Reports of Cases

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 26 October 2017 [1]

**Case C-533/16**

**Volkswagen AG**
**v**
**Finančné riaditeľstvo Slovenskej republiky**

(Request for a preliminary ruling
from the Najvyšší súd Slovenskej republiky (Supreme Court of the Slovak Republic))

(Reference for a preliminary ruling — Common system of value added tax — Deduction of tax paid to suppliers — Supply of goods not subject to VAT — Supply taxed under separate invoices — Right of deduction refused due to expiry of limitation period)

1. The Court of Justice has examined the right to deduct value added tax (VAT) many times in response to requests for preliminary rulings. In this case, the question raised by the referring court concerns the time limit for making that deduction.

2. The problem faced by the national court stems from the fact that, between 2004 and 2010, Volkswagen AG received goods from certain suppliers without VAT being included in the relevant invoices. Both parties had wrongly assumed that the transactions in question constituted financial compensation and, as such, were not subject to VAT.

3. When, in 2010, they realised their mistake, the suppliers charged the VAT to Volkswagen and did then issue the relevant invoice stating the amount of tax payable. They also filed a supplementary VAT return and paid the tax to the Treasury. Volkswagen sought to deduct the input VAT but the tax authority allowed the application only in respect of some of the periods claimed, rejecting it in the case of the other periods on the basis that the time limit for exercising the right (five years) had already elapsed.

4. The preliminary ruling proceedings will therefore allow the Court of Justice to decide to what extent the right of deduction applies where VAT was not charged at the time the goods were originally supplied and the subsequent adjustment affects tax periods dating back more than five years.

1 Original language: Spanish.

## I. Legislative framework

### *A. EU legislation*

*1. Directive 2006/112/EC*[2]

5. Article 62 states:

'For the purposes of this Directive:

(1) "chargeable event" shall mean the occurrence by virtue of which the legal conditions necessary for VAT to become chargeable are fulfilled;

(2) VAT shall become "chargeable" when the tax authority becomes entitled under the law, at a given moment, to claim the tax from the person liable to pay, even though the time of payment may be deferred.'

6. Article 167 provides:

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

7. Article 168 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.'

8. Article 178 states:

'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 Sections 3 to 6 of Chapter 3 of Title XI.' [3]

2 Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1), as amended ('Directive 2006/112' or 'the VAT Directive').

3 This comprises Articles 219a to 240 of the VAT Directive.

*2. Directive 2008/9/EC*[4]

9. According to Article 2:

'For the purposes of this Directive, the following definitions shall apply:

(1) "taxable person not established in the Member State of refund" means a taxable person within the meaning of Article 9(1) of Directive 2006/112/EC who is not established in the Member State of refund but established in the territory of another Member State;

…

(3) "refund period" means the period mentioned in Article 16 covered by the refund application;

…'

10. Article 3 lists the conditions that must be met by taxable persons not established in the Member State of refund in order to qualify for a refund.

11. Article 5 provides:

'Each Member State shall refund to any taxable person not established in the Member State of refund any VAT charged in respect of goods or services supplied to him by other taxable persons in that Member State or in respect of the importation of goods into that Member State, insofar as such goods and services are used for the purposes of the following transactions:

(a) transactions referred to in Article 169(a) and (b) of Directive 2006/112/EC'.

12. Article 8(2) provides as follows:

'2. In addition to the information specified in paragraph 1, the refund application shall set out, for each Member State of refund and for each invoice or importation document, the following details:

…

(d) date and number of the invoice or importation document;

(e) taxable amount and amount of VAT expressed in the currency of the Member State of refund;

…'

13. According to Article 15(1):

'The refund application shall be submitted to the Member State of establishment at the latest on 30 September of the calendar year following the refund period. The application shall be considered submitted only if the applicant has filled in all the information required under Articles 8, 9 and 11.'

4 Council Directive 2008/9/EC of 12 February 2008 laying down detailed rules for the refund of value added tax, provided for in Directive 2006/112/EC, to taxable persons not established in the Member State of refund but established in another Member State (OJ 2008, L 44, p. 23). In relation to VAT refunds, Article 171 of the VAT Directive refers to detailed implementing rules, which are currently contained in Directive 2008/9.

### *B. Slovak legislation*

*1. Zákon č. 222/2004 Z. z. o dani z pridanej hodnoty (Law No 222/2004 on VAT)*[5]

14. Paragraph 49(1) and (2) provides:

'(1) The right to deduct the tax paid on the goods or service shall accrue to the taxpayer on the day when a tax liability in respect of those goods or that service arises.

(2) The taxpayer may deduct, from the tax he is liable to pay, the tax paid on goods and services which he uses for supplies of goods and services as a taxpayer, subject to the exception laid down in subparagraphs 3 and 7. The taxpayer may deduct the tax if the tax is

(a) claimed as against him in Slovakia by another taxpayer in respect of goods and services which have been or are to be supplied to the taxpayer'.

15. Paragraph 51(1)(a) reads as follows:

'(1) A taxpayer may exercise the right to deduct tax in accordance with Paragraph 49, provided that

(a) in respect of deductions under Paragraph 49(2)(a), he holds an invoice drawn up by a taxpayer in accordance with Paragraph 71; ...'

16. Paragraph 55a(4) provides:

'In order to claim a tax refund, the applicant shall submit an electronic refund application via the electronic portal set up by the Member State in which the applicant has its seat, place of business, fixed establishment, domicile or habitual residence. The refund application shall be submitted no later than 30 September of the calendar year following the period in respect of which the refund is claimed. The Daňový úrad Bratislav I [(Bratislava I Tax Office, Slovak Republic)] shall notify the applicant by electronic means, without delay, of the date on which the refund application has been received.'

17. Paragraph 71(1)(a) and (2) provide:

'(1) For the purposes of the present law,

(a) an invoice means any document or notice which is drawn up in paper or electronic form in accordance with this law or a law applicable in another Member State governing the drawing up of invoices,

...

(2) Any document or message that amends and refers specifically and unambiguously to the initial invoice shall be treated as an invoice.'

5 'The Law on VAT'.

18. Paragraph 45 of zákon č. 511/1992 Zb. o správe daní (Law No 511/1992 on Tax Administration, 'the Tax Code') provides:

'(1) Except as otherwise provided in this law or in a separate law, it is not permissible to charge tax or an additional tax or grant a right to refund of an overpayment of tax or a tax refund after the expiry of a five-year period from the end of the year in which the obligation to submit the tax return or tax statement arose or in which the taxable person was obliged to pay the tax without being obliged to submit a tax return or tax statement, or in which the taxable person's right to a refund of the excess deduction or tax refund arose; …'

## II. Facts and the questions referred

19. Between 2004 and 2010, Hella Leuchten-Systeme GmbH, a company established in Paderborn, Germany, and two companies based in Slovakia, Hella Slovakia Front Lighting, s.r.o. and Hella Slovakia — Signal Lighting ('the Hella Suppliers'), supplied Volkswagen with moulds for the manufacture of car lights. [6]

20. The Hella Suppliers did not include VAT in the relevant invoices, since they did not regard the transactions as a supply of goods, but simply as financial compensation.

21. Once they became aware of the mistake, in 2010, the Hella Suppliers charged the VAT to Volkswagen under separate invoices, issued in accordance with Paragraph 71 of the Law on VAT, filed a supplementary VAT return and paid the relevant tax to the Treasury.

22. By an application dated 1 July 2011, submitted within the time limit stipulated by Directive 2008/9, Volkswagen claimed a refund of the VAT from the tax authority on the basis of Paragraphs 55a to 55g of the Law on VAT.

23. By a decision of 3 April 2012, the tax authority partially allowed Volkswagen's application and refunded EUR 1 536 622.92 of VAT, which related to the five years preceding the date of the application.

24. By the same decision, the tax authority rejected Volkswagen's claim in respect of the remainder of the VAT, which amounted to EUR 1 354 968.83. It asserted that the period laid down in Paragraph 45(1) of the Tax Code (five years from the supply of goods) had expired.

25. The decision of 3 April 2012 was upheld in the context of an administrative procedure by the Finančné riaditeľstvo Slovenskej republiky (Finance Directorate of the Slovak Republic).

26. Volkswagen challenged the decision of the Finance Directorate before the Krajský súd v Bratislave (Regional Court, Bratislava, Slovak Republic), which dismissed the action. The court, following the reasoning of the Finance Directorate, took the view that a taxable person's right to a refund of VAT arises at the time of the supply of the goods and its exercise is subject to a five-year time limit. Consequently, the right to a refund of VAT for the period between 2004 and 2006 had been lost by the time the refund application was filed (in 2011).

27. Volkswagen appealed against the judgment at first instance to the Najvyšší súd Slovenskej republiky (Supreme Court of the Slovak Republic) arguing, inter alia, that the interpretation adopted by the national law is not consistent with the EU legislation or with the case-law of the Court of Justice regarding the starting point for the calculation of the limitation period.

6 It is not a matter of dispute that the goods were used for the purposes of the taxed transactions of Volkswagen.

28. The Najvyšší súd Slovenskej republiky (Supreme Court of the Slovak Republic) observes that it faces two approaches to determining when the time limit for applying for a VAT deduction expires: (a) the Finance Directorate's approach, which is in line with national administrative practice, according to which the time limit starts on the date the goods are actually supplied, based on Articles 63 and 167 of the VAT Directive; and (b) Volkswagen's approach, which argues that in order to exercise the right to deduct VAT two cumulative conditions must be met: the supply of goods, being the taxed transaction, and the holding of an invoice or an appropriate replacement document.

29. Against this background, the Najvyšší súd Slovenskej republiky (Supreme Court of the Slovak Republic) is referring the following questions to the Court of Justice for a preliminary ruling:

'(1) Must Directive 2008/9 and the right to a tax refund be interpreted to the effect that the cumulative satisfaction of two conditions is required to exercise the right to a VAT refund, namely:

(i) the supply of the goods or service and

(ii) the inclusion of VAT on the invoice by the supplier?

In other words, is it possible for a taxable person who has not been charged VAT on an invoice to claim a tax refund?

(2) Is it in accordance with the principle of proportionality or VAT fiscal neutrality for the time limit for the tax refund to be calculated from a point at which not all the substantive law conditions required to exercise the right to a tax refund were satisfied?

(3) Are Articles 167 and 178(a) of the VAT Directive, in the light of the principle of fiscal neutrality, to be interpreted to the effect that, in circumstances such as those of the present case, and assuming that the other substantive law and procedural law conditions required to claim a right to a tax deduction are satisfied, they preclude an approach by the tax authorities which refuses the taxable person the right, claimed within the time limit under Directive 2008/9, to be refunded VAT which was charged to it by the supplier on the invoice and [paid] by the supplier before the expiry of the limitation period for relying upon the right under national law?

(4) Did the Slovak tax authorities, in the light of the principle of neutrality and the principle of proportionality, which are the fundamental principles of the common system of VAT, exceed the limits of what was necessary for achieving the objective defined by the VAT Directive when they refused the taxable person the right to a refund of the … tax [paid] on the ground that the limitation period laid down by national law for claiming a tax refund had expired, even though the taxable person could not exercise its right to a tax refund within that period and even though the tax was correctly collected and the risk of tax evasion or non-payment of the tax had been completed excluded?

(5) May the principles of legal certainty, legitimate expectations and the right to good administration under Article 41 of the Charter of Fundamental Rights of the European Union be interpreted as precluding an interpretation of the national legislation under which, for the purposes of observance of the time limit for claiming a tax refund, the time of the decision of the administrative authority on the tax refund is decisive, and not the time at which the tax refund is claimed by the taxable person?'

## III. Procedure before the Court of Justice

30. The order for reference was received at the Registry of the Court of Justice on 20 October 2016.

31. The Finance Directorate, the Slovak Government and the European Commission have submitted written observations.

32. In accordance with Article 76(2) of the Rules of Procedure of the Court of Justice, a hearing was not considered necessary.

## IV. Summary of the parties' observations

33. The observations of the Finance Directorate and the Slovak Government are similar in content and propose that the answer to the first four questions should be that EU law does not preclude the national legislation and practice at issue.

34. The Slovak Government argues, first, that the refund of VAT is merely a specific application of the right to deduct VAT, which forms part of the VAT mechanism and must not be limited.[7] In order to determine the time when the right of refund arises it is necessary to refer to the rules on deduction of VAT, even if they do not specifically mention refunds.

35. For the purposes of establishing that time, both national authorities rely on Articles 62(2), 63, 167, 170 and 171 of Directive 2006/112. From those articles they infer that the time limit for exercising the right to a refund, in the case of goods, runs from the time when the tax becomes chargeable, namely, the time those goods were supplied.

36. The invoice, however, plays no part determining that time and Article 178(a) of the VAT Directive cannot be interpreted as meaning that the right of deduction arises upon coming into possession of an invoice. To link the commencement of the time limit with possession of an invoice would be contrary to the principles of legal certainty, fiscal neutrality and proportionality.

37. Second, they conclude from Articles 168, 171, 179 and 180 of Directive 2006/112 and Articles 14, 15 and 16 of Directive 2008/9 that the right to a refund can be exercised only up until 30 September of the calendar year following the year in which it arose. It would not be contrary to EU law for a Member State to refuse a refund application submitted after that date.

38. The Slovak Government states that, under Article 180 of the VAT Directive, the Member States may extend the time limit for exercising that right,[8] but not remove the time limit altogether, and on that basis national legislation may impose a limitation period on VAT refunds.[9]

39. Finally, the two national authorities regard the fifth question as inadmissible, since the referring court has not clearly identified the significant facts nor explained how they are relevant to the substantive issue to be decided in the main proceedings.

40. The Commission proposes that the first three questions should be answered together. It argues that in order to exercise the right of deduction, a taxable person must have received an invoice showing the amount of input VAT charged.[10] It notes that the Slovak tax authority's approach would mean that a taxable person would be entitled to a deduction even if it had paid nothing to the Slovak Treasury and did not have an invoice at all. Furthermore, even if it had exercised its right of deduction, it would have been refused in this case.

7 In this regard, it cites the judgment of 28 July 2016, *Astone* (C-332/15, EU:C:2016:614, paragraph 30).

8 Judgment of 12 July 2012, *EMS-Bulgaria Transport* (C-284/11, EU:C:2012:458, paragraph 46).

9 It refers to the judgment of 8 May 2008, *Ecotrade* (C-95/07 and C-96/07, EU:C:2008:267, paragraphs 45 and 46).

10 In this context, it refers to the judgment of 29 April 2004, *Terra Baubedarf-Handel* (C-152/02, EU:C:2004:268, paragraph 35).

41. The Commission's position is that in a situation such as the one in the main proceedings, where there has been an adjustment, this triggers the right to deduct VAT, which is linked to the payment of the tax. The taxable person can claim a deduction of VAT only where goods have been supplied to that person and the relevant invoice issued.

42. With regard to the fourth question, it is the Commission's view that there were objective reasons why Volkswagen was unable to exercise its right to deduct VAT, since it was unaware that it owed VAT until the invoices were issued. To apply the limitation period of five years from the supply of goods would, in these circumstances, amount to making it impossible in practice to exercise that right.

43. Furthermore, such a situation would entail a breach of the principle of fiscal neutrality, since Volkswagen was obliged to make payment in respect of periods in excess of five years and the option of seeking a deduction was not available for all of those periods. The Commission adds that, for the same reasons, the Slovak legislation goes beyond the discretion available to a Member State.

44. As far as the fifth question is concerned, the Commission does not consider it necessary to give an answer, since, for the purposes of assessing the compatibility of the national legislation with EU law, there is no need to look beyond Directive 2006/112 or other provisions of secondary VAT legislation.

## V. Analysis

### *A. Preliminary remark, approach to and reformulation of the questions*

45. Although the main proceedings involve the taxable person claiming a VAT *refund* from the Slovak tax authorities, in reality, the refund is simply a consequence of the differential, or balance, of the amount of VAT that Volkswagen is liable to pay and the VAT payable or paid by it in a Member State other than the Member State in which it is established.

46. The dispute must therefore be resolved through an interpretation of the rules governing the right of deduction, which would be the basis for any VAT refund. A VAT refund is the means by which a Member State repays to taxable persons not established in that Member State the amount of input VAT that they have been charged in respect of goods and services supplied or provided by other taxable persons in that Member State.

47. The provisions on refunds in Directive 2008/9 reflect the provisions of Article 170 of Directive 2006/112. Interpretation of the former must therefore remain in step with the rules relating to the right of deduction contained in the latter, since Directive 2006/112 underlies all VAT legislation.

48. Consequently, it will be necessary to look, first of all, at the provisions of Directive 2006/112 concerning the right of deduction (and particularly Articles 167, 168 and 178). We can then move on to the second stage of examining Articles 14, 15 and 16 of Directive 2008/9, which deal with refunds, but this is not, in my view, necessary in order to answer the questions of the referring court. In any event, the principles of proportionality and VAT fiscal neutrality must be ever present.

49. I agree with the Slovak authorities and, partly, with the Commission that the first four questions are closely linked and merit joint consideration. I also think that it is appropriate to reformulate them in the interests of adding clarity to the Court's answer.

50. It seems to me that, summarising the four questions, what we are trying to ascertain is whether it is permissible under EU law (particularly Articles 167, 168 and 178 of the VAT Directive and the principles of proportionality and fiscal neutrality) to refuse to grant a taxable person a refund of input VAT on the grounds that the time limit for exercising that right has expired, in a situation where: (a) it was thought, wrongly, that the supply of goods was not subject to VAT; and (b) the subsequent adjustment took place several years later, with the taxable person paying the VAT at that time and then claiming it back later.

51. I will deal with the fifth question separately.

### *B. Questions 1 to 4*

52. The Court of Justice has frequently ruled on the substantive and formal requirements to which the right to deduct VAT is subject.

53. Regarding the *substantive* requirements, the focus has been on the provisions of Directive 2006/112 which govern the origin and scope of the right (Article 167 et seq. in Title X, Chapter 1 of the Directive).[11] Under these provisions, the right of deduction arises at the same time as the tax becomes chargeable: in the case of a supply of goods, this is when the goods are transferred from the supplier to the taxable person.[12] The key factor, as far as the VAT becoming chargeable is concerned, is that there should be a genuine transfer of possession of the goods by one party which empowers the other party actually to dispose of it as if he were its owner.[13]

54. The *formal* requirements for the right to deduct, 'by contrast, regulate the rules governing its exercise and monitoring thereof and the smooth functioning of the VAT system, such as the obligations relating to accounts, invoicing and filing returns'.[14] For the purposes of these preliminary ruling proceedings, the most important of these requirements,[15] is the one relating to the invoice: Article 178(a) of the VAT Directive provides that 'in order to exercise the right of deduction', a taxable person must 'hold an invoice drawn up in accordance with Sections 3 to 6 of Chapter 3 of Title XI' of the directive.

55. It is apparent from the order for reference that: (a) the supply of goods to Volkswagen did take place, as was later reflected in the corresponding invoice; and, (b) the invoice included all the information required by Directive 2006/112 (or, at least, this was not disputed). The substantive and formal conditions for the creation and exercise of the right to deduct VAT are therefore fulfilled.[16]

56. Thus, subject to any verification that the referring court may wish to carry out, Volkswagen was, in principle entitled to exercise its right of deduction. Evidence of this is provided by the fact that the tax authority recognised this right, albeit for only some of the tax periods in respect of which it was exercised. As for the remaining periods, the Slovak Government and the Finance Directorate argue that the fact that five years have elapsed rules this out.

11 Judgment of 11 December 2014, *Idexx Laboratories Italia* (C-590/13, EU:2014:2429, paragraph 41). The judgment mainly concerned Articles 17, 18 and 22 of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1), as amended by Council Directive 91/680/EEC of 16 December 1991 (OJ 1991 L 376, p. 1) ('the Sixth Directive'), but these provisions are included, and in some cases reproduced literally, in Directive 2006/112; see judgment of 21 June 2012, *Mahegében and Dávid* (C-80/11 and C-142/11, EU: C:2012:373, paragraphs 5 to 11).

12 Article 63 of Directive 2006/112.

13 Judgment of 22 October 2015, *PPUH Stehcemp* (C-277/14, EU:C:2015:719, paragraph 44 and the case-law cited).

14 Judgment of 11 December 2014, *Idexx Laboratories Italia* (C-590/13, EU:C:2014:2429, paragraph 42).

15 Article 178 et seq. of Directive 2006/112.

16 Judgment of 21 June 2012, *Mahegében and Dávid* (C-80/11 and C-142/11, EU:C:2012:373, paragraph 44).

57. The VAT Directive does not expressly refer to a time limit for exercising the right to deduct. This does not prevent national legislation setting a time limit for reasons associated with legal certainty. The Court of Justice has ruled that 'a limitation period the expiry of which has the effect of penalising a taxable person who has not been sufficiently diligent and has failed to claim deduction of input tax by making him forfeit his right to deduct cannot be regarded as incompatible with the regime established by the Sixth Directive, in so far as, first, that limitation period applies in the same way to analogous rights in tax matters founded on domestic law and to those founded on Community law (principle of equivalence) and, second, that it does not render virtually impossible or excessively difficult the exercise of the right to deduct (principle of effectiveness)'. [17]

58. However, establishing the commencement date of that period cannot be solely a matter of looking at the time the goods were supplied, irrespective of any other relevant factors. Although, under Article 167 of Directive 2006/112, the right of deduction arises at the same time as the tax becomes chargeable, Article 178 of that directive provides that it can only be *exercised* once the taxable person holds an invoice showing that the goods have been supplied.

59. The divergence between the time the right of deduction arises and the time that it is exercised is due to the way VAT works:

– When a taxable person obtains goods, he pays (or, at least, he is under a duty to pay) to the supplier of those goods a price which is inclusive of VAT for products which will, generally speaking, be used by him for the purposes of his taxed transactions.

– However, for the purposes of the administration of the tax, the taxable person is entitled to deduct the VAT already paid at a later date, when submitting to the tax authorities the appropriate paperwork, which must include the relevant invoices, [18] as an essential evidential requirement for claiming the deduction (or, as the case may be, the refund).

60. So, the right of deduction links two VAT payments: (a) the payment made by the taxable person in respect of the supply of goods from his supplier; and (b) the payment made to the taxable person by his customer when the taxable person supplies his own products to the customer. The invoices [19] are evidence that the corresponding transactions and the payment of the price, which must include VAT at the relevant rate, [20] actually took place.

61. That VAT in fact already belongs to the tax authority, which is why it becomes chargeable as soon as it is paid or should have been paid. The person issuing the invoice will hold the VAT in its capacity as an agent of the tax authority, in other words assuming the role of VAT collector. It follows that the right of deduction arises at the same time, since the taxable person must be able to refer to this payment of tax when settling with the tax authority.

62. In the words of the Court of Justice, 'the system of deduction … enables the intermediate links in the distribution chain to deduct from their own taxable amount the sums paid by each to his own supplier in respect of VAT on the corresponding transaction and thus pass on to the tax authorities the part of the VAT representing the difference between the price paid by each to his supplier and the price at which he supplied the goods to his purchaser'. [21]

17 Judgment of 8 May 2008, *Ecotrade* (C-95/07 and C-96/07, EU:C:2008:267, paragraph 46).

18 Under Article 218 of Directive 2006/112, 'documents or messages on paper or in electronic form' may be accepted as invoices 'if they meet the conditions laid down in [Chapter 3]'.

19 Although invoices are generally required in order to apply for a deduction, in some circumstances, the absence of an invoice will not be an obstacle to exercising the right to deduct. To this effect, see the judgment of 1 April 2004, *Bockemühl* (C-90/02, EU:C:2004:206, paragraph 47).

20 See Article 226(9) and (10) of Directive 2006/112.

21 See judgment of 29 April 2004, *Terra Baubedarf-Handel* (C-152/02, EU:C:2004:268, paragraph 36).

63. Underlying this model is the principle, ensured by the common system of VAT, that the taxation of all economic activities, whatever their purpose or results, provided that they are themselves subject to VAT, should be fiscally neutral. Under this system, the rules on deductions are meant to relieve the trader entirely of the burden of VAT due or paid.

64. Thus, the payment of the tax to the supplier by the taxable person lies at the heart of the right to deduct. It is not possible to separate deduction from payment of the tax: if the taxable person has not paid the tax, which generally appears in the invoice, there is no legal or financial basis on which to exercise the right of deduction.

65. In Directive 2006/112, and particularly in Article 167, the EU legislature is referring to *normal circumstances*, in which the supply of goods, the payment and the issuing of the invoice showing the amount of VAT all happen virtually simultaneously. In such cases, it makes sense that the chargeability of the VAT and the right of deduction both arise at the same time. [22]

66. By contrast, a situation such as the one in the main proceedings can be seen as *exceptional* or unusual, from the perspective of the VAT chargeable, because: (a) when Volkswagen received the goods from the supplier it did not pay any VAT, since both parties believed that the transaction was not subject to VAT; and (b) similarly, Volkswagen did not receive an invoice inclusive of VAT, which would have enabled it to exercise its right of deduction.

67. In these circumstances, the taxable person obviously could not claim the right to deduct an amount of VAT which had not been previously paid.

68. There was a major change in the situation when, in 2010, the Hella Suppliers made an adjustment in relation to the transactions which they had incorrectly thought were not subject to VAT by collecting the amount of VAT owed by Volkswagen and paying it to the Treasury. From that point, I think that it would have been correct to link chargeability and the subsequent right of deduction with the actual payment of the tax.

69. In other words, what took place was, in effect, an example of late payment of VAT. [23] With the adjustment of the transactions, the substantive and formal conditions triggering the right of deduction were truly satisfied. It was at that point that the calculation of the time limit for exercising it should have started: there was a genuine supply of goods, VAT of a certain amount became due and was paid to the Treasury and the relevant invoice meeting the requirements of Article 226 of the VAT Directive was issued.

70. However, the Slovak tax authorities are applying their national tax rules (Paragraph 45 of the Tax Code, to be precise) which backdate the exercise of the right to deduct VAT literally to the date when the goods were delivered (2004 to 2010). They then look to the five-year limitation period, taking that same date as the starting point for the calculation. This leads them to conclude that the right to deduct no longer exists in relation to the years prior to the limitation period (2004, 2005 and part of 2006, the refund application having been submitted on 1 July 2011).

22 The Court of Justice has held that 'the exercise of that right assumes that, in principle, taxable persons do not make payment and therefore do not pay input VAT until they have received an invoice, or another document which may be considered to serve as an invoice, and that the VAT cannot be regarded as being chargeable on a given transaction before it has been paid'. Judgment of 29 April 2004, *Terra Baubedarf-Handel* (C-152/02, EU:C:2004:268, paragraph 35).

23 The Court of Justice has ruled that 'a belated accounting for of VAT cannot, per se, be equated with evasion, which presupposes, first, that the transaction concerned … results in the accrual of a tax advantage the grant of which would be contrary to the purpose of those provisions [governing VAT]' and that 'the principle of fiscal neutrality precludes a penalty consisting in a refusal of the right to deduct if VAT is accounted for belatedly'. See paragraph 74 and operative part of the judgment of 12 July 2012, *EMS-Bulgaria Transport OOD* (C-284/11, EU:C:2012:458).

71. I do not think that this is the right approach. In the first place, I note that the Slovak tax authorities are applying the five-year period *against* Volkswagen when, under Paragraph 45 of the Tax Code,[24] this period also operates in respect of the collection of tax, in other words, in *favour* of Volkswagen, since the provision prevents the authorities from collecting tax due but not collected if five years have elapsed.[25]

72. If, after more than five years, the tax authority was prepared to accept the VAT owed by Volkswagen for 2004, for example, then, equally, it should accept that the taxable person has the right to deduct the VAT similarly paid.

73. Secondly, Article 167 of Directive 2006/112 can be read as meaning that, in circumstances such as those in this case, a taxable person acting in good faith[26] would not entirely lose the right to deduct VAT.

74. The way in which the national legislation has been interpreted by the practice of the Slovak tax authorities has led to a refusal to allow the exercise of that right, which is contrary to the principle of VAT fiscal neutrality. The Court of Justice has stated repeatedly that this principle must prevail and that the right of deduction forms part of the VAT mechanism and, as such, must not, generally speaking, be limited.[27]

75. The 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.[28] The Court of Justice has clearly ruled in favour of respecting the right of deduction to the fullest extent possible, holding, for example, that Article 167, Article 178(a), Article 179 and Article 226(3) of the VAT Directive preclude national legislation under which the correction of an invoice in relation to a detail which must be mentioned did not have retroactive effect, thereby restricted the ability to deduct the VAT due to the year in which it was corrected, not the year in which the invoice was originally drawn up.[29]

76. If that restriction was held to be contrary to Directive 2006/112, then, for the same reason, the approach adopted by the Slovak authorities which, in practice, makes it impossible to exercise the right of deduction in cases such as this, should also be considered contrary to it. It should be borne in mind that this right can only be exercised by a person once he is aware that the transactions are subject to VAT, and not before, and if that person has acted in good faith (which, I repeat, is not in question in this case).

77. Finally, the conduct at issue in the main proceedings appears to me to be disproportionate. Admittedly, Article 273 of Directive 2006/112 permits the Member States to adopt measures to ensure the correct collection of VAT and to prevent evasion. However, such measures —which, for reasons of legal certainty include setting time limits for exercising the right of deduction— must not go further than is necessary to attain those objectives and must not undermine the neutrality of VAT.[30]

24 Under this provision, the five-year limitation period applies both to the authorities and to taxpayers: the authorities may not collect tax, or additional tax, after the five years have elapsed and neither may the taxpayer apply for a refund of taxes already paid once that time has elapsed.

25 Under EU law, reasonable time limits for bringing proceedings, in the interests of legal certainty, protect both the taxpayer and the authorities; see judgment of 14 June 2017, *Compass Contract Services* (C-38/16, EU:C:2017:454, paragraph 42).

26 It is common ground between the parties to the main proceedings that neither the Hella Suppliers nor Volkswagen acted fraudulently or was aware that treating the various supplies of goods as transactions that were not subject to VAT was incorrect.

27 Judgment of 28 July 2016, *Astone* (C-332/15, EU:C:2016:614, paragraph 30).

28 Judgment of 15 September 2016, *Senatex* (C-518/14, EU:C:2016:691, paragraph 38).

29 Ibid., paragraph 43.

30 See, to that effect, judgment of 9 July 2015, *Salomie and Oltean* (C-183/14, EU:C:2015:454, paragraph 62).

78. Having established that the taxable person was acting in good faith and ruled out tax evasion or tax advantage, and in view of the fact that adjustments were made to the transactions, it would be disproportionate to deprive this taxpayer of the right of deduction merely for having incorrectly thought that the transactions were not subject to VAT and because the period elapsed by the time the adjustment took place exceeded five years.

79. The Slovak Government does, in fact, accept that it was appropriate to allow a deduction, but restricts this to the periods in respect of which VAT was paid which it does not consider to be time-barred. However, as I have already observed, if an interval of more than five years did not preclude payment of VAT, albeit late, to the Treasury, then, equally, it should not be an obstacle to exercising the right to a deduction either.

80. Consequently, I propose that the answer to the first four questions should be that, in circumstances such as those of the present case, in which it was thought, wrongly but in good faith, that a supply of goods was not subject to VAT and, some years later, an adjustment was made to the tax paid, the taxable person is entitled to deduct (or, as the case may be, to obtain a refund of) the amount of input VAT paid in respect of that transaction.

### *C. Question 5*

81. The referring court is asking whether the principles of legal certainty and legitimate expectations and Article 41 of the Charter of Fundamental Rights of the European Union ('the Charter') preclude the interpretation of the national legislation adopted by the Slovak tax authorities.

82. Rather than considering the question inadmissible in its entirety, as the Slovak Government suggests, I would agree with the Commission that at this point it is not necessary to answer it, since the questions of the referring court can be answered simply by reference to the Court's interpretation of Directive 2006/112. I will, however, give my thoughts on it, in the alternative, in case the Court of Justice should decide to address the question.

83. First, the reference to Article 41 of the Charter, which concerns the right to good administration, is not relevant in the main proceedings since that provision is addressed not to the Member States but solely to the institutions, bodies, offices and agencies of the European Union.[31] As the main proceedings concern the actions of the tax authorities of a Member State, that article is not applicable.

84. Secondly, any breach of the principle of the protection of legitimate expectations, would require the administrative authority to have caused Volkswagen to entertain expectations, which were justified by precise assurances,[32] that it would accede to its request, such that any prudent and well-informed trader would have acted in reliance on that certainty.[33]

85. There is, however, no evidence in the order for reference that any such assurances were given. Instead, the order outlines an administrative approach interpreting the national law on the time limit for applying for a VAT refund. The account makes no reference to precise assurances on the basis of which Volkswagen might have had an expectation of success in its application.

31 Judgment of 17 December 2015, *WebMindLicenses* (C-419/14, EU:C:2015:832, paragraph 83 and the case-law cited).

32 Judgment of 14 June 2017, *Santogal M-Comércio e Reparação de Automóveis* (C-26/16, EU:C:2017:453, paragraph 76 and the case-law cited).

33 Judgment of 9 July 2015, *Salomie and Oltean* (C-183/14, EU:C:2015:454, paragraph 45 and the case-law cited).

86. Thus, in the absence of any more specific information regarding those supposed assurances, the Court does not have before it the factual material necessary to give a useful answer to this part of the fifth question. [34]

87. Thirdly and finally, in the words of the Court of Justice, the principle of legal certainty implies that EU rules must enable those concerned to know unequivocally the extent of their rights and obligations so that they are in a position to order their affairs with the benefit of full information. [35]

88. As I have already mentioned, [36] the Court has confirmed that, under certain conditions, the Member States can introduce 'limitation periods' for exercising the right of VAT deduction, provided that these do not result that right being withdrawn, whether by law or de facto. [37]

89. It might be detrimental to legal certainty, in the sense outlined, if the interpretation of the provisions of national law governing such limitation periods were uncertain or arbitrary, or varied from authority to authority. However, there is no indication that this is the case here, where other taxable persons in the same position as Volkswagen also appear to have had the right of deduction refused. [38]

90. That is not to say that this interpretation, although consistent at a national level, is compatible with EU law. If it is not, then, as I suggested at the end of my analysis of the first four questions, it is sufficient for the purposes of providing an answer in the preliminary ruling proceedings, taken as a whole, to find that it is contrary to Directive 2006/112.

## VI. Conclusion

91. In the light of the foregoing, I propose that the Court reply as follows to the questions referred by the Najvyšší súd Slovenskej republiky (Supreme Court of the Slovak Republic):

Articles 167, 168 and 178 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, as well as the principles of fiscal neutrality and proportionality, preclude a refusal of the right to deduct VAT in the case of a taxable person who has acted in good faith in circumstances such as those in the main proceedings where it was thought, wrongly, that a supply of goods was not taxable but some years later the necessary adjustment was made and the VAT paid.

34 See, inter alia, judgment of 14 June 2017, *Santogal M-Comércio e Reparação de Automóveis* (C-26/16, EU:C:2017:453, paragraph 31 and the case-law cited).

35 Judgment of 7 March 2017, *RPO* (C-390/15, EU:C:2017:174, paragraph 59).

36 Points 57 and 77 of this Opinion.

37 Judgment of 9 June 2016, *Wolfgang und Wilfried Rey Grundstücksgemeinschaft GbR* (C-332/14, EU:C:2016:417, paragraphs 58 to 61).

38 The order for reference states that other undertakings are in a similar position.