directive), *supplemented by his VAT identification number* (Article 226(3)). By contrast, specification of the 'nature' of the supply is not necessary in the invoice in order to monitor the simple payment of the tax by the person who issued it." (Emphasis added)

71. She described these as "mandatory details". She then went on to consider whether the description of the legal services supplied complied with the requirements of article 226 and said at [71] that it did not. So she proceeded to consider the second of the questions that she had identified. She began by saying:

> "75. To answer this question one must interpret Article 178(a) of the VAT Directive, which governs the exercise of the right of deduction. According to this provision, in order to exercise his right of deduction arising under Article 168(a) of the VAT Directive, a taxable person must 'hold an invoice drawn up in accordance with Articles 220 to 236'.
>
> 76. On its wording the legislative provision is clear. If the taxable person does not hold an invoice which satisfies the requirements of Article 226 of the VAT Directive, he may indeed have a right of deduction under Article 168(a). However, pursuant to Article 178(a) of the VAT Directive, he cannot *exercise* this right so long as he does not hold an invoice which meets the requirements of Article 226 of the VAT Directive." (Original emphasis)

72. At [77] she said that Member States were prohibited by EU law from granting the right of deduction if the taxable person did not hold an invoice drawn up in accordance with Article 226; and that this was confirmed by EU case-law. She continued:

> "79. First, one must distinguish between an invoice which has been drawn up defectively and the infringement of *other* formal obligations which, according to the case-law, have no effect on the right to deduction, such as for example the fact that the supplier or the recipient of the supply is not registered for VAT, or a breach of accounting obligations. As regards such formal obligations, there is no provision such as Article 178(a) of the VAT Directive, which requires a person to hold a properly drawn up invoice in order to exercise the right of deduction.
>
> 80. As regards formal obligations which concern invoices, there is thus a specific legal provision. *In its consistent case-law the Court has therefore held that the exercise of the right of deduction depends on the invoice containing the details required by Article 226 of the VAT Directive.* The Member States must merely not make exercising it subject to additional requirements as regards the contents of an invoice which are not provided for in the VAT Directive." (Emphasis added)

73. This discussion distinguishes between non-compliance with article 226 on the one hand, and non-compliance with other (i.e. national) formalities. Compliance with article 226 is essential. At [85] she said:

> "… the present case does not concern an incorrect detail but the complete absence of the necessary details from an invoice. It is one thing if the details required by Article 226 of the VAT Directive are not present at all, or not to an adequate extent, but another if they are present but incorrect. In the former case, the requirements of Article 178(a) in conjunction with Article 226 of the VAT Directive are not complied with even in point of form."

74. She concluded at [87]:

> "In the present case, then, the fact that the invoices do not comply with the requirements of Article 226(6) and (7) of the VAT Directive in principle precludes exercising the right of deduction, in accordance with Article 178(a) of the VAT Directive. *Therefore, in order to be entitled to exercise his right of deduction, the taxable person in such a case must obtain a corrected invoice from the person who issued the invoice*." (Emphasis added)

75. She then went on to consider whether the invoice could be supplemented so as to comply with article 226. She said that in principle it could be; and that it would be

proportionate to require the taxable person to obtain a corrected invoice from his supplier. That question does not arise on the facts of this case.

76. In my judgment the Advocate General's opinion could not be clearer about the need to comply with the requirements of article 226 of the PVD as a precondition of the exercise of the right to deduct.

77. In the course of its judgment the court posed the question whether the invoices complied with article 226. It held that they did not, but that it was for the national court to decide whether the provision of additional information could be treated as invoices so as to bring them into compliance. The court then went on to consider the effect of non-compliance. It said (in a passage which I must quote at length, although omitting citations):

> "40. As regards the substantive conditions which must be met in order for the right to deduct VAT to arise, it is apparent from Article 168(a) of Directive 2006/112 that the goods or services relied on to give entitlement to that right must be used by the taxable person for the purposes of his own taxed output transactions and that those goods or services must be supplied by another taxable person as inputs...
>
> 41 As regards the formal conditions for the exercise of that right, it is apparent from Article 178(a) of Directive 2006/112 that the exercise of the right is subject to holding an invoice drawn up in accordance with Article 226 of that directive….
>
> 42 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. Consequently, where the tax authorities have the information necessary to establish that the substantive requirements have been satisfied, they cannot, in relation to the right of the taxable person to deduct that tax, impose additional conditions which may have the effect of rendering that right ineffective for practical purposes….
>
> 43 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 Directive 2006/112 if they have available all the information to ascertain whether the substantive conditions for that right are satisfied."

78. It is important to be clear about what the formal conditions were. They were the holding of an *invoice* drawn up in accordance with article 226. All that the court was saying was that if the information required to be in the invoice could be established by other means, then the taxable person could exercise the right to deduct. As I read this, therefore, all the court was saying was that if the tax authorities can be satisfied that the requirements of article 226 (6) and (7) were met, then the right to deduct could be exercised. For the court to have held that the right to deduct could be exercised on the

basis of an invoice that did not comply with article 226 and could not be made to comply would have been a radical and unannounced departure from previous case law.

79. In *Senatex GmbH v Finanzamt Hannover-Nord* (Case C-518/14), [2017] STC 205 the taxable person's VAT return was said by the German tax authorities to be defective, because the underlying invoice did not contain the addressee's tax number or VAT registration number; and did not refer to any other document from which those details could be deduced. The relevant details were subsequently provided. Once corrected the invoice complied with article 226 and, in particular, the requirement of the VRN. The main issue was whether the corrections to the invoice had retrospective effect. That question was governed by national law; and the court had to decide whether that was compatible with EU law. As other Advocates General had done, Advocate General Bot distinguished between the accrual of the right to deduction and the exercise of that right. He said:

> "32. The rules governing exercise of the right of deduction are set out in art 178 of the VAT directive. In particular, the taxable person must hold an invoice drawn up in accordance with art 226 of that directive, which must include the VAT identification number.
>
> 33. These conditions which must be fulfilled by the taxable person in order to exercise his right of deduction have been described as 'formal conditions' by the court. They do not constitute conditions to be fulfilled in order for the right to deduct VAT to arise, but they do allow the tax authorities to have all the information necessary to collect VAT and to exercise their supervision in order to prevent evasion.
>
> 34. Where, in an inspection by the tax authorities for example, they find errors or omissions in the drawing up of the invoice, the taxable person has the possibility of correcting that invoice with a view to exercising his right of deduction. That possibility is provided for in art 219 of the VAT directive, which states that 'any document or message that amends and refers specifically and unambiguously to the initial invoice shall be treated as an invoice'. The court has also ruled that that directive does not prohibit the correction of incorrect invoices."

80. He then went on to consider the temporal effect of a correction to an invoice. Although it is noticeable that compliance with article 226 was described as the fulfilment of formal conditions, he did not suggest that the right to deduct could be exercised on the basis of an uncorrected invoice. Later in his opinion he said:

> "43. …I do not dispute the importance of the invoice in the common system of VAT. It is a form of proof which permits the collection and deduction of VAT. Thus, a trader who invoices the sale of goods or the supply of a service issues an invoice with VAT and collects that VAT on behalf of the state. Similarly, that invoice will enable a taxable person who has

> paid VAT to provide proof of this and thus to deduct the VAT. More specifically, the VAT identification number allows the tax authorities to levy VAT more easily, by identifying the taxable person concerned, and to verify that the transactions actually occurred, in order to prevent evasion.
>
> 44. However, as the court has ruled on several occasions, the 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. This case law is all the more relevant in this case in so far as the failure to state the VAT identification number was rectified by the taxable person, who corrected the invoices, thereby also complying with the formal requirements laid down by EU law."

81. At [46] he said:

> "The required details on the invoice, which include the VAT identification number, are intended to enable the tax authorities to ensure the correct collection of the VAT and to permit supervision in order to prevent evasion. As stated at the hearing, I cannot see how, in such a case, the tax authorities can differentiate between a taxable person acting in good faith and a fraudster. Moreover, it is easier for a fraudster to enter a false VAT identification number, counting on the fact that his return will slip through the net, than not to include it at all, which would, in contrast, attract the attention of the tax authorities and give them cause for an inspection. If we imagine a taxable person acting in good faith whose invoice submitted in his return did not contain a VAT identification number, he would, in all likelihood, expose himself to an inspection by the tax authorities and could find himself in the same situation as Senatex, that is to say, having his right of deduction carried forward and having interest for late payment imposed, with significant financial consequences."

82. In the course of its judgment the court said (omitting citations):

> "29. As regards the formal conditions for the right of deduction, in accordance with art 178(a) of Directive 2006/112, the exercise of that right is subject to holding an invoice drawn up in accordance with art 226 of that directive …. Under art 226(3) of that directive, the invoice must mention inter alia the VAT identification number under which the taxable person made the supply of goods or services….
>
> 38. Secondly, 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… As noted in para 29, above, holding an invoice showing the details mentioned in art 226 of Directive 2006/112 is a formal condition, not a substantive condition, of the right to deduct VAT."

83. The court noted at [33] that it was common ground that the invoices were properly corrected. Thus the court was not dealing with a case in which the invoices were not and could not be corrected. At [35] the court said:

> "On this point, it must be recalled that, in accordance with the first paragraph of art 179 of Directive 2006/112, the deduction is to be made 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'. It follows that the right to deduct VAT must in principle be exercised in respect of the period during which, first, the right has arisen and, *secondly, the taxable person is in possession of an invoice*." (Emphasis added)

84. That statement does not suggest that possession of an invoice in corrected form is immaterial. On the contrary, it is one of two conditions necessary to exercise the right of deduction.

85. At [41] the court said:

> "Finally, it must be stated that the member states have power to lay down penalties for failure to comply with the formal conditions for the exercise of the right to deduct VAT. In accordance with art 273 of Directive 2006/112, the member states can adopt measures to ensure the correct collection of VAT and to prevent evasion, provided that those measures do not go further than is necessary to attain those objectives and do not undermine the neutrality of VAT."

86. The court's answer to the question referred was:

> "… arts 167, 178(a), 179 and 226(3) of Directive 2006/112 must be interpreted as precluding national legislation, such as that at issue in the main proceedings, under which the correction of an invoice in relation to a detail which must be mentioned, namely the VAT identification number, does not have retroactive effect, so that the right to deduct VAT exercised on the basis of the corrected invoice relates not to the year in which the invoice was originally drawn up but to the year in which it was corrected."

87. *Senatex*, then, was a case in which the failure to state the VRN on the invoice was ultimately corrected. Moreover, the court's answer to the question referred does not suggest that the right to deduct could have been exercised absent the correction.

88. In *Geissel v Finanzamt Neuss* (Joined Cases C-374/16 and C-375/16) the issue was whether the invoice had correctly specified the address of the supplier. In both cases, although an address was given it was not an address at which the supplier carried out any economic activity. Advocate General Wahl noted at [27] that the material conditions for the deduction of input tax were not in issue. If all that mattered was whether the material (or substantive) conditions had been satisfied in order for the right to deduct to be exercisable it is difficult to see (a) why the German courts would have made the reference in the first place; (b) why the CJEU would have thought it necessary to answer the questions referred; and (c) why neither the Advocate General nor the court gave a very short answer. The very fact that the question was asked and answered in the way that it was is inconsistent with Ms Shaw's submission.

89. The Advocate General said:

> "40. The obligation laid down in Article 226(5) of the VAT Directive to include the address of the issuer on the invoice has to be read in light of that double function of the invoice. The indication of the address of the issuer of the invoice serves — in combination with his name and VAT identification number — the purpose of establishing a link between a given economic transaction and a specific economic operator, the issuer of the invoice. In other words, it allows the issuer of the invoice to be identified.
>
> 41. *That identification is essential* for the tax authorities to be able to perform the necessary checks as to whether the amount of VAT is declared and paid. In turn, the identification also allows the taxable person to verify whether the issuer is a taxable person for the purposes of the VAT rules.
>
> 42. Against that background, I cannot share the view, expressed by the Austrian and German Governments, that the existence of actual economic activities, or a tangible presence of the trader's business at the address indicated on the invoice, is necessary to enable a correct identification of the issuer of the invoice and to contact him. Indeed, in accordance with Article 226 of the VAT Directive, the invoice also needs to include a number of other elements which serve that purpose. *Among those, the VAT identification number of the supplier of the goods or services is of particular importance.* That number can be easily verified by the authorities. In addition, the validity of that number can also be verified, including online, by anybody." (Emphasis added)

90. In the course of its judgment, the court said:

> "41 In the third place, as regards the teleological interpretation of Article 226 of the VAT Directive, the purpose of the details which must be shown on an invoice is to allow the tax authorities to monitor the payment of the tax due and the existence of a right to deduct VAT…

> 42 In that respect, as the Advocate General noted, in essence, in points 40 and 41 of his Opinion, the aim of indicating the address, name and VAT identification number of the issuer of the invoice is to make it possible to establish a link between a given economic transaction and a specific economic operator, namely the issuer of the invoice. The identification of the issuer of the invoice allows the tax authorities to check whether the amount of VAT giving rise to the deduction has been declared and paid. Such identification also allows the taxable person to check whether the issuer of the invoice is a taxable person for the purposes of the VAT rules.
>
> 43 In that regard, *it should be noted that the VAT identification number of the supplier of the goods or services is an essential piece of information in that identification.* That number is easily accessible and verifiable by the tax authorities.
>
> 44 Moreover, as the Advocate General noted in point 43 of his Opinion, in order to obtain a VAT identification number, undertakings must complete a registration process in which they are required to submit a VAT registration form, along with supporting documentation." (Emphasis added)

91. It seems to me to follow from this that if the VAT identification number is missing and cannot be supplied the invoice fails to comply with article 226 in an "essential" respect. If something is essential, I do not see how an invoice which lacks an essential component that cannot be otherwise supplied can be relied on in order to exercise the right to deduct.

92. *Vădan v Agenţia Naţională de Administrare Fiscală* (Case C-664/16) concerned the ability to exercise the right to deduct without any invoice at all. The taxable person proposed to establish his right to deduct by means of an expert's report. The court held that he could not. Advocate General Tanchev began his opinion by saying:

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

93. If Ms Shaw's submission is right, then the Advocate General must have been wrong. It is also instructive to consider the question that was referred to the court. The first question was this:

> "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?"

94. If Ms Shaw were correct, the simple answer to that question would have been "yes". But that is not what the court decided.

95. The court repeated the distinction between the substantive requirements of the right to deduct, and the formal requirements for exercising it. It repeated 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". But it held on the facts that the failure to produce invoices could not be replaced by an expert's report.

96. The next EU case to which I must refer is *Zipvit Ltd v HMRC* (Case C-156/20), [2022] 1 WLR 2637. Royal Mail had supplied services to Zipvit in the mistaken belief that they were exempt supplies, which is what domestic law provided. Consequently the invoices did not specify any VAT as payable. But the CJEU subsequently decided that the UK had not correctly transposed the directive and that in fact the supplies were not exempt; and should have been subject to VAT. The question was whether Zipvit could exercise the right to deduct, on the basis that the price paid for the supplies had to be treated as inclusive of VAT. The Supreme Court referred two questions to the CJEU (a) whether VAT had been due or paid and (b) was an invoice stating the amount of VAT necessary in order to exercise the right to deduct? The reference was made before the UK left the EU and so the consequences of the reference are the same as they would have been before the UK left the EU. Newey LJ explains this in *HMRC v Perfect* [2022] EWCA Civ 330, [2022] 1 WLR 3180.

97. The CJEU only found it necessary to answer the first question; but Advocate General Kokott considered both. She issued her opinion on 8 July 2021. She summarised her view as follows:

> "48. Either the right of deduction can be exercised upon the supply of the goods or services, in keeping with article 167 and article 63 of the VAT Directive—in that case, the only decisive factor is whether, despite the mutual error, VAT was included in the price paid (see section C.3)—or it depends upon possession of an invoice, in accordance with article 178 of the VAT Directive, stating the amount of VAT passed on.
>
> 49. I consider the second approach to be correct. On closer examination, only that view is also compatible with the court's case law to date. In that respect, a distinction must first be drawn between the origin of the right of deduction *in principle* and the origin of the right of deduction *in a given amount*.
>
> 50. Closer inspection of the court's case law shows that it has to date ruled mainly on the origin of the right of deduction *in principle*. The court has found that the right to deduct and, accordingly, to a refund is an integral part of the VAT scheme and in principle may not be limited. That right is exercisable

> immediately in respect of all taxes charged on input transactions. According to the court's settled case law, the fundamental principle of VAT neutrality requires the deduction or refund of input VAT to be allowed if the substantive requirements are satisfied, even if the taxable person has failed to comply with some of the formal requirements. The only exception should be where non-compliance with such formal requirements has effectively prevented the production of conclusive evidence that the substantive requirements were satisfied." (Original emphasis)

98. Although the Advocate General only referred to an invoice stating the amount of VAT passed on, that requirement derives from article 178 which in turn refers to the whole of article 226 as governing the contents of the invoice. It is clear from paragraphs 48 and 49 that possession of a compliant invoice is essential. This is reinforced by what she said at [76]; namely that possession of an invoice is a substantive condition and that the right of deduction "depends upon possession of a corresponding invoice".

99. She examined closely the previous case-law of the court. She pointed out at [78] that the formal shortcomings which do not preclude the right of deduction always concern the details of the content of an invoice, never possession of an invoice as such (or the existence of an invoice). At [79] she said:

> "Thus, that case law only refers to the absence of *certain* formal requirements, not to the absence of *all* formal requirements. It cannot therefore be concluded from that case law that a right of deduction can arise if no invoice is held. The court itself only notes that "holding an invoice showing the details mentioned in article 226 of the VAT Directive is a formal condition, [not a substantive condition,] of the right to deduct VAT". That observation is correct. The provision of all the information specified in article 226 of the VAT Directive is a formal requirement. Provided it is not essential (as explained in point 81 et seq), that information may also be added or amended at a later date (for example in accordance with article 219 of the VAT Directive). Possession of an invoice in accordance with article 178 of the VAT Directive is of itself a situation in fact, not a formal requirement." (Original emphasis)

100. She continued:

> "80. Furthermore, the court also "only" concludes from that finding that the tax authority cannot refuse the right to deduct VAT on the sole ground, for example, that an invoice does not satisfy the conditions required by article 226(6) and (7) of the VAT Directive (precise description of the quantity and nature of supply and date of the supply) if they have available all the information to ascertain whether the substantive conditions for that right are satisfied (*Barlis 06*, para 43). The same applies to the information mentioned in article 226(3) (supplier's VAT

> identification number) (*Senatex* [2017] STC 205, para 40 et seq) or article 226(2) (invoice number) (*Pannon Gép Centrum Kft v APEH Központi Hivatal Hatósági Főosztály Dél-dunántúli Kihelyezett Hatósági Osztály* (Case C-368/09) [2010] STC 2400, para 45 ; similarly, *Bundeszentralamt für Steuern v Y-GmbH* (Case C-346/19) EU:C:2020:1050, paras 53 and 57). Consequently, the court ascribed retroactive effect to the correction of a (formally incorrect) invoice already held by the recipient of the supply (see *Senatex* , para 43, *Barlis 06*, para 44 and *Petroma Transport*, para 34).
>
> 81. …A document that charges for a supply of goods or services is in fact an invoice within the meaning of article 178(a) of the VAT Directive if it enables both the recipient of the supply and the tax authorities to establish which supplier has passed on to which recipient of the supply which amount in VAT for which transaction, and when it has done so. That means it needs to state the supplier, the recipient of the supply, the goods or services supplied, the price and the VAT, which must be stated separately… As I have already stated elsewhere,… if those five essential items of information are provided, the spirit and purpose of the invoice are fulfilled and the right of deduction ultimately arises…
>
> 82. Failure to comply with the other requirements specified in article 226 of the VAT Directive does not preclude a right of deduction, provided they are corrected in the administrative or court proceedings. That legal consequence ultimately also follows from the court's case law on the retrospective correction of an invoice."

101. It seems clear from this passage that the Advocate General did not regard the inclusion of the VRN in the invoice itself as one of the essential items of information, provided that its omission could be and is corrected. That is what happened in *Senatex* where the supplier's VRN was in fact supplied to the tax authorities. As she said at the end of paragraph [80], the court gave retroactive effect to a *corrected* invoice. Among the cases she cited in paragraph [80] was *Barlis*; and her explanation of that case is the same view that I take of what it decided. I do not consider that she could have meant that it was permissible for the VRN never to be supplied, as that would have been contrary to what the court itself had said in *Geissel* and, indeed, to what she herself had said in *Barlis*. By contrast, one of the items that was essential was the recipient of the supply, who is expressly mentioned in paragraph [81]. One of the defects in the invoices in the present case is that they failed to name the customer.

102. The court ruled that Zipvit could not exercise the right to deduct because there was no VAT "due or payable" for the purposes of article 168. It did not, therefore, need to answer the question about the form of the invoice. When the case returned to these shores, the Supreme Court also found it unnecessary to rule on that question: [2022] UKSC 12, [2022] 1 WLR 2670.

103. On its way to Luxembourg, *Zipvit* was considered by this court: [2018] EWCA Civ 1515, [2018] 1 WLR 5729. Henderson LJ gave the only reasoned judgment. He considered *Barlis* and other EU case-law in some detail. At [108] he said:

> "At first sight, the decision in *Barlis* may appear to provide some support for Zipvit's case. But the facts could hardly have been more different. The only defects in the relevant invoices were that they did not provide a proper description of the legal services which had been supplied, and thus did not comply with article 226(6) and (7) which required details of "the extent and nature of the services rendered" and the date on which the supply had been made or completed. There was no reason to doubt that the corresponding output tax had been paid by the lawyers, nor was there any doubt about its chargeable rate and amount. In the present case, by contrast, the original invoices issued by Royal Mail to Zipvit described the supplies as exempt, and Zipvit has been wholly unable to provide any evidence that tax on the supplies was paid or accounted for by Royal Mail when it became clear that the supplies were in fact standard rated. Zipvit is therefore claiming to be entitled to exercise its right to deduct without being able to produce either a compliant VAT invoice, or supplementary information which shows that the conditions of article 226(9) and (10) are satisfied, that is to say details of "the VAT rate applied" and "the VAT amount payable", coupled with evidence of payment of that amount by Royal Mail."

104. At [113] he said:

> "Exercise of the right to deduct is subject to a mandatory requirement to produce a VAT invoice, which must contain the specified particulars. Zipvit is unable to produce invoices which satisfy the requirements of article 226(9) and (10), and it is also unable to produce any supplementary evidence showing payment of the relevant tax by Royal Mail. A necessary precondition for exercise of the right to deduct therefore remains unsatisfied."

105. He continued at [114]:

> "I also fail to see how Zipvit could hope to circumvent this fundamental difficulty by arguing that the requirement for a compliant VAT invoice is one of form rather than substance, and by invoking the discretion which HMRC have to accept alternative evidence under regulation 29(2) of the 1995 Regulations. It is true that *Barlis* [2016] STC 43 (at paras 40 and 41) and a number of other cases which we were shown, consistently draw a distinction between the substantive conditions which must be met in order for the right to deduct VAT to arise, and the formal conditions for the exercise of that right. But to describe a requirement as "formal" does not

> necessarily imply that compliance with it is optional, or that a failure to satisfy it is always capable of being excused. Cases like *Barlis* show that some of the requirements relating to invoices in article 226 must be dispensed with, if the tax authorities are supplied with the information necessary to establish that the substantive requirements of the right to deduct are satisfied. But the court was careful in *Barlis* to confine its discussion to the requirements in article 226(6) and (7) , and I do not think its reasoning can be extended to cover a failure to comply with the fundamental requirements relating to payment of the relevant tax in article 226(9) and (10). Provision of an invoice which complies with those requirements is essential to the proper performance by HMRC of their monitoring functions in relation to VAT, and is needed as evidence that the supplier has duly paid or accounted for the tax to HMRC."

106. Henderson LJ's explanation of *Barlis* is also the view that I take. He concluded at [117]:

> "The important point is that the inability of Zipvit to produce a compliant VAT invoice in support of its claim to deduct input tax is in my judgment fatal."

107. Although we are not bound by the decision of this court on the invoice issue in *Zipvit* (because the Supreme Court decided the case on a different point), I do not consider that there is anything in that judgment that is out of step with EU case-law as it stood at the time of *Zipvit*. That case law distinguishes between the accrual of the right to deduct, and the right to exercise it. Up to that time the EU case-law seems to me to fall into a number of different groups. The first group concerns requirements of national law which impose formal requirements that go beyond what the PVD (or before it the Sixth Directive) itself requires. In those cases, the taxable person may exercise the right of deduction even if some of those additional national requirements have not been satisfied. The second group concerns cases in which an invoice which does not, initially, comply with article 226, is corrected by evidence subsequently supplied which brings it into conformity. In those cases the taxable person may also exercise the right to deduct. The third group concerns cases to which the reverse charge procedure applies, or which concern intra-community supplies, where there is no EU requirement to hold an invoice complying with article 226. In addition, the case-law holds that some components of the invoice required by the PVD are more important than others. The VRN, with which we are concerned, was described in *Geissel* as "essential;" as was the name of the customer in *Zipvit*.

108. The real question, I think, is whether EU law has moved on, and what the effect of that is.

109. The VATA and the VATR are "EU-derived domestic legislation" as defined by section 1B (7) of the European Union (Withdrawal) Act 2018. Section 2 of that Act provides that EU-derived domestic legislation, as it has effect in domestic law immediately before 31 December 2020 ("IP completion day"), continues to have effect in domestic law on and after that day. Under section 5 of that Act the principle of supremacy of EU law continues to apply so far as relevant to the interpretation,

disapplication or quashing of any enactment or rule of law passed or made before IP completion day.

110. Section 6 deals with the interpretation of EU-retained law, which includes EU derived domestic legislation. It provides:

> "(1) A court or tribunal—
>
> (a) is not bound by any principles laid down, or any decisions made, on or after IP completion day by the European Court, and
>
> (b) cannot refer any matter to the European Court on or after IP completion day.
>
> (2) Subject to this and subsections (3) to (6), a court or tribunal may have regard to anything done on or after IP completion day by the European Court, another EU entity or the EU so far as it is relevant to any matter before the court or tribunal.
>
> (3) Any question as to the validity, meaning or effect of any retained EU law is to be decided, so far as that law is unmodified on or after IP completion day and so far as they are relevant to it—
>
> (a) in accordance with any retained case law and any retained general principles of EU law, and
>
> (b) having regard (among other things) to the limits, immediately before IP completion day, of EU competences."

111. Retained EU case law means any principles laid down by, and any decisions of, the European Court, as they have effect in EU law immediately before IP completion day. Against that changed legal landscape I turn to the post-Brexit cases.

112. In both of the post-Brexit cases to which we were referred, the court gave its decision without an opinion from the Advocate General. Under article 20 of the rules of procedure of the CJEU this course is adopted where, after hearing the Advocate General, the court decides that the case raises no new point of law.

113. In *Ferimet SL v Administracíon General del Estado* (Case C-281/20) the invoices were issued in the name of a fictitious supplier, but the taxable person nevertheless claimed the right to deduct. This was another case in which the reverse charge procedure applied, with the consequence that the PVD did not lay down any requirements about the contents of an invoice. The court gave judgment on 11 November 2021. It held that because the taxable person knowingly mentioned a fictitious supplier on the invoices it had failed to satisfy "a material condition governing the right to deduct VAT". Consequently, the tax authorities were entitled to refuse to permit the deduction. At [28] the court pointed out that in the case of the right to deduct arising under the reverse charge procedure, the taxable person was not

required to hold an invoice drawn up in accordance with the formal requirements of the PVD. The court also said:

> "33. Thus the Court has held that the fundamental principle of VAT neutrality requires deduction of input VAT to be allowed if the material conditions are satisfied, even if the taxable person has failed to comply with some of the formal conditions …
>
> 34 Consequently, where the tax authorities have the information necessary to establish that the substantive requirements have been satisfied, they cannot, in relation to the right of the taxable person to deduct that tax, impose additional conditions which may have the effect of rendering that right ineffective for practical purposes…
>
> 35 Those considerations apply, in particular, in the context of the application of the reverse charge procedure…
>
> 36 The position may, however, be different if non-compliance with formal requirements effectively prevents the production of conclusive evidence that the substantive requirements have been satisfied...
>
> 37 That may be the case where the identity of the true supplier is not mentioned on the invoice relating to the goods or services on the basis of which the right to deduct is exercised, if that prevents the supplier from being identified and, therefore, the supplier's status as a taxable person from being established, since, as has been noted in paragraph 27 of the present judgment, that status is one of the material conditions of the right to deduct VAT.
>
> 38 In that context, it should be pointed out that, first, the tax authorities cannot restrict themselves to examining the invoice itself. They must also take account of the additional information provided by the taxable person… Secondly, it is for the taxable person seeking deduction of VAT to establish that he or she meets the conditions for eligibility… The tax authorities may thus require the taxable person him- or herself to produce the evidence they consider necessary for determining whether or not the deduction requested should be granted… "

114. It went on to say at [43] that it was for the taxable person to prove that its supplier was itself a taxable person; but that that could be apparent from the circumstances. Since the reverse charge procedure did not require the taxable person to hold an invoice that complied with article 226 (see [28] and [35]), I do not consider that that case is directly applicable to a case in which the taxable person is so required. It is consistent with previous cases about the reverse charge procedure, and does not advance Ms Shaw's argument.

115. In *Kemwater ProChemie sro v Odvolací finanční ředitelství* (Case C-154/20) the right to deduct was refused on the ground that the supplier of the services had not been identified. The court gave its decision on 9 December 2021. In *Kemwater* the court held that the purpose of naming the supplier on the invoice was to enable the tax authorities to check that the supplier was a taxable person. The court said:

> "24. It should be recalled that the right to deduct VAT is subject to compliance with material as well as formal conditions. As regards the material conditions, it is apparent from Article 168(a) of Directive 2006/112 that, in order for that right to be available, first, the person concerned must be a 'taxable person' within the meaning of that directive. Secondly, the goods or services relied on as the basis for claiming the right of deduction must be supplied by another taxable person as inputs and those goods or services must be used by the taxable person for the purposes of his or her own taxed output transactions. As to the detailed rules governing the exercise of the right to deduct VAT, which may be considered formal conditions, Article 178(a) of Directive 2006/112 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 11 November 2021, *Ferimet*, C-281/20, EU:C:2021:910, paragraph 26 and the case-law cited).
>
> 25 It follows that the naming of the supplier, on the invoice relating to the goods or services on the basis of which the right to deduct VAT is exercised, is a formal condition for the exercise of that right. By contrast, the status of the supplier of the goods or services as a taxable person is, as the referring court and the Czech, Spanish and Hungarian Governments observe, among the material conditions for the exercise of that right (see, to that effect, judgment of 11 November 2021, *Ferimet*, C-281/20, EU:C:2021:910, paragraph 27)."

116. What the court did not apparently recognise was that *Ferimet* was a case about the reverse charge procedure as regards which the PVD does not prescribe the contents of the invoice. The court went on to say:

> "34 … it is for the taxable person exercising the right to deduct VAT, in principle, to establish that the supplier of the goods or services on the basis of which that right is exercised had the status of taxable person. Accordingly, the taxable person is required to provide objective evidence that goods or services were actually supplied as inputs by taxable persons for the purposes of his or her own transactions subject to VAT, in respect of which he or she has actually paid VAT. 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 or she has paid VAT…

…

36 So far as concerns the burden of proof as to whether the supplier is a taxable person, a distinction must be made between, on the one hand, establishing a material condition governing the right to deduct VAT and, on the other, determining the existence of VAT fraud…

37 Thus, although, in the context of fighting VAT fraud, a taxable person wishing to exercise the right to deduct VAT cannot, as a general rule, be required to check that the supplier of the goods or services concerned has 'taxable person' status, the position is otherwise if establishing that status is necessary for the purpose of verifying that that material condition governing the right of deduction is satisfied…

38 In the latter situation, it is for the taxable person to establish, on the basis of objective evidence, that the supplier has the status of taxable person, unless the tax authorities have the information necessary to check that that material condition governing the right to deduct VAT is satisfied. In that regard, it follows from the wording of Article 9(1) of Directive 2006/112 that the concept of 'taxable person' is defined widely, on the basis of the factual circumstances, and therefore that the supplier's status as a taxable person may be apparent from the circumstances of the case…

39 That is so in particular, even though the Member State has made use of the option in Article 287 of Directive 2006/112 to exempt taxable persons whose annual turnover is no higher than a certain amount, where it can be inferred with certainty from the factual circumstances, such as the volume and price of the goods or services purchased, that the supplier's annual turnover exceeds that amount, with the result that that supplier cannot benefit from the exemption provided for in that article, and that supplier necessarily has the status of taxable person.

40 To deny a taxable person the right to deduct VAT on the ground that the true supplier of the goods or services concerned has not been identified and that that taxable person has not proved that that supplier was a taxable person, when it clearly follows from the factual circumstances that that supplier necessarily had that status, would be contrary to the principle of fiscal neutrality and to the case-law cited in paragraphs 26 to 30 above. Consequently, contrary to the referring court's submissions, in order to be able to exercise that right the taxable person cannot be required, in every case, to prove, where the true supplier of the goods or services concerned has not been identified, that that supplier has the status of taxable person."

117. The court held that the status of the supplier as a taxable person is a "material" condition. I take that to mean the same as what previous cases had referred to as "substantive" conditions. That meant that no right of deduction could be exercised unless that condition was satisfied. But importantly, for present purposes, the court held in terms that the status of the supplier as a taxable person could be inferred with certainty from the factual circumstances, such as the volume and price of goods or services purchased. It went on to say that it was not possible to deny the right of deduction where it clearly followed from the factual circumstances that the supplier necessarily had the status of a taxable person. When the court said that it would be contrary to fiscal neutrality to deny the right of deduction, what it must have been referring to is *the exercise* of the right of deduction. The court did not say anything about the need to correct invoices which did not comply with article 226. Since the supplier could not be identified, it must also follow that the supplier's VRN was not available either. In that respect, I consider that despite the fact that the court adopted the procedure under article 20 of its rules of procedure, and must therefore have thought that it was not dealing with a new point of law, *Kemwater* broke new ground.

118. It is also noticeable that in *Kemwater* the court did not refer to *Geissel* and on one view directly contradicts it. The only case that it cited was *Ferimet*. But *Ferimet* did not refer to *Geissel* either. Moreover, as I have said, *Ferimet* was a reverse charge procedure case for which the PVD itself laid down no formal requirements. The court in *Kemwater* did not explain why it was transposing a case dealing with the reverse charge procedure to the wholly different situation which it was considering.

119. Because judgment in *Kemwater* was given after 31 December 2020 we are not bound by it, although we may have regard to it. In my judgment it is at odds with the previous jurisprudence of the court; proceeded to a decision without the benefit of an Advocate General's opinion; does not explain why it applied a case in which no EU formalities were prescribed to one in which they were; and does not deal with the cases which only gave effect to corrected invoices, or where the taxable person ultimately supplied the information that the PVD required the invoice to contain. Although I have had regard to it, I do not consider that we should follow it.

120. In my judgment, Tower Bridge did not have the ability to exercise its right of deduction as of right.

Discretion

121. That leads to the second ground of appeal, namely the argument that HMRC ought to have permitted Tower Bridge to exercise the right of deduction. The primary means by which a taxable person may exercise the right to deduction is by possession of a valid VAT invoice, whose contents are prescribed by regulation 13 of the VATR. But the proviso to regulation 29 states:

> "provided that where the Commissioners so direct, either generally or in relation to particular cases or classes of cases, a claimant shall hold, instead of the document or invoice (as the case may require) specified in sub-paragraph (a)…above, such other documentary evidence of the charge to VAT as the Commissioners may direct"

122. It is common ground that the proviso gives discretion to HMRC. Where HMRC exercise a discretion entrusted to them, the role of the FTT is supervisory only: *Customs and Excise Commissioners v Peachtree Enterprises Ltd* [1994] STC 747. It is also common ground that where the proviso refers to "the charge to VAT" what it is referring to is the input tax which the taxable person claims to be entitled to deduct. That paved the way for Ms Shaw's submission that all that HMRC were entitled to require was evidence that the person claiming the right was a taxable person; the goods or services supplied to him were supplied for the purposes of his own taxable transactions and supplied by him to another taxable person; and that the input tax had actually been incurred and paid. There was no other discretion to exercise.

123. In my judgment, however, there are in fact two exercises of discretion embedded within the proviso. The first is whether to entertain an application to establish the right to deduct otherwise than by a compliant invoice ("where the Commissioners so direct"). The second, if the first discretion is exercised in the taxable person's favour, is the discretion to specify the documentary evidence that HMRC require in order to prove that the input tax has been incurred ("such other documentary evidence of the charge to VAT as the Commissioners may direct").

124. HMRC refused to exercise their discretion to allow recovery of the input tax on the basis that: (i) Stratex was not registered for VAT; (ii) the transactions were connected to fraud; and (iii) CFE failed to conduct reasonable due diligence in relation to the transactions.

125. As we have seen from the EU case law the court has held that national tax authorities should allow defective invoices to be corrected by the subsequent supply of information which ought to have been in the invoices in the first place but was not. That is the primary purpose of HMRC's discretion under regulation 29.

126. As Mr Puzey correctly submitted on behalf of HMRC, possession by the taxable person of a valid VAT invoice is HMRC's first line of defence against fraud in the system. If the invoice does not contain any VAT number there is the possibility (that transpired in this case) that the transaction was fraudulent. If the customer's name is missing that raises the possibility that the invoice may be used more than once to make duplicate claims, as Arnold J correctly noted in *HMRC v Boyce* [2017] UKUT 0177 (TCC). Arnold J also said, again correctly, that HMRC were being asked to make an exception to the general rule that the right to deduct cannot be exercised without a valid VAT invoice and that it is therefore for the taxable person to demonstrate why an exception should be made.

127. On the facts of this case, if an exception were to be made, there would be a loss to the public purse consisting of the input tax, with no corresponding gain to the public purse from the output tax that Stratex ought to have paid but fraudulently did not. As Judge Jones noted in his decision at [320], CFE had failed to carry out "the most basic of checks on Stratex". In *Collée* at [36] the court expressly referred to the question whether the failure to provide the evidence could lead to a loss of tax revenues. These are perfectly legitimate matters for HMRC to take into account in deciding whether to exercise the first discretion in the taxable person's favour.

128. Nor is this a case in which a defective invoice can be corrected by evidence subsequently supplied. Although it would, perhaps, be possible for the customer name

to be supplied, the VRN cannot because it does not exist. The purpose for which Tower Bridge seeks to impugn HMRC's exercise of discretion is therefore outside the primary purpose of the proviso to regulation 29.

129. *Kittel* has nothing to say about this kind of case, as *Kittel* applies even where the taxable person has a compliant VAT invoice.

130. In my judgment the attack on HMRC's exercise of discretion fails.

131. The question of discretion also came up in *Zipvit*. Since the exercise of discretion was a matter of national law, it was not among the questions referred to the CJEU; and the Supreme Court did not need to deal with it, since Zipvit's claim fell at the first fence. Nevertheless, Henderson LJ did deal with it. I have already quoted paragraph [114] of his judgment which sets out part of his reasoning on that issue. It needs to be supplemented by a further extract from paragraph [117] in which he said:

> "Whether the situation is described as one in which HMRC have no discretion, because the requirements of article 226(9) and (10) cannot be dispensed with, or as one where there is in law a discretion but on the facts of the present case it can only be exercised in one way, does not seem to me to matter. The important point is that the inability of Zipvit to produce a compliant VAT invoice in support of its claim to deduct input tax is in my judgment fatal."

132. On either of these two bases, the same point applies here. It follows that even if HMRC made errors in reaching its original decision, remitting the question of discretion would inevitably result in the same outcome.

Result

133. I would dismiss the appeal.

Lord Justice Snowden:

134. I agree.

Sir Launcelot Henderson:

135. I also agree.