

Simon's Tax Cases/Simon's Tax Cases 2020/Zipvit Ltd v Revenue and Customs Commissioners; Note - [2020] STC 865

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Zipvit Ltd v Revenue and Customs Commissioners; Note

[2020] UKSC 15

SUPREME COURT

LORD HODGE, LADY BLACK, LORD BRIGGS, LORD SALES AND LORD HAMBLÉN JJSC

29, 30 JANUARY, 1 APRIL 2020

Value added tax – Input tax – Claim for repayment of input tax – Taxpayer using postal services on which VAT not charged – Subsequent ruling of European Court of Justice establishing that postal services should have been subject to VAT – Taxpayer making claim for input tax – Claim refused – Whether VAT due or paid – Whether in absence of VAT invoice HMRC should have exercised discretion to allow input tax claim – Whether matter to be referred to European Court of Justice for preliminary ruling – Value Added Tax Regulations 1995, SI 1995/2518, reg 29 – Council Directive 2006/112/EC, arts 168(a), 226.

The taxpayer carried on a business supplying vitamins and minerals by mail order and used the services of Royal Mail. Royal Mail supplied the taxpayer with various business postal services under contracts which had been individually negotiated with the taxpayer, including its 'Mailmedia®' service ('the services'). On the basis of the domestic legislation and guidance and the common mistaken view that the services were exempt from value added tax ('VAT'), the invoices issued by Royal Mail to the taxpayer in relation to the services were marked 'E' for exempt, showed no sum attributable to VAT to be due, and charged the taxpayer only the commercial price of the services. The taxpayer duly paid to Royal Mail the sums set out in the invoices and did not at the time of the supplies make any claim to recover input VAT in respect of them. That common understanding of the law was, however, shown to be wrong in *R (on the application of TNT Post UK Ltd) v Revenue and Customs Comrs* (Case C-357/07) [2009] STC 1438, in which the Court of Justice of the European Union ('CJEU') held that the postal services exemption applied only to supplies made by the public postal services acting as such, and did not apply to supplies of services for which the terms had been individually negotiated. In light of that decision, the taxpayer made claims to recover input tax on the basis that Royal Mail had wrongly treated its supplies to the taxpayer as exempt when they were in law standard-rated. The Revenue and Customs Commissioners ('HMRC') refused the taxpayer's claims and the taxpayer appealed to the First-tier Tribunal ('FTT'). The FTT dismissed the appeal, holding that HMRC had no enforceable tax claim against Royal Mail because Royal Mail had not in its VAT returns declared any VAT in respect of its supply of the services, had made no voluntary disclosure of underpaid VAT, had not issued any invoice showing the VAT as due, and HMRC had not assessed Royal Mail as liable to pay any VAT. In those circumstances, there was no VAT 'due or paid' by Royal Mail in respect of the supply of the services, for the purposes of art 168(a) of Council Directive 2006/112/EC ('the Directive'). The FTT went

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on to find that, in the absence of a VAT invoice from Royal Mail to the taxpayer, HMRC had been entitled to exercise its discretion under reg 29(2) of the Value Added Tax Regulations 1995, SI 1995/2518, to reject the alternative evidence provided by the taxpayer of its having received taxable supplies for the purposes of its trade (albeit that HMRC had failed to consider all matters that were relevant to the exercise of its discretion, but had it done so, its conclusion would have been the same). The taxpayer's appeal against the FTT's decision was dismissed by the Upper Tribunal ('UT'). In relation to the 'due or paid' issue, it was common ground that 'due or paid' meant due or paid by the taxpayer to the supplier. The UT upheld the FTT's decision on the invoice issue and on the question of the exercise of discretion under reg 29(2). The taxpayer made a further appeal to the Court of Appeal which was also dismissed. After an extensive review of the CJEU's case law in relation to the 'due or paid' issue as it arose in the light of the factual position regarding the taxpayer's contractual obligations, the Court of Appeal found that the position was not *acte clair*. However, it reached the same conclusion as the tribunals below on the invoice issue. The Court of Appeal held that it was a necessary precondition for the taxpayer to be able to exercise any right of deduction of input VAT in respect of the services that it should be able to produce VAT invoices which showed that VAT had been charged in respect of the supplies of the services, in compliance with art 226(9) and (10) of the Directive, or supplementary evidence showing payment of the relevant tax by Royal Mail to HMRC, which the taxpayer could not do. The Court of Appeal agreed with the tribunals on the question of the exercise of discretion by HMRC under reg 29(2) and considered the position regarding the invoice issue to be *acte clair*, so that no reference was required to the CJEU. The taxpayer appealed to the Supreme Court, contending that it should succeed on both the 'due or paid' issue and the invoice issue, including so far as necessary on the question of the exercise of discretion by HMRC under reg 29(2). The Supreme Court concluded that it was necessary to refer the following questions to the Court of Justice of the European Union: '(1) Where (i) a tax authority, the supplier and the trader who is a taxable person misinterpret European VAT legislation and treat a supply, which is taxable at the standard rate, as exempt from VAT, (ii) the contract between the supplier and the trader stated that the price for the supply was exclusive of VAT and provided that if VAT were due the trader should bear the cost of it, (iii) the supplier never claims and can no longer claim the additional VAT due from the trader, and (iv) the tax authority cannot or can no longer (through the operation of limitation) claim from the supplier the VAT which should have been paid, is the effect of the Directive that the price actually paid is the combination of a net chargeable amount plus VAT thereon so that the trader can claim to deduct input tax under art 168(a) of the Directive as VAT which was in fact 'paid' in respect of that supply? (2) Alternatively, in those circumstances can the trader claim to deduct input tax under art 168(a) of the Directive as VAT which was 'due' in respect of that supply? (3) Where a tax authority, the supplier and the trader who is a taxable person misinterpret European VAT legislation and treat a supply, which is taxable at the standard rate, as exempt from VAT, with the result that the trader is unable to produce to the tax authority a VAT invoice which complies with art 226(9) and (10) of the Directive in respect of the supply made to it, is the trader entitled to claim to deduct input tax under art 168(a) of the Directive? (4) In answering questions (1) to (3): (a) is it relevant to investigate whether the supplier would have a defence, whether based on legitimate expectation or

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otherwise, arising under national law or EU law, to any attempt by the tax authority to issue an assessment requiring it to account for a sum representing VAT in respect of the supply? (b) is it relevant that the trader knew at the same time as the tax authority and the supplier that the supply was not in fact exempt, or had the same means of knowledge as them, and could have offered to pay the VAT which was due in respect of the supply (as calculated by reference to the commercial price of the supply) so that it could be passed on to the tax authority, but omitted to do so?'

Notes

For the postal services exemption, see De Voil Indirect Tax Service V4.126.

For the Value Added Tax Regulations 1995, SI 1995/2518, reg 29, see the Orange Tax Handbook 2019–20, Part 1, p 1245.

For Council Directive 2006/112/EC, arts 168, 226, see the *Orange Tax Handbook 2019–20, Part 1*, pp 1926, 1944.

Cases referred to

Barlis 06—Investimentos Imobiliários e Turísticos SA v Autoridade Tributária e Aduaneira (Case C-516/14) EU:C:2016:690, [2016] BVC 43, ECJ.

Biosafe—Indústria de Reciclagens SA v Flexipiso—Pavimentos SA (Case C-8/17) EU:C:2017:927 (opinion), EU:C:2018:249 (judgment), [2018] BVC 17, ECJ.

Elida Gibbs Ltd v Customs and Excise Comrs (Case C-317/94) EU:C:1996:400, [1996] **STC** 1387, [1997] QB 499, [1997] All ER (EC) 53, [1996] ECR I-5339, ECJ.

Minister Finansów v MDDP sp z oo Akademia Biznesu, sp komandytowa (Case C-319/12) EU:C:2013:778, [2014] **STC** 699, ECJ.

R (on the application of TNT Post UK Ltd) v Revenue and Customs Comrs (Case C-357/07) EU:C:2009:248, [2009] **STC** 1438, [2009] ECR I-3025, [2009] 3 CMLR 752, ECJ.

SC Paper Consult SRL v Directia Regionala a Finantelor Publice Cluj-Napoca and Administratia Judeteana a Finantelor Publice Bistrita Nasaud (Case C-101/16) EU:C:2017:775, [2017] BVC 52, [2017] SWTI 2274, [2017] All ER (D) 60 (Nov), ECJ.

Tulică v Agenția Națională de Administrare Fiscală – Direcția Generală de Soluționare a Contestațiilor (Joined cases C-249/12 and C-250/12) EU:C:2013:722, [2013] BVC 547, [2013] SWTI 3566, [2013] All ER (D) 121 (Nov), ECJ.

Vădan v Agenția Națională de Administrare Fiscală — Direcția Generală de Soluționare a Contestațiilor (Case C-664/16) EU:C:2018:933, ECJ.

Véleclair SA v Ministre du budget, des comptes publics et de la réforme de l'Etat (Case C-414/10) EU:C:2012:183, [2012] **STC** 1281, ECJ.

Volkswagen AG v Finančné riaditeľstvo Slovenskej republiky (Case C-533/16) EU:C:2017:823 (opinion), EU:C:2018:204 (judgment), [2018] BVC 15, [2018] SWTI 783, [2018] All ER (D) 188 (Mar), ECJ.

Appeal

Zipvit Ltd appealed with permission of the Supreme Court granted on 18 December 2018 from the judgment of the Court of Appeal (Henderson, Asplin LJ and Dame Elizabeth Gloster) given on 29 June 2018 ([2018] EWCA Civ 1515, [2018] **STC** 1502) dismissing its appeal from the decision of

the Upper Tribunal (Tax and Chancery Chamber) (Proudman J) of 27 June 2016 ([2016] UKUT 294 (TCC), [2016] **STC** 1782) dismissing its appeal from a decision of the

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First-tier Tribunal (Judge Mosedale) released on 3 July 2014 ([2014] UKFTT 649 (TC), [2014] SFTD 1309) dismissing its appeal from the decision of the Revenue and Customs Commissioners ('HMRC') rejecting Zipvit's claim for input tax which it claimed to have incurred. The facts are set out in the judgment.

Roger Thomas QC (instructed by *Mishcon de Reya LLP*) for Zipvit.

Sam Grodzinski QC and *Eleni Mitrophanos* (instructed by the *Solicitor for Revenue and Customs*) for HMRC.

Judgment was reserved.

1 April 2020. The following judgment was delivered.

LORD BRIGGS and LORD SALES

(with whom Lord Hodge, Lady Black and Lord Hamblen agree).

Introduction

[1] This case is concerned with the right of a trader (in this case, Zipvit) to deduct input VAT due or paid by it on supplies of services to it by a supplier (in this case, Royal Mail), so far as those supplies are used for the trader's own supplies of goods or services to an ultimate consumer. The issue arises in a specific set of circumstances.

[2] The general terms and conditions governing the supply contract between the supplier and the trader provided that the trader should pay the commercial price for the supply plus such amount of VAT (if any) as was chargeable in respect of the supply. As determined by a subsequent judgment of the Court of Justice, the supply should in fact have been treated as standard rated for VAT, so that the trader should have been charged VAT assessed at the relevant percentage of the commercial price for the supply. However, at the time of the supply both the supplier and the trader, acting in good faith and on the basis of a common mistake, understood that the supply was exempt from VAT, so the trader was only charged and only paid a sum equal to the commercial price for the supply. The invoices relating to the supplies in question denoted the supplies as exempt and hence indicated that no VAT was due in respect of them.

[3] The tax authorities (Her Majesty's Revenue and Customs Commissioners, 'HMRC') made the same mistake in good faith. HMRC had inadvertently contributed to the mistake by the parties, by issuing tax guidance containing statements to the same effect.

[4] The effect of the mistake has been that the trader has only paid the amounts equivalent to the commercial price for each supply and there is now no prospect that it can be made to pay, or will pay, the additional amount equivalent to the VAT element of the total price (ie the commercial price plus the VAT due in respect of it) which ought to have been charged and paid in respect of such supplies. Likewise, the supplier has not accounted to HMRC for any VAT due or paid in respect of such supplies, and there is no prospect that it can now be made to account, or will account, to HMRC for such VAT.

[5] Notwithstanding this, the trader now maintains that under art 168(a) of the Principal VAT Directive (Council Directive 2006/112/EC – 'the Directive') it is entitled as against HMRC to make a claim to deduct as input VAT the VAT due in respect of the supplies in question or a VAT element deemed by law to be included in the price charged by the supplier for each supply (and hence

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deemed by law to be VAT in fact paid in respect of such supply when the trader paid what the parties believed to be the commercial price of the supply). Against this, HMRC contend that in the circumstances of this case, on the proper interpretation of the Directive: (1) there is no VAT due or paid in respect of the supplies in question, so no claim can be made to recover input tax in relation to them, and/or (2) the invoices relating to the supplies in question did not show that VAT was due in respect of the supplies, and since the trader at no stage held invoices which showed that VAT was due and its amount, in compliance with art 226(9) and (10) of the Directive, for this reason also the trader is not entitled to recover input tax in relation to the supplies. The trader responds on point (1) that VAT must be treated as having been paid as part of the price (or as due) and on point (2) that all relevant facts are now known and it can prove by other means the amount of the VAT due or paid on each supply.

[6] The sums claimed by Zipvit as input VAT on the relevant supplies amount to £415,746 plus interest. The present proceedings are a test case in respect of supplies of services by Royal Mail where the same mistake was made. The court has been provided with estimates of between about £500m and £1bn as the total value of the claims against HMRC.

The factual background

[7] Royal Mail is the public postal service in the United Kingdom. Article 132(1)(a) of the Directive (and equivalent provisions which preceded it) provides that member states shall exempt 'the supply by the public postal services of services other than passenger transport and telecommunications services, and the supply of goods incidental thereto'. In implementing this provision, Parliament and HMRC interpreted it as covering all postal services supplied by Royal Mail. The implementing national legislation, the Value Added Tax Act 1994 ('VATA'), contained a provision to this effect (Sch 9, Group 3, para 1) and HMRC issued guidance notes to the same effect.

[8] Zipvit carries on the business of supplying vitamins and minerals by mail order and used the services of Royal Mail. During the period 1 January 2006 to 31 March 2010, Royal Mail supplied Zipvit with a number of business postal services under contracts which had been individually negotiated with Zipvit. The present proceedings concern supplies of one such service, Royal Mail's 'Mailmedia®' service ('the services').

[9] The contract under which Royal Mail supplied the services incorporated Royal Mail's relevant general terms of business which provided that all postage charges specified as payable by the customer (ie Zipvit) were exclusive of VAT, that the customer 'shall pay any VAT due on Postage and other charges at the appropriate rate', and that 'VAT shall be calculated and paid on [the commercial price of the services]'. Accord-

ingly, insofar as VAT was due in respect of the supply of the services, the total price payable by Zipvit for such supply under the contract was the commercial price plus the VAT element.

[10] However, on the basis of the domestic legislation and guidance and the common mistaken view that the services were exempt from VAT, the invoices issued by Royal Mail to Zipvit in relation to the services were marked 'E' for exempt, showed no sum attributable to VAT to be due, and charged Zipvit only the commercial price of the services. Zipvit duly paid to Royal Mail the sums set out in the invoices. Zipvit did not at the time of the supplies make any claim to recover input VAT in respect of them.

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[11] Since Royal Mail understood the services to be exempt, and since it had set out no charge for VAT in its invoices, it did not account to HMRC for any sum relating to VAT in respect of the supply of the services. HMRC likewise believed the services to be exempt and did not expect or require Royal Mail to account to them for any such sum.

[12] Things proceeded in this way for several years, until the judgment of the Court of Justice of 23 April 2009 in *R (on the application of TNT Post UK Ltd) v Revenue and Customs Comrs* (Case C-357/07) EU:C:2009:248, [2009] **STC** 1438, [2009] ECR I-3025. The Court of Justice held that the postal services exemption applied only to supplies made by the public postal services acting as such, and did not apply to supplies of services for which the terms had been individually negotiated.

[13] On the basis of this interpretation of the Directive and its predecessor by the Court of Justice, in the relevant period the services in the present proceedings should have been treated as standard rated. Royal Mail should have charged Zipvit a total price for the supply of the services equal to the commercial price plus VAT at the relevant rate, and Royal Mail should have accounted to HMRC for that VAT element. As it was, however, Zipvit was not charged and did not pay that VAT element, and Royal Mail did not account to HMRC for any sum representing VAT in respect of the services.

[14] In the light of the *TNT Post* judgment, Zipvit made two claims against HMRC for deduction of input VAT in respect of the services by a procedure called 'voluntary disclosure': (i) on 15 September 2009 in the amount of £382,599 plus interest, in respect of 'input tax paid from the quarter ended 31 March 2006 (due after 1 April 2006) to the quarter ended 30 June 2009', and (ii) on 8 April 2010 in the amount of £33,147, relating to the periods to December 2009 and to March 2010. These claims were calculated on the basis that the prices actually paid for the supplies must be treated as having included a VAT element.

[15] In the meantime, HMRC was making inquiries with Royal Mail to establish precisely which of its services were affected by the *TNT Post* judgment.

[16] HMRC rejected Zipvit's claims by letter dated 12 May 2010. This was on the basis that Zipvit had been contractually obliged to pay VAT in relation to the commercial price for the services, but it had not been charged VAT in the relevant invoices and had not paid that VAT element. After review, HMRC upheld that decision by letter dated 2 July 2010.

[17] At this time, the national limitation period of six years under s 5 of the Limitation Act 1980 for a contract claim by Royal Mail to claim the balance of the total price due to it in respect of the supply of the services (ie a sum equal to the amount of the VAT due in respect of such supply, calculated by reference to the commercial price of the services) had not expired. But issuing claims against all Royal Mail's relevant customers affected by the *TNT Post* judgment, including Zipvit, would have been costly and administratively burdensome for Royal Mail and it had no commercial interest in doing this, and so did not pursue such claims.

[18] At this time, HMRC were within the time limits set out in s 73(6) and s 77(1) of VATA to issue assessments against Royal Mail for VAT in respect of at least some of the supplies of the services. However, HMRC considered that they should not issue such assessments because national law in the form of VATA had provided at the relevant time that the supply of the services was exempt and, moreover, Royal Mail had not in fact received from Zipvit the VAT

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due in respect of the supplies. Furthermore, HMRC considered that they had created an enforceable legitimate expectation on the part of Royal Mail that it was not required to collect and account for VAT in respect of the services, so that Royal Mail would have a good defence to any attempt to issue assessments against it to account for VAT in respect of the services.

[19] Zipvit appealed against HMRC's review decision to the First-tier Tribunal (Tax Chamber). The hearing of the appeal took place on 14 and 15 May 2014. By this time, the limitation period for a contract claim by Royal Mail against Zipvit for the payment of the balance of the total price due for the supply of the services had expired in relation to the greater part of the supplies which had been made. HMRC were also largely if not entirely out of time to issue an assessment against Royal Mail, as noted in para [140] of the First-tier Tribunal's judgment.

[20] The First-tier Tribunal held that the services were standard rated as a matter of EU law, as the judgment in *TNT Post* indicated, and that the postal service exemption in national law could and should be interpreted in the same way, so that the services were properly to be regarded as standard rated as a matter of national law. This is now common ground.

[21] The First-tier Tribunal dismissed Zipvit's appeal, in a judgment dated 3 July 2014 ([2014] UKFTT 649 (TC), [2014] SFTD 1309). It held that HMRC had no enforceable tax claim against Royal Mail because Royal Mail had not in its VAT returns declared any VAT in respect of its supply of the services, had made no voluntary disclosure of underpaid VAT, had not issued any invoice showing the VAT as due, and HMRC had not assessed Royal Mail as liable to pay any VAT: para [137]. In those circumstances there was no VAT 'due or paid' by Royal Mail in respect of the supply of the services, for the purposes of art 168(a) of the Directive: paras [138]–[146]. The question whether HMRC would have been prevented by principles of public law, including the principle of legitimate expectation, from issuing an assessment against Royal Mail was left to one side, as unnecessary for determination: paras [147]–[148]. In any event, since Zipvit did not hold valid tax invoices in respect of the supply of the services, showing a charge to VAT, it had no right to claim deduction of such VAT as input tax: paras [149]–[153]. Although HMRC have a discretion under national law to accept alternative evidence of payment of VAT in place of a tax invoice (under reg 29(2) of the Value Added Tax Regulations 1995 (SI 1995/2518) – 'reg 29(2)'), which they had omitted to consider in their decisions, the First-tier Tribunal found that on due consideration whether to accept alternative evidence, HMRC would inevitably and rightly have decided in the exercise of their discretion not to accept Zipvit's claim for a deduction of input VAT in respect of the services: paras [192]–[198]. The important point in that regard was that repayment of notional input VAT to Zipvit in respect of the services would constitute an unmerited windfall for Zipvit: paras [189] and [195]–[198]. Zipvit had in fact paid only the commercial price for the services, exclusive of any element of VAT, so repayment to it of a notional element of VAT in respect of the supply of those services would mean that in economic terms it would have received the services for considerably less than their true commercial value, and there was no good reason why HMRC should in their discretion dedicate large sums of public money to achieve such an unmeritorious benefit for Zipvit.

[22] Zipvit appealed. The Upper Tribunal (Tax Chamber) dismissed the appeal ([2016] UKUT 294 (TCC), [2016] **STC** 1782). Its reasoning on the 'due or paid' issue (art 168(a) of the Directive) differed from that of the First-tier

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Tribunal which was later disapproved by the Court of Appeal and is not now supported by HMRC. It is now common ground that 'due or paid' means due or paid by the trader to the supplier. The Upper Tribunal upheld the First-tier Tribunal's decision on the invoice issue and on the question of the exercise of discretion under reg 29(2).

[23] Zipvit appealed to the Court of Appeal. It was only in the Court of Appeal that the underlying factual position regarding the obligations of Zipvit under its contract with Royal Mail was finally fully investigated and the findings of fact in that respect set out above were made. These are now common ground.

[24] The Court of Appeal dismissed Zipvit's appeal ([2018] EWCA Civ 1515, [2018] **STC** 1502, [2018] 1 WLR 5729). After an extensive review of the case law of the Court of Justice in relation to the 'due or paid' point as it arose in the light of the factual position regarding Zipvit's contractual obligations, the Court of Appeal found that the position was not *acte clair*: para [86]. However, the Court of Appeal reached the same conclusion as the Tribunals below on the invoice issue: paras [91]–[119]. After reviewing the case law of the Court of Justice, the Court of Appeal held that it was a necessary precondition for Zipvit to be able to exercise any right of deduction of input VAT in respect of the services that it should be able to produce VAT invoices which showed that VAT had been charged in respect of the supplies of the services, in compliance with art 226(9) and (10) of the Directive, or supplementary evidence showing payment of the relevant tax by Royal Mail to HMRC, which Zipvit could not do: paras [113]–[115]. The Court of Appeal agreed with the Tribunals below on the question of the exercise of discretion by HMRC under reg 29(2): paras [116]–[117]. If HMRC treated Zipvit as having paid input VAT in respect of the services, Zipvit would receive an unmerited windfall ('un-covenanted bonus'), by obtaining in effect a reduction in the commercial price it had had to pay for the services, paid for out of public funds, even though that VAT had not been paid into the public purse: para [116]. The Court of Appeal considered the position regarding the invoice issue to be *acte clair*, so that no reference was required to the Court of Justice: para [119].

The appeal to the Supreme Court

[25] Zipvit has now appealed to this court. Zipvit contends that it should succeed on both the 'due or paid' issue and the invoice issue, including so far as necessary on the question of the exercise of discretion by HMRC under reg 29(2). After full argument, the court has decided that neither the 'due or paid' issue nor the invoice issue can be regarded as *acte clair*, and that a reference should be made to the Court of Justice to ask the questions set out at the end of this judgment. In brief outline, the parties' submissions on the appeal are as follows.

(1) The 'due or paid' issue

[26] Article 168(a) of the Directive provides that a trader who is a taxable person has an entitlement to deduct from VAT which he is liable to pay 'the VAT due or paid ... in respect of supplies to him of goods or services, carried out or to be carried out by another taxable person'.

[27] Zipvit contends that in the circumstances of this case, on each occasion when (although contractually liable for VAT in addition) it only paid the commercial price charged to it in Royal Mail's invoice it (Zipvit) must be treated as having paid an element of VAT to be regarded as embedded in the

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sum paid. The sum charged by Royal Mail and paid by Zipvit should be treated as a total price comprising a (lesser) taxable amount and the VAT at standard rate on that taxable amount. Thus, if Royal Mail charged Zipvit £120 in an invoice for the services, that being the commercial price for the services, and Zipvit only paid that amount, then even though the invoice purported to say that the services were exempt from VAT, the taxable amount (within the meaning of arts 73 and 78 of the Directive) should (after the elapse of six months under art 90 and s 26A of VATA) be treated as having been only £100 and the additional £20 (as-

suming a 20% rate of VAT) should be treated as VAT, which Zipvit is now entitled to claim as input VAT relating to supplies made by it to its customers. This embedded VAT element of each payment constitutes VAT which has been 'paid', in the requisite sense, and thus falls within art 168(a).

[28] In support of this submission, Zipvit relies in particular on arts 73, 78 and 90 of the Directive (reflected in national law in ss 19(2) and 26A of VATA) and the judgment in *Tulică v Agenția Națională de Administrare Fiscală – Direcția Generală de Soluționare a Contestațiilor* (Joined cases C-249/12 and C-250/12) EU:C:2013:722, [2013] BVC 547.

[29] Alternatively, even if the embedded element of VAT on which Zipvit relies is not to be regarded as having been 'paid' for the purposes of art 168(a), VAT should be regarded as being 'due' for the purposes of that provision, so that Zipvit is entitled to claim to deduct it as input VAT on that basis.

[30] To the extent that HMRC say that they cannot compel Royal Mail to account to them for VAT in respect of its supply of the services to Zipvit, that is HMRC's own fault (either because of their actions in creating any legitimate expectation or other defence on which Royal Mail could rely against enforcement action taken by HMRC – it not being admitted that there is any such defence – or by reason of allowing time to elapse so that they are now out of time to take enforcement action), and is not in any event a matter which can prevent Zipvit from relying on its entitlement under art 168(a) to deduct input VAT due or paid.

[31] Against these submissions, HMRC contend that in the circumstances of this case there is nothing in the Directive which requires or justifies the retrospective re-writing of the commercial arrangements between Royal Mail and Zipvit, according to which the invoices from Royal Mail referred only to the commercial price to be paid by Zipvit for the services and Zipvit remained contractually obliged to pay Royal Mail an additional sum in respect of VAT at the standard rate in respect of that commercial price (as became clear only after the *TNT Post* judgment). As events transpired, Royal Mail did not issue further invoices to demand payment of that VAT; it could not be compelled to issue such further invoices (and is now out of time to do so, under the national law of limitation in relation to contract claims); it has not accounted to HMRC for any VAT in respect of the services (whether embedded VAT on a lower notional commercial price as referred to by Zipvit or VAT chargeable on the true commercial price); and HMRC could not take action to compel Royal Mail to account for any VAT in respect of the supply of the services (either for reasons of public law, including respect for the legitimate expectations of Royal Mail, or by reason of limitation).

[32] HMRC say that to allow Zipvit to claim an element of VAT notionally embedded in the payments it made to Royal Mail would be to re-write history in an entirely theoretical manner divorced from reality, which is not required by any provision of the Directive. As the Tribunals and the Court of Appeal

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rightly found, it would mean that Zipvit gained an unmerited financial windfall at the expense of the taxpayer (and which would give it an advantage against its commercial competitors), which cannot be justified under the Directive. It would also produce a result which would violate the principle of neutrality which is fundamental to the Directive, in that the input VAT which Zipvit claims to deduct has never been paid into the public purse and Royal Mail would not have acted as collecting agent for the tax authorities in the manner required to give effect to that principle (relying in that regard, in particular, on the judgments in *Elida Gibbs Ltd v Customs and Excise Comrs* (Case C-317/94) EU:C:1996:400, [1996] STC 1387, [1997] QB 499, para 22, and in *Minister Finansów v MDDP sp z oo Akademia Biznesu, sp komandytowa* (Case C-319/12) EU:C:2013:778, [2014] STC 699, paras 41–43).

[33] HMRC submit that the present case is to be distinguished from the circumstances under consideration in *Tulică*. At para 37 of the judgment in that case, the Court of Justice expressly said that it was not dealing with the type of contractual arrangement which has been found to exist in this case. In a case where the contract between the supplier (Royal Mail) and the trader (Zipvit) obliges the trader to pay the commercial price

for the services supplied plus a supplement covering the VAT due in respect of that commercial price, the case law indicates that on the proper interpretation of art 168(a) of the Directive VAT can only be regarded as having been 'paid' when the VAT due in respect of the commercial price is actually paid, which it has not been here. The case law also indicates that VAT can only be regarded as being 'due' when there is an enforceable claim to collect it from Zipvit and to ensure that it is passed on to the tax authorities, which there is not here. HMRC rely, in particular, on *Véleclair SA v Ministre du budget, des comptes publics et de la réforme de l'Etat* (Case C-414/10) EU:C:2012:183, [2012] **STC** 1281; *Volkswagen AG v Finančné riaditeľstvo Slovenskej republiky* (Case C-533/16) EU:C:2017:823 (opinion), EU:C:2018:204 (judgment), [2018] BVC 15; and *Biosafe—Indústria de Reciclagens SA v Flexipiso—Pavimentos SA* (Case C-8/17) EU:C:2017:927 (opinion), EU:C:2018:249 (judgment), [2018] BVC 17.

[34] HMRC say that the case law does not suggest that the conduct of the tax authority is a relevant consideration in the application of the Directive in a case of this kind. Usually, in the absence of a declaration by the supplier or the presentation of tax invoices which comply with art 226(9) and (10), the tax authority will not know what supplies have been made and whether it is in a position to issue a tax assessment against the supplier. Further and in any event, there is nothing in the conduct of HMRC which could justify disregarding the principles of EU law referred to in this jurisprudence. As in the *Volkswagen* and *Biosafe-Industria* cases, the situation under review has arisen as a result of a simple mistake made in good faith by all of Zipvit, Royal Mail and HMRC.

[35] HMRC also rely on the principle that asymmetrical reliance on the Directive is not permitted, whereby a trader both takes advantage of an exemption in national law (which is not in fact authorised by the Directive) in relation to supplies and seeks to deduct input VAT in relation to those supplies. In that regard, HMRC refer in particular to the *MDDP* case. They contend that in substance Zipvit is seeking both to take advantage of the fact that national law mistakenly treated the supply of the services in this case as exempt and to rely on the Directive in support of its claim to deduct input VAT in relation to such supply, in breach of that principle. Zipvit denies this.

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(2) The invoice issue

[36] Zipvit submits that the case law of the Court of Justice indicates that there is an important difference between the substantive requirements to be satisfied for a claim for input tax (including those in art 168(a)) and the formal requirements which apply in relation to such a claim (including those in relation to the production of a VAT invoice in accordance with art 226). The approach is strict in relation to the substantive requirements, but departure from the formal requirements is permissible if alternative satisfactory evidence of the VAT which was paid or is due can be produced by the trader. Zipvit relies in particular on the judgments in *Barlis 06—Investimentos Imobiliários e Turísticos SA v Autoridade Tributária e Aduaneira* (Case C-516/14) EU:C:2016:690, [2016] BVC 43, *SC Paper Consult SRL v Direcția Regională a Finanțelor Publice Cluj-Napoca and Administrația Județeană a Finanțelor Publice Bistrița-Nasaud* (Case C-101/16) EU:C:2017:775, [2017] BVC 52 and *Vădan v Agenția Națională de Administrare Fiscală — Direcția Generală de Soluționare a Contestațiilor* (Case C-664/16) EU:C:2018:933.

[37] In this case, Zipvit contends that it has produced alternative satisfactory evidence of the VAT which was paid (in the form of the payment of embedded VAT which Zipvit contends was included in the price paid by it to Royal Mail) or which was due, since with the benefit of the judgment in the *TNT Post* case this can readily be worked out from the invoices which Royal Mail in fact sent to Zipvit together with an understanding of the contractual arrangements for the provision of the services to which the invoices related. HMRC could not, in the exercise of their discretion under reg 29(2), refuse to accept the alternative evidence produced by Zipvit in support of its claim.

[38] Zipvit contends that the judgments in the *Volkswagen* and *Biosafe—Industria* cases do not have the significance for the invoice issue which HMRC say they have. According to Zipvit, the better explanation of

the reasoning in those cases is that they were concerned to ensure that a trader should not be prevented from being able to give practical effect to its right to claim deduction of input VAT in circumstances where it had been misled by receipt of an invoice which purported to show that no VAT was due in respect of a supply.

[39] Against this, HMRC submit that the regime in the Directive for collection of VAT in accordance with the principle of neutrality requires particular importance to be attached to the requirements in art 226(9) and (10) regarding production of an invoice which shows that VAT is due in respect of a supply and in what amount. Under the VAT regime, several parties need to know these matters in order for the regime to function effectively; and the tax authorities need to be presented with invoices which deal properly with these requirements so that they can monitor the position and ensure that the supplier has properly accounted to them for the VAT charged. Therefore, according to HMRC, a valid claim for deduction of input tax cannot be made in the absence of a VAT invoice which satisfies these particular requirements.

[40] HMRC support the reasoning of the Court of Appeal. They also rely, in particular, on the Advocate Generals' opinions and the judgments in the *Volkswagen* and *Biosafe—Industria* cases, which they contend support their submission that a valid claim for deduction of input VAT in respect of the supply of the services would have to be supported by a VAT invoice from Royal Mail which complied with art 226(9) and (10) of the Directive. Zipvit had never asked Royal Mail to send invoices charging it with the VAT due in respect of the commercial price charged for the supply of the services and evidently had

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no intention of asking for such invoices or of paying the charge for VAT which they would contain. Since Zipvit could not produce relevant VAT invoices in support of its claim to deduct input VAT in respect of the services, that claim must fail. There is nothing in EU law which can be relied on to impugn the conclusion of the Tribunals and the Court of Appeal regarding the exercise of HMRC's discretion under reg 29(2).

[41] Copies of the provisions of national law referred to above are annexed to this reference.

The reference to the Court of Justice

[42] In these circumstances, the court refers the following questions to the Court of Justice:

- (1) Where (i) a tax authority, the supplier and the trader who is a taxable person misinterpret European VAT legislation and treat a supply, which is taxable at the standard rate, as exempt from VAT, (ii) the contract between the supplier and the trader stated that the price for the supply was exclusive of VAT and provided that if VAT were due the trader should bear the cost of it, (iii) the supplier never claims and can no longer claim the additional VAT due from the trader, and (iv) the tax authority cannot or can no longer (through the operation of limitation) claim from the supplier the VAT which should have been paid, is the effect of the Directive that the price actually paid is the combination of a net chargeable amount plus VAT thereon so that the trader can claim to deduct input tax under art 168(a) of the Directive as VAT which was in fact 'paid' in respect of that supply?
- (2) Alternatively, in those circumstances can the trader claim to deduct input tax under art 168(a) of the Directive as VAT which was 'due' in respect of that supply?
- (3) Where a tax authority, the supplier and the trader who is a taxable person misinterpret European VAT legislation and treat a supply, which is taxable at the standard rate, as exempt from VAT, with the result that the trader is unable to produce to the tax authority a VAT invoice which complies with art 226(9) and (10) of the Directive in respect of the supply made to it, is the trader entitled to claim to deduct input tax under art 168(a) of the Directive?

(4) In answering questions (1) to (3):

(a) is it relevant to investigate whether the supplier would have a defence, whether based on legitimate expectation or otherwise, arising under national law or EU law, to any attempt by the tax authority to issue an assessment requiring it to account for a sum representing VAT in respect of the supply?

(b) is it relevant that the trader knew at the same time as the tax authority and the supplier that the supply was not in fact exempt, or had the same means of knowledge as them, and could have offered to pay the VAT which was due in respect of the supply (as calculated by reference to the commercial price of the supply) so that it could be passed on to the tax authority, but omitted to do so?

Reference accordingly.