

# **ECJ case- law on the VAT deduction**

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# General comments (I)

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# General comments (II), relevance of the right of deduct, the principle of neutrality

- **General principle** referred to in judgments like:
  - Rompelman, 14-2-1985, C-268/83
  - Midland Bank, 8-6-2000, C-98/98
  - Securenta, 13-3-2008, C-437/06
  - Polski Trawertyn, 1-3-2012, C-280/10
  - Mahagében and Dávid, 21-6-2012, C-80/11 and C-142/11
  - Idexx Laboratories Italia, 11-12-2014, C-590/13
  - Sveda, 22-10-2015, C-126/14

# General comments (III), possibility to set up exceptions

- Unless expressly authorized, it is **impossible** to set up exceptions to right to deduct:
  - Commission vs. France, 21-9-1988, C-50/87
  - BP Soupergaz, 6-7-1995, C-62/93
  - Ampafrance and Sanofi, 19-9-2000, C-177/99 and C-181/99
  - SALIX Grundstücks-Vermietungsgesellschaft, 4-6-2009, C-102/08
  - Mahagében and Dávid, 21-6-2012, C-80/11 and C-142/11

# General comments (IV), irrelevance of fulfilment of formal requirements

- A **mere break** in the fulfilment of the formal requirements cannot, by it self, justify the deny of the right to deduct input VAT:
  - Collée, 27-9-2007, C-146/05
  - Pannon Gép Centrum, 15-7-2010, C-368/09
  - Nidera Handelscompagnie, 21-10-2010, C-385/09
  - Dankowski, 22-12-2010, C-438/09
  - Petroma Transports and others, 8-5-2013, C-271/12
  - Idexx Laboratories Italia, 11-12-2014, C-590/13
  - Dobre, 7-3-2018, C-159/17
  - Gamesa Wind România, 12-9-2018, C-69/17
  - Vădan, 21-11-2018, C-664/16
  - Fontana, 21-11-2018, C-648/16

# General comments (V), principle of effectiveness

- As any other right included in the EU Law, the right to deduct input VAT must be **effective**. Requirements making it very difficult or nearly impossible are contrary to the VAT Directive:
  - Uszodaépítő, 30-9-2010, C-392/09
  - Polski Trawertyn, 1-3-2012, C-280/10



# Origin of the right of deduction

- Origin of the right of deduction
- Time limit for the right to deduct
- The taxable person condition at the time of the origin of the right to deduct
- The intention with which goods and services were acquired
- Overcurrent circumstances
- Amendments in legislation in force when the right to deduct arises



# Origin of the right of deduction (I)

- **Terra Baubedarf-Handel, 29-4-2004, C-152/02**
  - The exercise of the right to deduct is conditioned on the provision of an invoice that meets the requirements established for that purpose by the corresponding Member State. In case of receipt of said invoice after the end of the settlement period in which the operation was made, it will be when the invoice is received when the right to deduct may be exercised, not before.

# Origin of the right of deduction (II)

- **Véleclair, 29-3-2012, C-414/10**
  - VAT corresponding to imports is deductible even if the quota is still unpaid.

# Origin of the right of deduction (III)

- **Volkswagen, 21-3-2018, C-533/16**
  - EU law precludes legislation of a Member State under which, in circumstances in which the VAT was charged to the taxable person and paid several years after the delivery of the concerned goods, the right to claim a refund of VAT is denied on the grounds that the limitation period provided for by that legislation for the exercise of that right began to run from the date of supply and expired before the application for a refund was submitted.

# Origin of the right of deduction (IV)

- **Kolloß and Wirtl, 31-5-2018, C-660/16**
  - According to the VAT Directive, a taxable person may not be refused the right to deduct the VAT relating to a payment on account in respect of some goods where that payment has been made and received and where, at the time that payment was made, all the relevant information concerning the future supply could be regarded as known to that the recipient and the supply of those goods appeared to be certain.
  - However, that buyer may be refused that right if it is established, having regard to objective elements, that, at the time the payment on account was made, he knew or should reasonably have known that that supply was uncertain.

# Origin of the right of deduction, time limit for the right to deduct (I)

- **Ecotrade, 8-5-2008, C-95/07 and C-96/07**
  - An expiration term whose termination has the effect of penalizing the taxpayer with the loss of the right to deduct cannot be considered incompatible with the regime established by the VAT Directive, provided that this period is applied in the same way to similar rights in tax matters based on national law and those based on the EU law (principle of equivalence) and that do not make it in practice impossible or excessively difficult (principle of effectiveness).
  - It is compatible with the principle of equal treatment that the expiration period begins to run for the tax authorities later than the start of the expiration period for the taxpayer to exercise his right to the deduction.

# Origin of the right of deduction, time limit for the right to deduct (II)

- **Nidera Handelscompagnie, 21-10-2010, C-385/09**
  - If the exercise of the right to deduct VAT was not subject to any temporary limitation, the legal certainty principle would not be fully respected. The obligation for taxpayers to identify themselves for VAT purposes could become meaningless if the Member States could not impose a reasonable time period for that purpose.

# Origin of the right of deduction, time limit for the right to deduct (III)

- **EMS Bulgaria Transport, 12-7-2012, C-284/11**
  - The exercise of the right to deduct may be subject to a period of expiration, provided that it does not make it excessively difficult or impossible in practice to exercise that right.
  - It is for the national court to make this assessment, for which it may take into account, in particular, the subsequent approval of an extension of the expiry period, as well as the duration of the registration procedure, for VAT purposes, which must be followed within of the same term to be able to exercise the aforementioned right to the deduction.

## Origin of the right of deduction, the taxable person condition at the time of the origin of the right to deduct (I)

- **Rompelman, 14-2-1985, C-268/83**

- The acquisition of a right to the future transfer of property rights in part of a building yet to be constructed with a view to letting such premises in due course may be regarded as an economic activity within the meaning of the VAT Directive.
- Consequently, the VAT paid for this operation is deductible. Any other interpretation would imply a discrimination between acquisitions prior to the start of active operations and those that take place later, contrary to the principle of neutrality.



## Origin of the right of deduction, the taxable person condition at the time of the origin of the right to deduct (II)

- **INZO, 29-2-1996, C-110/94**

- Once the tax authority has accepted that a company which has declared an intention to commence an economic activity giving rise to taxable transactions has the status of VAT taxable person, the commissioning of a profitability study may be regarded as an economic activity, even if the purpose of that study is to investigate to what degree the envisaged activity is profitable.
- Except in cases of fraud or abuse, the status of taxable person may not be withdrawn retroactively where, in view of the results of that study, it has been decided not to move to the operational phase, but to put the company into liquidation, being that the economic activity has not given rise to taxable transactions.

## Origin of the right of deduction, the taxable person condition at the time of the origin of the right to deduct (III)

- **Investrand, 8-2-2007, C-435/05**

- The costs of advisory services acquired by a taxable person in order to determine the amount of a credit that is part of the assets of his company and which refers to a sale of shares held before the taxable person had the condition of such, do not present, in the absence of data that demonstrate that these services are exclusively related to economic activity, a direct and immediate relationship with this activity and, therefore, are not deductible.

# Origin of the right of deduction, the intention with which goods and services were acquired (I)

- **Lennartz, 11-7-1991, C-97/90**
  - The determination of whether, in a particular case, a taxable person has acquired goods for the purposes of his economic activity is a question of fact which must be determined in the light of all the circumstances of the case, including the nature of the goods concerned and the period between the acquisition of the goods and their use for the purposes of the taxable person's economic activity.

# Origin of the right of deduction, the intention with which goods and services were acquired (II)

- **Waterschap Zeeuws Vlaanderen, 2-6-2005, C-378/02**
  - A body governed by public law that acquires a capital good acting as a public authority, without having the condition, therefore, of taxable person, and that subsequently sells said asset as taxable person cannot apply the adjustment of capital goods that is regulated in the VAT Directive for said transactions when performed by taxable persons.

# Origin of the right of deduction, the intention with which goods and services were acquired (III)

- **Klub, 22-3-2012, C-153/11**

- According to the VAT Directive, the VAT paid for a capital good that is acquired with the intention of using it in the economic activity is deductible, although its effective use in the same is delayed in time.
- It is for the national court to determine whether the taxpayer has acquired the capital good for the needs of its economic activity and to assess, if applicable, the existence of a fraudulent practice.

# Origin of the right of deduction, the intention with which goods and services were acquired (IV)

- **Gmina Ryjewo, 25-7-2018, C-140/17**
  - The VAT Directive and the principle of the neutrality do not preclude a public body from the right to an adjustment of deductions of VAT borne on immovable property acquired as capital goods in a situation where, at the time of the acquisition of those goods they could, by their very nature, be used both for taxable activities and for non-taxable activities but were initially used for non-taxable activities, and that public body had not expressly stated its intention to use those goods for a taxable activity but had also not excluded the possibility that they might be used for such a purpose, so long as it follows from an assessment of all the factual circumstances.

# Origin of the right of deduction, overcurrent circumstances (I)

- **Ghent Coal Terminal, 15-1-1998, C-37/95**
  - In accordance with the VAT Directive, VAT borne for the acquisition of goods and services whose destination was the realization of taxed transactions, but which, for reasons beyond the control of the taxpayer, have never been used in such operations, is eligible for deduction.

# Origin of the right of deduction, overcurrent circumstances (II)

- **Kolloß and Wirtl, 31-5-2018, C-660/16 and C-661/16**
  - According to the VAT Directive, a taxable person may not be refused the right to deduct the VAT relating to a payment on account in respect of goods where that payment has been made and received and where, at the time that payment was made, all the relevant information concerning the future supply was known and the supply of those goods appeared to be certain.
  - However, that taxable person may be refused that right if it is established, having regard to objective elements, that, at the time the payment on account was made, he knew or should reasonably have known that that supply was uncertain.



# Origin of the right of deduction, amendments in legislation in force when the right to deduct arises (I)

- **Schloßstraße, 8-6-2000, C-396/98**

- In application of the principle of legal certainty, a taxable person who acquires a good that is going to be used to carry out operations generating the right to deduct continues to have this right, although at the time of carrying out the aforementioned operations they no longer generate this right as a consequence of a legislative amendment produced after the purchase of the concerned good.

## Origin of the right of deduction, amendments in legislation in force when the right to deduct arises (II)

- **Gemeente Leusden and Holin Groep, 29-4-2004, C-487/01 and C-7/02**
  - The principles of protection of legitimate expectations and legal certainty do not preclude a Member State from removing the possibility to opt out the exemption in the leasing of immovable property, deriving from this the obligation to adjust the deductions made for the capital goods leased.
  - These same principles do not preclude the abolition of tax provisions which generate advantageous situations for taxpayers, even if they are not abusive practices.

## Origin of the right of deduction, amendments in legislation in force when the right to deduct arises (III)

- **Heiser, 3-3-2005, C-172/03**
  - A regulation according to which dentists go from a regime of taxation and not exemption to an exemption regime, without requiring the regularization that comes from the VAT paid on the acquisition of capital goods, must be qualified as aid of State, contrary to the TFEU art.107.

## Origin of the right of deduction, amendments in legislation in force when the right to deduct arises (IV)

- **«Goed Wonen», 26-4-2005, C-376/02**
  - A legal amendment may affect the right to the deduction if it was born after said amendment rule was announced by the administrative authority that proposed it to the national Parliament, although the latter has subsequently approved it with retroactive effect.
  - The principles of legal certainty and protection of legitimate expectations do not preclude a conclusion like this. In this case, adjustment of the deductions thus made may be mandatory.

# Scope of the right of deduction

- The right to deduct and the development of the economic activity in the time
- Subjective element
  - Non-taxable persons
  - Partial use in the economic activity
    - Private use by taxable persons
    - In particular, the holding entities
    - The leasing of goods to related persons or entities
  - Economic-marriage regimes
  - Effect of third parties' conduct in the right to deduct
    - General comments
    - In particular, fraudulent transactions
  - The right to deduct and the cases of abuse
- The use in transactions generating the right to deduct
  - General principle of fractioned payments
  - Goods and services used in exempted transactions
  - General expenses
- The right to deduct and the charging of VAT
  - VAT not directly borne
  - VAT incorrectly charged and borne
  - Reverse charge
- Additional restrictions
  - Personal use goods and services, standstill clause
  - Temporary provisions

# Scope of the right of deduction, the right to deduct and the development of the economic activity in the time (I)

- **Rompelman, 14-2-1985, C-268/83**

- The acquisition of a right to the future transfer of property rights in part of a building yet to be constructed with a view to letting such premises in due course may be regarded as an economic activity within the meaning of the VAT Directive.
- Consequently, VAT borne for this operation is deductible. Any other interpretation would imply a discrimination between acquisitions prior to the start of active operations and those that take place later, contrary to the principle of neutrality.

# Scope of the right of deduction, the right to deduct and the development of the economic activity in the time (II)

- **INZO, 29-2-1996, C-110/94**

- Once the tax authority has accepted that a company which has declared an intention to commence an economic activity has the status of a taxable person for VAT purposes, the commissioning of a profitability study in respect of the envisaged activity may be regarded as a part of the economic activity, even if the purpose of that study is to investigate to what degree the activity envisaged is profitable.
- Except in cases of fraud or abuse, the status of taxable person may not be withdrawn retroactively where, in view of the results of that study, it has been decided not to move to the operational phase, but to put the company into liquidation with the result that the economic activity envisaged has not given rise to taxable transactions.

# Scope of the right of deduction, the right to deduct and the development of the economic activity in the time (III)

- **Breitsohl, 8-6-2000, C-400/98**
  - In accordance with the VAT Directive, VAT borne for of goods and services acquired with the intention of allocating them to an economic activity are deductible, although at the date of the deduction it is known that the activity is not going to start at any time.



# Scope of the right of deduction, the right to deduct and the development of the economic activity in the time (IV)

- **Klub, 22-3-2012, C-153/11**

- According to the VAT Directive, VAT paid for a capital good that is acquired with the intention of using it in the economic activity is deductible, although its effective use in the same is delayed in time.
- It is for the national court to determine whether the taxpayer has acquired the capital good for the needs of its economic activity and to assess, if applicable, the existence of a fraudulent practice.

# Scope of the right of deduction, the right to deduct and the development of the economic activity in the time (V)

- **Fini H, 3-3-2005, C-32/03**

- A taxpayer who ceases in the activity, but cannot cease the lease of the premises that he was using, can deduct the VAT paid for it, since it is a service direct and immediately related to the activity he developed, provided that there is no intention of fraud or abuse.

# Scope of the right of deduction, the right to deduct and the development of the economic activity in the time (VI)

- **Wind Inovation 1, 9-11-2017, C-552/16**
  - The VAT Directive precludes national legislation pursuant to which the compulsory removal from the VAT register of a company whose dissolution has been ordered by court decision results, even where that company continues to carry out economic transactions whilst being placed under liquidation, in the obligation to calculate the input VAT due or paid on the available assets on the date of that dissolution and to pay it and which, therefore, makes the right to deduct subject to compliance with that obligation.

# Scope of the right of deduction, subjective element, non-taxable persons (I)

- **Polysar Investments Netherlands, 20-6-1991, C-60/90**
  - A pure holding company that lacks the status of VAT taxable person does not have the right to the deduction of the input VAT.

# Scope of the right of deduction, subjective element, non-taxable persons (II)

- **Gemeente Borsele, 12-5-2016, C-520/14**
  - For the purposes of the VAT Directive, a public authority which provides a service for the transport of schoolchildren under conditions such as those described in the main proceedings, recovering 3% of the total costs of the service, does not carry out an economic activity and is not therefore a taxable person.
  - The conditions under which the services at issue in the main proceedings are supplied are different from those under which passenger transport services are usually provided, since the municipality does not offer services on the general passenger transport market, but rather appears to be a beneficiary and final consumer of transport services which it acquires from transport undertakings with which it deals and which it makes available as part of its public service activities.

# Scope of the right of deduction, subjective element, non-taxable persons (III)

- **MVM, 12-1-2017, C-28/16**

- According to the VAT Directive, insofar as the involvement of a holding company, in the management of its subsidiaries, where it has charged those subsidiaries neither for the cost of the services procured in the interest of the group of companies as a whole or in the interest of certain of its subsidiaries, nor for the corresponding VAT, does not constitute an 'economic activity', such a holding company does not have the right to deduct input VAT paid in respect of those services in so far as those services relate to transactions falling outside the scope of that directive (this is an order, not a judgment).

## Scope of the right of deduction, subjective element, partial use in the economic activity, private use by taxable persons (I)

- **BLP Group, 6-4-1995, C-4/94**

- The fact that the funds obtained from the sale of some shares are intended to settle the debts of the activity does not allow the services related to said sale to be considered as general expenses of the activity and, therefore, VAT borne as a deductible.

## Scope of the right of deduction, subjective element, partial use in the economic activity, private use by taxable persons (II)

- **Armbrecht, 4-10-1995, C-291/92**
  - A taxable person may choose to integrate into its business assets the total of a good used for the purposes of economic activity and for private purposes. In any case, both the deductions and their regularizations or adjustments will refer to the part of the asset that has been integrated into the business assets (judgment relating to events prior to Dir 2010/45, which introduced art.168a in the Dir 2006/112).



## Scope of the right of deduction, subjective element, partial use in the economic activity, private use by taxable persons (III)

- **Seeling, 8-5-2003, C-269/00**

- The use by its owner for private purposes of a property that has been completely integrated into its business assets is not exempt as a lease. Consequently, the VAT paid on the acquisition of said property is fully deductible, having to pay the VAT corresponding to the private use of the property as it is being produced (judgment relating to events prior to Dir 2010/45, which introduced art.168a in the Dir 2006/112).

## Scope of the right of deduction, subjective element, partial use in the economic activity, private use by taxable persons (IV)

- **X, 19-7-2012, C-334/10**
  - The private use of a capital good for mixed use cannot prevent the right to deduction of input VAT when the intention of the taxpayer is its destination to economic activity.
  - Therefore, a taxpayer who temporarily uses a part of a capital good affected to his business for his private needs has the right to deduct the VAT borne for the expenses incurred in making lasting reforms to said good, even if said reforms were carried out for the purposes of such temporary use for private purposes.

## Scope of the right of deduction, subjective element, partial use in the economic activity, private use by taxable persons (V)

- **Malburg, 13-3-2014, C-204/13**

- According to the VAT Directive, a member in a partnership of tax advisors who acquires from said partnership a portion of its client base for the sole purpose of making that client base available directly and free of charge to a newly founded partnership of tax advisors, in which he will be the principal member, so that that partnership can use that client base in its business, without that client base however becoming part of the capital assets of the newly founded partnership, is not entitled to deduct the input VAT corresponding to the acquisition of the referred client base.

## Scope of the right of deduction, subjective element, partial use in the economic activity, private use by taxable persons (VI)

- **DSV Road, 25-6-2015, C-187/14**
  - It is compatible with the VAT Directive a national regulation that opposes the deduction of VAT paid on import by a carrier that is neither the importer nor the owner of the concerned goods, but it has simply carried out their transport and the customs processing in the framework of its activity as a freight forwarder.

## Scope of the right of deduction, subjective element, partial use in the economic activity, private use by taxable persons (VII)

- **Związek Gmin Zagłębia Miedziowego, 8-5-2019, C-566/17**
  - The VAT Directive precludes a national practice that authorizes the taxpayer to deduct the entire VAT borne by the acquisition of goods and services used in the performance of economic activities, subject to VAT, and non-economic activities, which do not VAT is applied, due to the absence, in the national tax regulations, of specific rules relating to the criteria and breakdown methods that allow the taxpayer to determine the part of that input VAT that must be considered related, respectively, to their activities economic and with their non-economic activities.

## Scope of the right of deduction, subjective element, partial use in the economic activity, private use by taxable persons (VIII)

- **The Chancellor, Masters and Scholars of the University of Cambridge, 3-7-2019, C-316/18**
  - According to the VAT Directive, a taxable person who exercises both subject to VAT and exempted activities, who invests in a fund the donations and endowments that receives and who uses the income generated by that fund to cover the costs of all these activities, cannot deduct, as general expenses, the input VAT paid in respect of the costs associated with that investment.

## Scope of the right of deduction, subjective element, partial use in the economic activity, in particular, the holding entities (I)

- **Sofitam, 22-6-1993, C-333/91**
  - Dividends are not consideration of operations subject to VAT. Consequently, it is not appropriate to include their amount in any of the terms, numerator or denominator, of the proportional deduction or pro rata.

## Scope of the right of deduction, subjective element, partial use in the economic activity, in particular, the holding entities (II)

- **Floridienne and Berginvest, 14-11-2000, C-142/99**
  - Transactions outside the scope of application of VAT, as dividends, are not included in the calculations of the fraction used to calculate the deductible proportion.



## Scope of the right of deduction, subjective element, partial use in the economic activity, in particular, the holding entities (III)

- **Cibo Participations, 27-9-2001, C-16/00**
  - Expenses incurred by a holding company for the services used in connection with the acquisition of shares in a subsidiary to which said holding company will provide support services are part of its general expenses and, therefore, have in principle a direct and immediate relationship with its economic activity.

## Scope of the right of deduction, subjective element, partial use in the economic activity, in particular, the holding entities (IV)

- **Securenta, 13-3-2008, C-437/06**

- If a taxable person indifferently performs economic, taxed or exempt activities, and non-economic activities, the deduction of the VAT paid for services related to the issuance of shares and atypical silent partnerships is only admissible insofar as said expenses can be imputed to the economic activity.
- The taxable person that simultaneously develop economic activities and others that are not can deduct the VAT proportionally corresponding to the first one. Although the determination of the methods and the criteria for allocating the input VAT falls within the discretion of the Member States, they must take into account the purpose and structure of the Directive and establish a calculation method that objectively reflects the part of the expenses incurred that is really attributable to each of these two activities.

# Scope of the right of deduction, subjective element, partial use in the economic activity, in particular, the holding entities (V)

- **Larentia + Minerva, 16-7-2015, C-108/14**

- For the purposes of the VAT Directive, it must be considered that:
  - the expenditure connected with the acquisition of shareholdings in subsidiaries incurred by a company which involves itself in their management and which, on that basis, carries out an economic activity must be regarded as belonging to its general expenditure and the input VAT must, in principle, be deducted in full, unless certain output economic transactions are exempt, in which case the right to deduct will be partial;
  - the expenditure connected with the acquisition of shareholdings in subsidiaries incurred by a holding company which involves itself in the management only of some of those subsidiaries and which, with regard to the others, does not, by contrast, carry out an economic activity must be regarded as only partially belonging to its general expenditure, so that the VAT paid on that expenditure may be deducted only in proportion to that which is inherent to the economic activity.

# Scope of the right of deduction, subjective element, partial use in the economic activity, in particular, the holding entities (VI)

- **Marle Participations, 5-7-2018, C-320/17**

- The letting of a building by a holding company to its subsidiary can be considered as involvement in the management of that subsidiary, which must be qualified as an economic activity, giving rise to the right to deduct the VAT on the expenditure incurred for the purpose of acquiring shares in that subsidiary, where that supply of services is made on a continuing basis, carried out for consideration and taxed, meaning that the letting is not exempt, and there is a direct link between the service rendered by the supplier and the consideration received from the beneficiary.
- Expenditure connected with the acquisition of shareholdings in subsidiaries incurred by a holding company which involves itself in the subsidiaries' management by letting them a building and which, on that basis, carries out an economic activity, has to be regarded as belonging to its general expenditure and the VAT paid on that expenditure must, in principle, be capable of being deducted in full.
- Expenditure connected with the acquisition of shareholdings in subsidiaries incurred by a holding company which involves itself in the management of only some of those subsidiaries and which, with regard to the others, does not, by contrast, carry out an economic activity must be regarded as only partially belonging to its general expenditure, so that the VAT paid on that expenditure may be deducted only in proportion to the expenditure which is inherent in the economic activity.

# Scope of the right of deduction, subjective element, partial use in the economic activity, in particular, the holding entities (VII)

- **Ryanair, 17-10-2018, C-249/17**
  - VAT borne for consultancy services received for the purpose of the acquisition of another company's shares is deductible far as:
    - the services were provided to the company when it intended, by the planned acquisition, to pursue an economic activity consisting in providing to that company management services subject to VAT, even if, ultimately, that economic activity, which was to give rise to taxable transactions, was not carried out and, accordingly, did not give rise to such transactions.
    - the expenditure must be regarded as being attributable to the performance of that economic activity which consisted in carrying out transactions giving rise to a right to deduct. On that basis, that expenditure has a direct and immediate link with that economic activity as a whole and, consequently, is part of its general costs.
  - It follows that the corresponding VAT gives rise to the right to deduction in full.


## Scope of the right of deduction, subjective element, partial use in the economic activity, the leasing of goods to related persons or entities (I)

- **Eon Aset Menidjmont, 16-2-2012, C-118/11**
  - A leased motor vehicle will be considered used for the needs of taxed transactions of the taxable person if there is a direct and immediate relationship between the use of said vehicle and the taxable persons economic activity.
  - A car leased under a financial lease and qualified as a capital good shall be considered used for the needs of the taxed operations if the taxpayer acting as such affects it in its entirety to its business assets, input VAT being fully and immediately deductible.
  - VAT borne in the lease of a vehicle that is used for the provision free of charge by the employer to employees, including manager, is deductible as general expenses of the activity, in which case the provision of the transportation service will be subject to VAT.

## Scope of the right of deduction, subjective element, partial use in the economic activity, the leasing of goods to related persons or entities (II)

- **X, 19-7-2012, C-334/10**

- The private use of a capital good for mixed use cannot prevent the right to deduction of input VAT when the intention of the taxpayer is its destination to the economic activity. Therefore, a taxpayer who temporarily uses a part of a capital good affected to his business for his private needs has the right to deduct the VAT incurred for the expenses incurred in making lasting reforms to said good, even if said reforms were carried out for the purposes of such temporary use for private purposes.
- That right to deduct exists regardless of whether, upon acquisition of the capital good on which the reforms were made, the VAT was invoiced to the taxpayer or deducted by the latter.



Scope of the right of deduction, subjective element, partial use in the economic activity, the leasing of goods to related persons or entities (III)

- **BLM, 29-3-2012, C-436/10**

- The free transfer of a property to the administrator of a company cannot be considered as an exempt operation that limits the right to the deduction. It is for the referring court to determine whether, in a situation such as that at issue in the main proceedings, a lease of immovable property which may be exempt can be considered to exist.



## Scope of the right of deduction, subjective element, partial use in the economic activity, the leasing of goods to related persons or entities (IV)

- **Becker, 21-2-2013, C-104/12**

- For the purposes of the VAT Directive, the existence of a direct and immediate relationship between a specific operation and the whole activity of the taxpayer, in order to determine whether the goods and services have been used by it for the needs of their own taxed operations, depends on the objective content of the good or service.
- The VAT paid by a company for the expenses of legal assistance in a criminal proceeding against its managers is not deductible, since they are services aimed at private use by them.

# Scope of the right of deduction, subjective element, economic-marriage regimes

- **HE, 21-4-2005, C-25/03**

- A marital community which does not have legal personality and does not itself carry out an economic activity is not a taxable person for the purposes of VAT. The acquisition of a property by a marital community can be considered as a delivery of goods made for one of the co-owners, this being considered as the recipient of the transaction.
- A natural person who purchase a property jointly with his spouse can deduct the input VAT corresponding to the proportional part of the property he uses in his economic activity, even if only on an ancillary basis, provided that said part does not exceed the percentage of property that said spouse has in the property and include this part of the property in the assets of his business.

## Scope of the right of deduction, subjective element, effect of third parties' conduct in the right to deduct: general comments (I)


- **Optigen, Fulcrum Electronics and Bond House Systems, 12-1-2006, C-354/03, C-355/03 and C-484/03**
  - For the purposes of the right of deduction of a taxable person, it is irrelevant that the person who delivered the concerned goods or services has entered the VAT that the taxable person intends to deduct.

## Scope of the right of deduction, subjective element, effect of third parties' conduct in the right to deduct: general comments (II)

- **Paper Consult, 19-10-2017, C-101/16**
  - The VAT Directive precludes national rules according to which the right to deduct VAT is refused on the ground that the trader which supplied a service and issued the corresponding invoice, on which the expenditure and the VAT are indicated separately, has been declared inactive by the tax authorities of a Member State, that declaration of inactivity being public and accessible on the internet to any taxable person in that State, in the case where that refusal of the right to deduct is systematic and final, making it impossible to adduce evidence that there was no tax evasion or loss of tax revenue.

## Scope of the right of deduction, subjective element, effect of third parties' conduct in the right to deduct: general comments (III)

- **SGI, 27-6-2018, C-459/17 and C-460/17**
  - In order to deny a taxable person in possession of an invoice the right to deduct the VAT appearing on that invoice, it is sufficient that the authorities establish that the transactions covered by that invoice have not actually been carried out.



Scope of the right of deduction, subjective element, effect of third parties' conduct in the right to deduct: in particular, fraudulent transactions (I)

- **Optigen, Fulcrum Electronics and Bond House Systems, 12-1-2006, C-354/03, C-355/03 and C-484/03**
  - VAT borne in the acquisitions of goods acquired in operations corresponding to chain frauds is deductible when the acquirer neither had have knowledge nor could have it about the fraudulent nature of the operations.

## Scope of the right of deduction, subjective element, effect of third parties' conduct in the right to deduct: in particular, fraudulent transactions (II)

- **Kittel and Recolta, 6-7-2006, C-439/04 and C-440/04**
  - When a supply of goods is made to a taxable person who did not know and could not have known that the transaction was part of a fraud committed by the seller, the VAT Directive precludes a national law according to which the cancellation of the sales contract, under a rule of civil law that considers it null of right because of an unlawful cause attributable to the seller, implies the loss of the right to deduct the VAT borne by the recipient. In this respect, the question of whether such nullity results from fraud in VAT or other fraud is irrelevant.
  - The input VAT incurred in transactions typical of a carousel fraud are not deductible when the buyer was aware of this circumstance. Therefore, if it is proven, through objective data, that in a delivery of goods to a taxpayer, he knew or should have known that, through his acquisition, he participated in an operation that was part of a VAT fraud, VAT thus satisfied is not deductible.

## Scope of the right of deduction, subjective element, effect of third parties' conduct in the right to deduct: in particular, fraudulent transactions (III)

- **Mahagében Kft and Péter Dávid, 21-6-2012, C-80/11 and C-142/11**
  - The VAT Directive precludes the tax authorities from denying the right to the deduction to a taxable person who has purchased goods or services from a taxpayer that has committed irregularities, or has suppliers that have committed them, without these authorities crediting, by objective data, that the taxpayer knew or should have known that the operation on which the right to deduct is based was part of a fraud committed by said issuer or by a previous operator in the supply chain.
  - The tax authorities are responsible for the accreditation, based on objective data, that the taxpayer knew or could have known that the transactions in which he participated were part of a fraud. Therefore, the right to deduct cannot be denied for the reason that the taxpayer has not ascertained that the issuer of the invoice relating to the acquired goods had the status of taxpayer, had the concerned goods and was in a position to supply them and fulfilled its VAT obligations, or for the reason that the taxpayer does not have, apart from the aforementioned invoice, other documents that can demonstrate the above circumstances, despite the fact that the material and formal requirements provided by the VAT Directive for the exercise of the right to deduct are met and that the taxpayer had no evidence to suspect the existence of irregularities or tax fraud.



## Scope of the right of deduction, subjective element, effect of third parties' conduct in the right to deduct: in particular, fraudulent transactions (IV)

- **Bonik, 6-12-2012, C-285/11**
  - Given that the denial of the right to deduct is an exception to the application of the fundamental principle that constitutes this right, it is for the competent tax authorities to prove based on objective evidence that the taxable person knew, or should have known, that the transaction relied on as a basis for the right of deduction was connected with VAT fraud committed upstream or downstream in the chain of supply.
  - The VAT Directive is opposed to the refusal of a taxable person to deduct the VAT corresponding to a delivery of goods due that, taking into account fraud or irregularities committed in a phase before or after said delivery, it is considered that this was not actually done, without having been shown with objective data that the taxpayer knew or should have known that the operation on which the right to the deduction is based was part of a VAT fraud committed at an earlier or later stage in the supply chain.

## Scope of the right of deduction, subjective element, effect of third parties' conduct in the right to deduct: in particular, fraudulent transactions (V)


- **Stroy trans, 31-3-2013, C-642/11**

- The principles of fiscal neutrality, proportionality and legitimate expectations do not preclude the recipient of an invoice from being denied the right to deduct input VAT due to the absence of a real transaction subject to VAT, even though, in the corrected assessment referred to the issuer of that invoice, the VAT declared by the latter has not been rectified.
- However, when, in view of the frauds or irregularities committed by said issuer or that precede the operation invoked to justify the right to the deduction, it is considered that this operation has not been carried out effectively, it must be accredited, through objective data and without requiring the addressee of the invoice to verify that it does not concern him, that the addressee knew or should have known that this operation was part of a VAT fraud, which is to be verified by the referring court.
- The judgment of the same date, LVK-56, case C-643/11, is of identical content.

## Scope of the right of deduction, subjective element, effect of third parties' conduct in the right to deduct: in particular, fraudulent transactions (VI)

- **«Evita-K», 18-7-2013, C-78/12**

- In the context of the exercise of the right the input VAT, the concept of «supply of goods» and the evidence that such a supply has in fact been carried out are not linked to the form of the acquisition of a right of ownership of the goods concerned.
- It is for the referring court to carry out, in accordance with the national rules relating to evidence, an overall assessment of all the facts and circumstances of the dispute before it in order to determine whether the supplies of goods at issue in the main proceedings were actually carried out and whether, as the case may be, a right to deduct may be exercised on the basis of those supplies.



Scope of the right of deduction, subjective element, effect of third parties' conduct in the right to deduct: in particular, fraudulent transactions (VII)

- **PPUH Stehcemp, 22-10-2015, C-277/14**
  - The VAT Directive is opposed to national legislation that denies the right to deduct input VAT based on the fact that the invoice has been issued by an operator which, in accordance with the criteria established in such legislation, must be considered non-existent since it is impossible to identify the true provider of the assets, unless it is demonstrated, with objective data, and without requiring the taxpayer verifications that do not concern him, that said taxpayer knew or should to have known that this delivery was part of a fraud in VAT.

## Scope of the right of deduction, subjective element, effect of third parties' conduct in the right to deduct: in particular, fraudulent transactions (VIII)

- **EN.SA., 8-5-2019, C-712/17**
  - In a situation in which fictitious sales of electricity made in a circular manner between the same operators and for the same amounts, did not cause losses of tax revenue, the VAT Directive, in the light of the principles of neutrality and proportionality, does not preclude a national legislation that excludes deduction of the VAT corresponding to fictitious operations and obliges those who mention VAT on an invoice to pay said tax, even in the case of a fictitious operation, provided that national law allows the tax debt resulting from that obligation to be regularized if the issuer of the invoice, who was not acting in good faith, completely eliminated, in due course, the risk of loss of tax revenue that corresponds to verify the referring court.
  - The principles of proportionality and neutrality of VAT, in a situation such as that at issue in the main proceedings, are contrary to a rule of national law whereby the illegal deduction of VAT is sanctioned with a fine equal to the amount of the deduction made.

## Scope of the right of deduction, subjective element, effect of third parties' conduct in the right to deduct: in particular, fraudulent transactions (IX)

- **Altic, 3-10-2019, C-329/18**

- The VAT Directive precludes a taxable person who participates in the food chain from being refused the right to deduct input VAT on the sole ground, assuming that it has been duly established, that that taxable person has not complied with his obligations under the EU regulations in matters of food safety. Said non-compliance may, however, constitute one element among others which, taken together and in a consistent manner, tend to show that the taxable person knew or should have known that he was involved in a transaction involving VAT fraud, which it is for the referring court to assess.
- According to the VAT Directive, the failure, by a taxable person who participates in the food chain, to ascertain that his suppliers fulfil their requirements on feed and food law, animal health and animal welfare rules, is not relevant for the purpose of determining whether the taxable person knew or should have known that he was involved in a transaction involving VAT fraud.

# Scope of the right of deduction, subjective element, the right to deduct and the cases of abuse (I)

- **Halifax and others, 21-2-2006, C-255/02**
  - According to the VAT Directive, the input VAT is not deductible when the operations on which said right is based constitute an abusive practice.
  - The verification that there is an abusive practice requires that, despite the formal application of the requirements established in the Directive and in national legislation, the operations result in obtaining a tax advantage that would be contrary to the objective pursued by such provisions.
  - This can also result from the set of objective elements existing if they prove that the essential purpose of the operations is to obtain a tax advantage.

# Scope of the right of deduction, subjective element, the right to deduct and the cases of abuse (II)

- **Weald Leasing, 22-12-2010, C-103/09**
  - The tax advantage accruing from an asset leasing transactions, instead of the outright purchase of those assets, does not constitute a tax advantage that would be contrary to the purpose of the VAT Directive and of the national legislation transposing it, provided that the contractual terms of those transactions, particularly those concerned with setting the level of rentals, correspond to arms length terms and that the involvement of an intermediate third party company in those transactions is not such as to preclude the application of those provisions. The fact that the undertaking does not engage in leasing transactions in the context of its normal commercial operations is irrelevant in that regard.
  - If certain contractual terms of the leasing transactions at issue in the main proceedings, and/or the intervention of an intermediate third party company in those transactions, constituted an abusive practice, those transactions must be redefined so as to re-establish the situation that would have prevailed in the absence of the elements of those contractual terms which were abusive and/or in the absence of the intervention of that company.



# Scope of the right of deduction, subjective element, the right to deduct and the cases of abuse (III)

- **RBS Deutschland Holdings, 22-12-2010, C-277/09**
  - A practice that takes advantage of an existing legislative divergence between two Member States cannot be considered abusive.
  - In circumstances such as those in the main proceedings, and in accordance with the VAT Directive, a Member State cannot refuse a taxable person the deduction of the VAT charged on the acquisition of goods made in that Member State, when those goods are used for the needs of leasing operations carried out in another Member State, based only on the fact that the operations carried out after the acquisition of the goods did not give rise to payment of VAT in the second Member State.
  - Nor does the principle of prohibiting abusive practices preclude the right to deduct VAT in circumstances such as those in the main proceedings, in which a company established in a Member State decides to carry out leasing operations through its subsidiary established in another Member State to a third-party company established in the first Member State, in order to avoid having to pay VAT for the payments that remunerate such operations, given that those operations are qualified, in the first Member State, as leasing services performed in the second Member State and, in that second Member State, as deliveries of goods made in the first Member State.


# Scope of the right of deduction, subjective element, the right to deduct and the cases of abuse (IV)

- **Kuršu zeme, 10-7-2019, C-273/18**

- According to the VAT Directive, in order to deny the right to deduct input VAT, the fact that an acquisition of goods occurred after a chain of operations between several people and the fact that the taxable person acquired possession of the goods in question in the premises of a person involved in said chain, other than that indicated on the invoice as a supplier, is not in itself sufficient to verify the existence of an abusive practice on the part of the taxable person or of the other persons involved in said chain, since the competent tax authority is obliged to demonstrate the existence of an undue tax advantage which enjoyed the taxpayer or those other people.

## Scope of the right of deduction, the use in transactions generating the right to deduct, general principle of fractioned payments

- As far as their costs are **included in the price** of the goods and services provided in the development of the economic activity, their input VAT is deductible:
  - BLP Group, 6-4-1995, C-4/94
  - Midland Bank, 8-6-2000, C-98/98
  - SKF, 29-10-2009, C-29/08
  - Bastová, 10-11-2016, C-432/15
  - Iberdrola Inmobiliaria Real Estate Investments, 14-9-2017, C-132/16



Scope of the right of deduction, the use in transactions generating the right to deduct, goods and services used in exempted transactions (I)

- **BLP Group, 6-4-1995, C-4/94**

- The VAT borne in advisory services related to a sale of shares, given that the aforementioned sale is exempt, are not deductible.
- More generally, except in the cases expressly provided for, when a taxpayer provides services to another taxable person who uses them to carry out an exempt operation, the second party does not have the right to deduct the input VAT, even in the case that the ultimate objective of the exempt operation is to carry out a subject operation.

## Scope of the right of deduction, the use in transactions generating the right to deduct, goods and services used in exempted transactions (II)

- **Stockholm Lindöpark, 18-1-2001, C-150/99**
  - The taxpayer cannot be denied the right to deduct input VAT on the basis that the goods and services acquired have been used in the performance of exempt transactions if the concerned exemption exceeded the provisions of the VAT Directive.
  - The regulations governing the right to deduct are sufficiently clear, precise and unconditional for a private person to invoke them against a State before a National Court.

## Scope of the right of deduction, the use in transactions generating the right to deduct, goods and services used in exempted transactions (III)

- **SKF, 29-10-2009, C-29/08**

- A delivery of shares that is exempt from VAT does not generate the right to the deduction; however, this interpretation is valid only if there is a direct and immediate relationship between the services received for which the VAT is incurred and the exempt delivery of shares. If, on the other hand, such a relationship does not exist and the cost of the operations for which the VAT is incurred is included in the prices of products of the selling company, the deductibility of the input VAT should be admitted.

## Scope of the right of deduction, the use in transactions generating the right to deduct, goods and services used in exempted transactions (IV)

- **MDDP, 28-11-2013, C-319/12**

- The VAT paid in relation to exempt transactions is not deductible, even when an exemption established in national law is incompatible with the VAT Directive.
- However, the taxable person who is in such situation may invoke the incompatibility of the national rule with the VAT Directive so that it is not applied when, even taking account of the margin of appreciation granted to Member States, that taxable person could not objectively be regarded as an organization having objects similar to those of an educational body governed by public law, being excluded from the exemption.
- In this last hypothesis, the educational services supplied by that taxable person will be subject to VAT and that person could then benefit from the right to deduct input VAT.

# Scope of the right of deduction, the use in transactions generating the right to deduct, general expenses (I)

- **Midland Bank, 8-6-2000, C-98/98**

- In accordance with the VAT Directive, in principle, the existence of a direct and immediate relationship between a specific operation for which the VAT is accrued and one or more transactions for which VAT is charged is necessary in order for the taxpayer to be entitled to its deduction and to determine the scope of such right.
- In general, the deductible quotas are those corresponding to operations whose amount is part of the costs of the operations of the activity, not those that are the consequence of said operations. This principle would only cease to apply if it can be shown that the costs of the company's operations were already foreseen. The VAT quotas corresponding to the expenses related to obtaining a compensation are deductible as general expenses of the activity, although obtaining it is not subject to VAT.



# Scope of the right of deduction, the use in transactions generating the right to deduct, general expenses (II)

- **Abbey National, 22-2-2001, C-408/98**
  - The services received in relation to the transfers of a going concern, not taxed as such, must be considered part of the taxable person's overheads and, in principle, directly and immediately related to its economic activity.
  - If the transferor carries out operations generating the right to deduct and transactions that do not generate such right, he can only deduct the part of the VAT paid that is proportional to the amount of the operations first referred.
  - However, if the services received by the transferor to carry out the transmission have a direct and immediate relationship with a clearly delimited part of its economic activities, so that the costs of said services are part of the overheads corresponding to said part of the activity, and if all the operations that comprise it are subject to VAT, the taxpayer may deduct the full amount of VAT borne by the expenses incurred to obtain said services.

## Scope of the right of deduction, the use in transactions generating the right to deduct, general expenses (III)

- **Kretztechnik, 26-5-2005, C-465/03**
  - The VAT borne for services relating to an IPO of a taxable person are deductible as general expenses of the activity, insofar as the totality of the operations carried out by said taxable person in the development of its economic activity constitute taxable transactions.

## Scope of the right of deduction, the use in transactions generating the right to deduct, general expenses (IV)

- **SKF, 29-10-2009, C-29/08**

- A transmission of shares that is exempt from VAT does not generate the right to the deduction; however, this interpretation is valid only if there is a direct and immediate relationship between the services received for which the VAT is borne and the exempt delivery of shares.
- If, on the contrary, such a relationship does not exist and the cost of the operations for which the VAT is borne is included in the prices of products of the selling company, the deductibility of the input VAT should be admitted.

# Scope of the right of deduction, the use in transactions generating the right to deduct, general expenses (V)

- **PPG Holdings, 18-7-2013, C-26/12**
  - A taxable person who has set up a pension fund in the form of a legally and fiscally separate entity in order to safeguard the pension rights of his employees and former employees, is entitled to deduct the input VAT on services relating to the management and operation of that fund, whose constitution is mandatory to the taxable person bearing its corresponding costs.

## Scope of the right of deduction, the use in transactions generating the right to deduct, general expenses (VI)

- **AES-3C Maritza East 1, 18-7-2013, C-124/12**
  - Provided that expenses maintain a direct and immediate relationship with the taxable person's overheads as far as they are linked to the economic activity of said taxable person, the costs related to clothing, equipment and personnel transport generate deductible VAT, regardless of whether or not the aforementioned services refer to staff working for that taxable person or staff that is provided to it by another entity.

# Scope of the right of deduction, the use in transactions generating the right to deduct, general expenses (VII)

- **Sveda, 22-10-2015, C-126/14**
  - The VAT Directive grants the right to deduct the input VAT paid for the acquisition or production of capital goods, for the purposes of a planned economic activity related to rural and recreational tourism, which are (i) directly intended for use by the public free of charge, and may (ii) enable taxed transactions to be carried out, provided that a direct and immediate link is established between said investments and the output transactions giving rise to the right to deduct or with the taxable person's economic activity as a whole.

## Scope of the right of deduction, the use in transactions generating the right to deduct, general expenses (VIII)

- **Bastová, 10-11-2016, C-432/15**

- According to the VAT Directive, a taxable person who breeds and trains his own race horses and those of other owners, has the right to deduct the input VAT on the transactions relating to the preparation for horse races on the ground that the corresponding costs are part of the overheads of his economic activity, provided that the costs incurred have a direct and immediate link with that overall activity.
- This could be the case if the costs thus incurred is, from an objective point of view, a means of promoting the economic activity, this being a matter for the referring court to determine.

# Scope of the right of deduction, the use in transactions generating the right to deduct, general expenses (IX)

- **Iberdrola Inmobiliaria Real Estate Investments, 14-9-2017, C-132/16**
  - According to the VAT Directive, a taxable person has the right to deduct input VAT in respect of a supply of services consisting of the construction or improvement of a property owned by a third party when that third party enjoys the results of those services free of charge and when those services are used both by the taxable person and by the third party in the context of their economic activity, in so far as those services do not exceed that which is necessary to allow that taxable person to carry out the taxable output transactions and their cost is included in the price of those transactions.



## Scope of the right of deduction, the use in transactions generating the right to deduct, general expenses (X)

- **Amărăști Land Investment, 19-12-2019, C-707/18**
  - The VAT Directive does not preclude the parties to an operation whose object is the transfer of property ownership to agree in a clause by which the future buyer bears all or part of the expenses related to the administrative formalities related to said operation, in particular, those related to the registration of the property. However, the mere existence of such a clause in a synalagmatic promise to sell a property is not decisive when it comes to knowing whether the future buyer has the right to deduct the VAT that is levied on the payment of the expenses derived from the registration of the property.

# Scope of the right of deduction, the right to deduct and the charging of VAT, VAT not directly borne (I)

- **Intiem, 8-3-1988, C-165/86**

- According to the VAT Directive, a taxable person can deduct the input VAT corresponding to fuel deliveries made to its employees, but on behalf of the aforementioned taxpayer, when said fuel is used exclusively in its economic activity and it deals with deliveries that are invoiced in the name of the taxpayer claiming the deduction.

# Scope of the right of deduction, the right to deduct and the charging of VAT, VAT not directly borne (II)

- **Commission v Netherlands, 8-11-2001, C-338/98**
  - It is not compatible with the VAT Directive a system that allows the deduction of a percentage of the compensations paid by taxpayers to their employees for the expenses they had when they used their private vehicles in the economic activity. By allowing this, the Netherlands failed to comply with the Directive.
  - The judgment of 10-3-2005, Commission v United Kingdom, C-33/03, is of a very similar content.

# Scope of the right of deduction, the right to deduct and the charging of VAT, VAT not directly borne (III)

- **Auto Lease Holland, 6-2-2003, C-185/01**
  - Fuel supplies made to lessees of vehicles that acquire it in the name and on behalf of the lessor must be understood as made to the lessees.
  - It cannot be considered, therefore, that there is a delivery of fuel from the lessor to the lessee of a vehicle transferred under a leasing contract in cases in which the lessee is supplied with fuel at the petrol stations, even when this supply is made in the name and on behalf of the lessor. Said lessor, therefore, is not entitled to claim the refund of VAT borne for the deliveries of fuel supplied in that way.

# Scope of the right of deduction, the right to deduct and the charging of VAT, VAT not directly borne (IV)

- **Polski Trawertyn, 1-3-2012, C-280/10**
  - The VAT paid by the partners of a company in constitution must be deductible by the latter, regardless of whether the invoices in which they are documented are issued in the name of the partners or of the company.

# Scope of the right of deduction, the right to deduct and the charging of VAT, VAT not directly borne (V)

- **PPG Holdings, 18-7-2013, C-26/12**

- A taxable person who has set up a pension fund in the form of a legally and fiscally separate entity in order to safeguard the pension rights of his employees and former employees, is entitled to deduct the VAT he has paid on services relating to the management and operation of that fund as included in the overheads of the economic activity.

# Scope of the right of deduction, the right to deduct and the charging of VAT, VAT not directly borne (VI)

- **DSV Road, 25-6-2015, C-187/14**

- It is compatible with the VAT Directive a national regulation that opposes the deduction of VAT paid on import by a carrier that is neither the importer nor the owner of the concerned goods, but it has simply carried out their transport and the customs processing in the framework of its activity as a freight forwarder.

# Scope of the right of deduction, the right to deduct and the charging of VAT, VAT not directly borne (VII)

- **TGE Gas Engineering, 7-8-2018, C-16/17**
  - The VAT Directive, together with the principle of neutrality, preclude the tax authorities from regarding a company which has its headquarters in a Member State and a branch in a different Member State as constituting two separate taxable entities on the ground that each of those entities has a tax identification number, and, for that reason, from refusing that branch the right to deduct the VAT on the debit notes issued by an EIG of which that company, and not its branch, is a member.



## Scope of the right of deduction, the right to deduct and the charging of VAT, VAT incorrectly charged and borne (I)

- **ORO Amsterdam Behher, 5-12-1989, C-165/88**
  - The EU law on December 1990 did not preclude national legislation that excluded the deduction of VAT included in goods purchased from individuals for subsequent resale by taxpayers (judgment relating to events prior to the establishment of the special arrangements for second-hand goods in the VAT Directive).

## Scope of the right of deduction, the right to deduct and the charging of VAT, VAT incorrectly charged and borne (II)

- **Genius Holding, 13-12-1989, C-342/87**
  - The VAT is not deductible by the mere fact of being mentioned in an invoice. The deductibility of the input VAT is conditioned to the fact that it is VAT that corresponds to the acquisition of goods or services and has been correctly accrued and charged.

## Scope of the right of deduction, the right to deduct and the charging of VAT, VAT incorrectly charged and borne (III)

- **Reemtsma Cigarettenfabriken, 15-3-2007, C-35/05**
  - The refund procedure for non-established entities does not apply to the VAT quotas accrued and invoiced by mistake.
  - It is compatible with the principles of neutrality, effectiveness and non-discrimination a national legislation that only allows the provider of a service the claim amounts unduly paid by way of VAT to the tax authorities and the recipient of the services can exercise an action of civil law to claim from the provider the amounts paid in excess. However, in case it is excessively difficult or impossible, this claim must also be allowed to the recipient of the operation that has paid the VAT unduly charged.
  - The above conclusions are independent of the national regulation for the purposes of direct taxes.

## Scope of the right of deduction, the right to deduct and the charging of VAT, VAT incorrectly charged and borne (IV)

- **X and fiscale eenheid Facet-Facet Trading, 22-4-2010, C-536/08 and C-539/08**
  - VAT paid on Intra-EU acquisitions taxed at the Member State of identification of the purchaser, instead of the destination Member State, is not deductible.

## Scope of the right of deduction, the right to deduct and the charging of VAT, VAT incorrectly charged and borne (V)

- **Loyalty Management UK and Baxi Group, 7-10-2010, C-53/09 and C-55/09**
  - The gifts made within the framework of a loyalty program in which there is a third party that pays their price must be considered operations carried out for consideration, although the person who receives them do not pay any amount for them.
  - The payments made by the sponsor to the manager of a program that delivers loyalty gifts to customers must be considered, in part, the consideration, paid by a third party, of a delivery of goods made by the program manager to those customers and, in part, the consideration of a provision of services made by the manager in favour of the sponsor, resulting the VAT borne in such a case deductible.
  - The VAT charged to the third party that pays these gifts is not deductible.

## Scope of the right of deduction, the right to deduct and the charging of VAT, VAT incorrectly charged and borne (VI)

- **FIRIN, 13-3-2014, C-107/13**

- According to the VAT Directive, the VAT paid for an advance payment on account of a supply that has not been finally made is not deductible.
- This non-deductibility is independent of the VAT regularization made by the taxpayer who received the payment on account, that is, it is practiced even though the supplier continues to owe this tax and has not reimbursed the payment on account.

# Scope of the right of deduction, the right to deduct and the charging of VAT, reverse charge (I)

- **Bockemühl, 1-4-2004, C-90/02**
  - The taxpayer who is liable for VAT and is therefore liable to pay the VAT, is not obliged to be in possession of an invoice issued in accordance with the nowadays art.226 of the VAT to be able to exercise their right to deduct.

# Scope of the right of deduction, the right to deduct and the charging of VAT, reverse charge (II)

- **Ecotrade, 8-5-2008, C-95/07 and C-96/07**
  - In cases of inadequate compliance with formal obligations in intra-EU acquisitions, and since the tax administration has the necessary data to determine that the taxpayer is the person liable to pay the VAT, as a recipient, it cannot impose additional requirements that may have as an effect the absolute impossibility of exercising the right to deduct.



# Scope of the right of deduction, the right to deduct and the charging of VAT, reverse charge (II)

- **Uszodaépítő, 30-9-2010, C-392/09**
  - In the cases of self-assessment, being the tax authorities provided with all the information necessary for the identification of the taxpayer, the right of deduction cannot be conditioned to have a complete invoice.

# Scope of the right of deduction, the right to deduct and the charging of VAT, reverse charge (IV)

- **Fatorie, 6-2-2014, C-424/12**
  - The VAT unduly paid to the supplier is not deductible in a situation in which the reverse charge mechanism should have been applied, being the denial of the right to deduct compatible with the VAT Directive and the principle of neutrality.

# Scope of the right of deduction, the right to deduct and the charging of VAT, reverse charge (V)

- **GST – Sarviz AG Germania, 23-4-2015, C-111/14**

- In a case of undue application of the reverse charge mechanism in a provision of services, the VAT Directive opposes to require the VAT to the service provider when the recipient of those services, who has also paid the tax for the same services have been denied the right to deduct for not having the corresponding tax document, since the national law does not allow the regularization of tax documents when there is a final complementary assessment.

# Scope of the right of deduction, the right to deduct and the charging of VAT, reverse charge (VI)

- **Farkas, 26-4-2017, C-564/15**

- It is compatible with the VAT Directive and with the principles of fiscal neutrality, effectiveness and proportionality that, in a situation in which the purchaser of a good improperly paid to the seller, while the reverse charge mechanism was applicable, said purchaser is deprived of the right to the deduction of the VAT, even though the seller paid the VAT to the Public Treasury.
- However, those principles require, insofar as the reimbursement of the unduly invoiced VAT by the seller to the purchaser is impossible or excessively difficult, in particular, in case of insolvency of the seller, that the purchaser may request the refund directly to the tax authorities.

# Scope of the right of deduction, additional restrictions, personal use goods and services, standstill clause (I)

- **Commission v France, 18-6-1998, C-43/96**
  - The standstill clause included in the VAT Directive allows excluding the right to deduction of the VAT paid in relation with means of transport that constitute means of work of the taxpayer.

## Scope of the right of deduction, additional restrictions, personal use goods and services, standstill clause (II)

- **Royscot and others, 5-10-1999, C-305/97**
  - The standstill clause included in the VAT Directive allows to maintain exclusions from the right to the deduction even in relation to vehicles used in the economic activity, although they are indispensable for it and cannot be used in satisfying the private needs of the taxable person.
  - For the purposes of its application, it is irrelevant that the Council has exceeded the period of 4 years to adopt harmonization measures regarding the deduction of the VAT borne on expenses for private use.

## Scope of the right of deduction, additional restrictions, personal use goods and services, standstill clause (III)

- **Commission v France, 14-6-2001, C-345/99**
  - The standstill clause included in the VAT Directive allows modifications to be made to the limiting clauses of restriction of the right to deduct from the date of entry into force of the Directive, aimed at the elimination of these restrictions, such as the possibility of deducting VAT from vehicles used for education, even if the condition of exclusive affectation is required.

## Scope of the right of deduction, additional restrictions, personal use goods and services, standstill clause (IV)

- **Commission v France, 14-6-2001, C-40/00**
  - The standstill clause included in the VAT Directive allows to introduce modifications in the limiting clauses of the right to the deduction upon entry into force of the Directive whose purpose is the elimination of such restrictions, but not the establishment of new restrictions. By reinstating, from 1-1-1998, a complete abolition of the right to deduct VAT on the purchase of diesel fuel used as fuel for vehicles for which there is no right to deduction, after partially introducing that right to the deduction previously, France failed to comply with the Directive.
  - The judgments of 22-12-2008, Magoora, C-414/07, 23-4-2009, Puffer, C-460/07, 18-7-2013, AES-3C Maritza East 1, C-124/12, 2-5-2019, Grupa Lotos C-225/18, and of 26-2-2000, PAGE International, C-630/19, are of a similar content.



# Scope of the right of deduction, additional restrictions, personal use goods and services, standstill clause (V)

- **Metropol and Stadler, 8-1-2002, C-409/99**
  - The standstill clause included in the VAT Directive does not allow the introduction of restrictions on the right to deduct certain expenses related to non-existent vehicles at the time when the VAT Directive was applied, in which such expenditure gave rise to the right to deduct input VAT in accordance with a consolidated practice of the authorities of the concerned Member State, based on a ministerial circular.

# Scope of the right of deduction, additional restrictions, personal use goods and services, standstill clause (VI)

- **Cookies World, 11-9-2003, C-155/01**

- The standstill clause included in the VAT Directive does not allow the creation of new taxable events. Nor does it allow the introduction of restrictions on the right to deduction not existing at the entry into force of the VAT Directive.

# Scope of the right of deduction, additional restrictions, personal use goods and services, standstill clause (VII)

- **Charles-Tijmens, 14-7-2005, C-434/03**
  - The standstill clause included in the VAT Directive only allows restricting the right to the deduction in the case of certain goods but does not allow to exclude from the right to the deduction all the goods susceptible of private use.

# Scope of the right of deduction, additional restrictions, personal use goods and services, standstill clause (VIII)

- **Danfoss and AstraZeneca, 11-12-2008, C-371/07**
  - It is not compatible with the standstill clause included in the VAT Directive that a Member State applies, after the entry into force of the Directive, an exclusion of the right to deduct VAT levied on expenses for meals offered free of charge by business canteens to business relations and staff during work meetings, given that, at the time of said entry into force, this exclusion was not effectively applicable to said expenses, due to an administrative practice that taxed the services provided by these canteens for the amount of their cost price (calculated on the basis of production costs, that is, the price of raw materials and salary costs corresponding to the preparation and sale of said foods and beverages, as well as the administration of the dining rooms), admitting the full deduction of the input VAT.

# Scope of the right of deduction, additional restrictions, personal use goods and services, standstill clause (IX)

- **X Holding and Oracle Nederland, 15-4-2010, C-538/08 and C-33/09**
  - For the purposes of the application of the standstill clause in the VAT Directive, Member States must precisely circumscribe the goods and services to which they refer.
  - Means of transport for individual use of employees, expenses of meals, drinks or accommodation could be considered included in this concept and, consequently, the VAT paid for them will not be deductible. The same could be said of the expenses incurred to subsequently carry out «business gifts» or «other gifts».
  - The same provision allows a national regulation, established before the entry into force of this Directive and by virtue of which a taxable person can deduct VAT paid for the acquisition of certain goods and services that are partially used to satisfy private needs and partially for business purposes, not in its entirety but only in proportion to its use for business purposes.
  - The same provision allows a Member State, after the entry into force of this Directive, to modify an existing exclusion of the right of deduction, when this modification, in principle, limits the scope of this exclusion, although it cannot be ruled out that, in a case in a specific case, in a fiscal year, broaden the scope of application of said exclusion, due to the fixed amount established by the amended regulations.

# Scope of the right of deduction, additional restrictions, personal use goods and services, standstill clause (X)

- **Oasis East, 30-9-2010, C-395/09**
  - The standstill clause included in the VAT Directive does not allow the Member States to exclude the right to the deduction of quotas corresponding to services acquired from companies established in tax heavens.

# Scope of the right of deduction, additional restrictions, temporary provisions (I)

- **Metropol and Stadler, 8-1-2002, C-409/99**
  - It is not possible to exercise the possibility of introducing temporary restrictions on the right to the deduction without prior consultation with the VAT Committee or through the establishment of permanent measures, not circumstantial ones.

# Scope of the right of deduction, additional restrictions, temporary provisions (II)

- **Stradasfalti, 14-9-2006, C-228/05**
  - For the application of the temporary restrictions, it is necessary to consult the VAT Committee providing it with all the information so that it is aware of them, but a pronouncement in favour of the Committee is not necessary. These emergency measures must be temporary, not permanent. Therefore, they must contain an indication as to the expiration date or be part of a package of short-term measures.
  - It cannot be opposed to a taxpayer a measure of exception in the matter of deductions that has not been adopted in accordance with the corresponding provisions.





# Proportional deduction

- Objective scope
- Transactions to be included
  - Consideration of the operations corresponding to the economic activities
  - Financial operations
  - Transmission of capital goods
- Amounts to be computed
- Rounding rules

# Proportional deduction, objective scope (I)

- **Abbey National, 22-2-2001, C-408/98**
  - The services received in relation to the transfers of a going concern, not taxed as such, must be considered part of the taxable person's overheads and, in principle, directly and immediately related to its economic activity.
  - If the transferor carries out operations generating the right to deduct and transactions that do not generate such right, he can only deduct the part of the VAT paid that is proportional to the amount of the operations first referred.
  - However, if the services received by the transferor to carry out the transmission have a direct and immediate relationship with a clearly delimited part of its economic activities, so that the costs of said services are part of the overheads corresponding to said part of the activity, and if all the operations that comprise it are subject to VAT, the taxpayer may deduct the full amount of VAT borne by the expenses incurred to obtain said services.

# Proportional deduction, objective scope (II)

- **Commission v Spain, 6-10-2005, C-204/03**

- It is not compatible with the VAT Directive a national regulation that requires the application of a proportional deduction rule to taxpayers who exclusively carry out transactions that generate the right to deduct and, at the same time, receive subsidies not linked to the price of their operations, not included, therefore, in the taxable base of their operations. A similar conclusion was reached in the judgments of 6-10-2005, Commission v France, C-243/03, and 23-4-2009, PARAT Automotive Cabrio, C-74/08.
- Neither is compatible with the VAT Directive a limitation on the right to the deduction of the VAT paid on the acquisition of capital goods financed with subsidies that is proportional to the amount of said subsidies.

# Proportional deduction, objective scope (III)

- **Varzim Sol, 16-2-2012, C-25/11**
  - Where a Member State authorizes mixed taxable persons to make the deduction on the basis of the effective use of all or part of the goods and services, in sectors of activity in which such taxable persons carry out exclusively taxable transactions, untaxed «subsidies» cannot be included in the denominator of the fraction used to determine the deductible proportion.

# Proportional deduction, objective scope (IV)

- **BLC Baumarkt, 8-11-2012, C-511/10**
  - In order to determine the right to deduct VAT on a property that is used both for carrying out transactions that generate the right to deduct and for others that do not generate it, the Member States may apply criteria different from the turnover and the pro rata, such as the number of square meters allocated to one and another use, provided that the selected method guarantees a more precise determination of said proportional deduction.

# Proportional deduction, objective scope (V)

- **Gemeente "s-Hertogenbosch, 10-9-2014, C-92/13**
  - According to the VAT Directive, there is a delivery of goods when a municipality takes first occupation of a building which it has had built on its own land and of which it intends to use 94% of the area for its activities as a public authority and 6% of that area for its activities as a taxable person, including 1% for exempt activities in respect of which no right to deduct VAT exists.
  - The subsequent use of the building for the activities of the municipality may give rise to a right to deduct the VAT borne in the proportion corresponding to its use for the purposes of the taxable transactions.

# Proportional deduction, objective scope (VI)

- **Wolfgang und Wilfried Rey Grundstücksgemeinschaft, 9-6-2016, C-332/14**
  - For the purposes of the proportional deduction, where a building is used in order to carry out certain output transactions in respect of which the input VAT is deductible and others in respect of which it is not, the Member States are not required to prescribe that the input goods and services used for the construction, acquisition, use, conservation or maintenance of that building must, in a first stage, be assigned to those various transactions when such assignation is difficult to carry out, in order that, in a second stage, only the deduction entitlement due in respect of those of the goods and services which are used both for certain transactions in respect of which VAT is deductible and for others in respect of which it is not is determined by applying a turnover-based allocation key or, provided that this method guarantees a more precise determination of the deductible proportion, on the basis of floor area.

# Proportional deduction, objective scope (VII)

- **Mercedes Benz Italia, 14-12-2016, C-378/15**

- The VAT Directive does not preclude national rules and practice which require a taxable person:
  - to apply to all the acquired goods and services a deduction proportion based on turnover, without providing for a method of calculation which is based on the nature and actual destination of each of them and which objectively reflects the portion of the expenditure actually attributed to each of the taxed and untaxed activities; and
  - to refer to the composition of his turnover in order to identify transactions which may be classified as «incidental», in so far as the assessment carried out for that purpose also takes account of the relationship between those transactions and the taxable activities of that taxable person and, as the case may be, of the use which they entail of the goods and services which are subject to VAT.



# Proportional deduction, objective scope (VIII)

- **Volkswagen Financial Services (UK), 18-10-2018, C-153/17**
  - In the application of a proportional deduction in case of goods and services used for both taxable transactions and exempt transactions, a method or allocation key other than the turnover-based method can be used, on condition that the method used guarantees a more precise determination of the deductible proportion of the input VAT than that arising from the application of the turnover-based method.
  - The method chosen must not necessarily be the most precise possible, but that it must be able to guarantee a more precise result than the result which would arise from the application of the turnover-based allocation key.

# Proportional deduction, transactions to be included, operations corresponding to the economic activities (I)

- **Sofitam, 22-6-1993, C-333/91**
  - Dividends are not consideration of operations subject to VAT. Consequently, it is not appropriate to include the amount in any of the terms, numerator or denominator, of the proportional deduction.

## Proportional deduction, transactions to be included, operations corresponding to the economic activities (II)

- **Floridienne and Berginvest, 14-11-2000, C-142/99**
  - Dividends obtained from subsidiaries cannot be qualified as consideration for the administrative and accounting services provided to them. As a result, the calculation of the proportional deduction of an entity that receives dividends from subsidiaries to which it also provides other services does not apply.
  - In particular, dividends obtained from subsidiaries and interests from loans that cannot be considered granted in the development of economic activities (as it would be the case of those whose origin is in the dividends that were obtained from them), must be excluded for that purpose.

## Proportional deduction, transactions to be included, operations corresponding to the economic activities (III)

- **Cibo Participations, 27-9-2001, C-16/00**
  - Expenses incurred by a holding company for the different services used in connection with the acquisition of shares in a subsidiary are part of its general expenses and, therefore, in principle have a direct and immediate relationship with the whole of its economic activity.

# Proportional deduction, transactions to be included, financial operations (I)

- **Régie Dauphinoise, 11-7-1996, C-306/94**
  - In accordance with the VAT Directive, the interests received by a company managing third parties' immovable properties on treasury placements made for its own account of funds paid by the owners or lessees are to be included in the denominator of the fraction used to calculate the deductible proportion.

# Proportional deduction, transactions to be included, financial operations (II)

- **EDM, 29-4-2004, C-77/01**

- The amount of financial operations that are to be considered incidental is not computed in the calculation of the proportional deduction, insofar as they only imply a very limited use of goods or services for which VAT is incurred.
- Although the magnitude of the income generated by financial transactions falling within the scope of application of VAT may be an indication that these operations should not be considered ancillary within the meaning of that provision, the fact that such operations generate income higher than those produced for the activity indicated as principal by the company concerned cannot exclude, by itself, the qualification of those as «incidental transactions».

# Proportional deduction, transactions to be included, financial operations (III)

- **SKF, 29-10-2009, C-29/08**

- The transfer of shares in a company to which services have been provided may be considered as a direct, permanent and necessary extension of the economic activity and, as such, to be included in the denominator of the pro rata.

# Proportional deduction, transactions to be included, transmission of capital goods (I)

- **Nordania Finans and BG Factoring, 6-3-2008, C-98/07**
  - The notion of «capital goods used by the taxable person for the purposes of his business», excluded as such from the terms of the pro rata, does not include vehicles which a leasing undertaking purchases with a view to leasing them and subsequently selling them upon termination of the respective leasing contracts, as the sale of such vehicles at the end of those contracts is an integral part of the usual business activities of that undertaking.



# Proportional deduction, transactions to be included, transmission of capital goods (II)

- **NCC Construction Danmark, 29-10-2009, C-174/08**
  - The sale, in the case of a building business, of buildings constructed on its own account cannot be classified as an «incidental real estate transaction», excluded as such from the terms of the pro rata, where that activity constitutes the direct, permanent and necessary extension of its business. In those circumstances, it is not necessary to assess to what extent that sales activity, viewed separately, entails a use of goods and services on which VAT is borne.

# Proportional deduction, amounts to be computed (I)

- **First National Bank of Chicago, 14-7-1998, C-172/96**
  - In foreign exchange transactions in which no fees or commission are calculated with regard to certain specific transactions, the taxable amount is the net result of the transactions of the supplier of the services over a certain period of time.

# Proportional deduction, amounts to be computed (II)

- **International Bingo Technology, 19-7-2012, C-377/11**
  - In accordance with the VAT Directive, in the case of the sale of bingo cards, the taxable base of VAT does not include the part of the price of these cards, previously set by the regulations, which is used to pay the prizes to the players.
  - For the calculation of the proportional deduction applicable to gaming activities the amounts that, by regulatory enforcement, should be used for prizes, should not be considered.

# Proportional deduction, amounts to be computed (III)

- **Banco Mais, 10-7-2014, C-183/13**
  - The VAT Directive does not preclude a Member State from requiring a bank, which, inter alia, carries out leasing activities, to include in the numerator and denominator of the proportional deduction to be applied to all of its mixed use goods and services just the part of the rental payments made by customers as part of their leasing agreements that corresponds to interest, where that use of the goods and services is primarily caused by the financing and management of those contracts, that being a matter for the national court to ascertain.

# Proportional deduction, amounts to be computed (IV)

- **Morgan Stanley, 24-1-2019, C-165/17**

- In order to determine the deductible proportion applicable to the general costs of a branch registered in a Member State, which are used for both transactions of that branch in that State and transactions of the principal establishment of that branch, established in another Member State, account must be taken, in the denominator of deductible proportion, of the transactions carried out by both that branch and that principal establishment, it being specified that it is necessary that, in the numerator of that fraction, besides the taxed transactions carried out by that branch, solely the taxed transactions carried out by that principal establishment must appear, in respect of which VAT would also be deductible if they had been carried out in the State in which the branch concerned is registered.
- In order to determine the deductible proportion applicable to the general costs of a branch registered in a Member State, which are used for both transactions of that branch in that State and transactions of the principal establishment of that branch established in another Member State, account must be taken, in the denominator of the deductible proportion, of the transactions carried out by both that branch and that principal establishment, it being specified that it is necessary that, in the numerator of that fraction, besides the taxed transactions carried out by that branch, solely the taxed transactions carried out by that principal establishment must appear, in respect of which VAT would also be deductible if they had been carried out in the State in which the branch concerned is registered.

# Proportional deduction, amounts to be computed (V)

- **CTT - Correios de Portugal, 30-4-2020, C-661/18**
  - The VAT Directive, read in the light of the EU Law principles of fiscal neutrality, legal certainty and proportionality, do not preclude a Member State, when authorizing a taxable person to deduct VAT on the basis of the use made of all or part of the goods and services used both for transactions in respect of which VAT is deductible and for transactions in respect of which VAT is not deductible pursuant to that provision, from prohibiting such a taxable person from changing the deduction method once the final proportion has been fixed.

# Proportional deduction, rounding rules (I)

- **Royal Bank of Scotland, 18-12-2008, C-488/07**
  - The rounding up rule established by the VAT Directive is only mandatory for the Member States if the general regime of proportional deduction applies, but not when any of the possibilities of exception, referred to the actual use of the concerned goods and services, is applied.

# Proportional deduction, rounding rules (II)


- **Kreissparkasse Wiedenbrück, 16-6-2016, C-186/15**
  - According to the VAT Directive, Member States are not obliged to apply the rule of rounding established when the proportional deduction is calculated according to one of the special methods referred to the real use.
  - Member States are only obliged to apply the rounding rule in case of deductions regularization when, by virtue of their national legislation, the proportional deduction has been calculated in accordance with one of the methods established in the event that this rule has been applied to settle the initial amount of the deduction.






# Formal requirements

- Link between the right of deduction and its formal justification
  - The formal requirements as a reflection of the operations
  - Invoices, obtention and submission to the Administration
- Rejection of the right of deduction for mere formal non-compliance
- In particular, reverse charge cases




Formal requirements, link between the right of deduction and its formal justification, the formal requirements as a reflection of the operations (I)

- **Jeunehomme and others, 14-7-1988, C-123/87**
  - The right to the deduction can only be exercised if there is an invoice that meets the requirements specified in this respect by the State of deduction, necessary to ensure the collection of VAT and its control by the tax authorities (judgment relating to events prior to the entry into force of Dir 2001/115 and 2010/45, on invoicing).



Formal requirements, link between the right of deduction and its formal justification, the formal requirements as a reflection of the operations (II)


- **Commission v Netherlands, 8-11-2001, C-338/98**
  - The formal requirements for the right to deduction that are contained in the VAT Directive are somewhat different from the requirements that govern the origin of the aforementioned law. There being no right to the deduction, there is no formal justification for it in any way.



Formal requirements, link between the right of deduction and its formal justification, the formal requirements as a reflection of the operations (III)

- **HE, 21-4-2005, C-25/03**


- The fact that the acquisition of a property is invoiced in an indistinct manner in the name of the spouses that make up the marital community is not an impediment for the VAT paid for its acquisition to be deducted by one of the spouses in the proportional part that corresponds to its use in the economic activity.
- Therefore, it is not necessary for the taxpayer to have an invoice issued to his name, stating the fractions of the price and VAT corresponding to the co-ownership quota.



Formal requirements, link between the right of deduction and its formal justification, the formal requirements as a reflection of the operations (IV)

- **Dankowski, 22-12-2010, C-438/09**


- The identification number of the taxpayer that must appear on the invoice must be such as to allow its identification in an unequivocal manner. The right to the deduction of VAT charged by a taxpayer who has not yet registered for VAT purposes cannot be denied.
- In particular, the taxpayer has the right to deduct the VAT borne for services provided by another taxable person who is not registered for the purposes of this tax, when the invoices relating to such services include all the required information, in particular, those necessary for the identification of the person who issued said invoices and the nature of the services rendered.



Formal requirements, link between the right of deduction and its formal justification, the formal requirements as a reflection of the operations (V)


- **Polski Trawertyn, 1-3-2012, C-280/10**

- The VAT paid by the members of a partnership, before the creation and registration of such partnership, must be deductible by the latter, regardless of whether the invoices in which they are documented are issued in the name of the partners and not of the company, insofar as, although the invoice has an important documentary function, since it can contain verifiable data, there are circumstances in which the data can be validly verified by means other than an invoice and in which the requirement to have an invoice fully in accordance with the provisions of the VAT Directive could call into question the right of deduction of a taxpayer.



Formal requirements, link between the right of deduction and its formal justification, the formal requirements as a reflection of the operations (VI)

- **Idexx Laboratories Italy, 11-12-2014, C-590/13**
  - The formal requirements contained in the VAT Directive are requirements of the right to deduct, whose non-compliance, in the event of carrying out intra-EU acquisitions of goods, cannot result in the loss of that right. Mere formal irregularities, such as improper registration of invoices received, cannot prevent the right to deduct VAT corresponding to the intra-EU acquisitions.




Formal requirements, link between the right of deduction and its formal justification, the formal requirements as a reflection of the operations (VII)

- **Astone, 28-7-2016, C-332/15**


- The VAT Directive is not opposed to a national regulation that allows the tax authorities to deny a taxable person the right to deduct VAT when it has been proved that the latter fraudulently failed most of the formal obligations incumbent on him to enjoy that right, which is for the referring court to verify.






Formal requirements, link between the right of deduction and its formal justification, the formal requirements as a reflection of the operations (VIII)

- **Barlis 06 – Investimentos Imobiliários e Turísticos, 15-9-2016, C-516/14**
  - The VAT Directive precludes the national tax authorities from denying the right to deduct VAT based solely on the fact that the taxpayer is in possession of an invoice that does not meet the requirements established therein, when the aforementioned authorities have all the information necessary to verify compliance with the material requirements of exercising that right.



Formal requirements, link between the right of deduction and its formal justification, the formal requirements as a reflection of the operations (IX)


- **Geissel and others, 15-11-2017, C-374/16 and C-375/16**
  - The VAT Directive precludes national legislation which makes the exercise of the right to deduct input VAT subject to the condition that the address where the issuer of an invoice carries out its economic activity is indicated on the invoice.



Formal requirements, link between the right of deduction and its formal justification, the formal requirements as a reflection of the operations (X)

- **Vădan, 21-11-2018, C-664/16**


- A taxable person who is unable to provide evidence of the amount of input tax he has paid, by producing invoices or any other document, cannot benefit from a right to deduct VAT solely on the basis of an assessment resulting from an expert report commissioned by a national court.



Formal requirements, link between the right of deduction and its formal justification; invoices, obtention and submission to the Administration  
(I)


- **Reisdorf, 5-12-1996, C-85/95**

- For the purposes of the VAT Directive, the Member States may admit as invoice not only the original, but also any other document that produces its effects, according to the criteria that they themselves can establish. Likewise, they are empowered to admit other evidence proving the reality of the transactions when the taxpayer is no longer in possession of the invoice (judgment relating to events prior to the entry into force of Dir 2001/115 and 2010/45, on invoicing).




Formal requirements, link between the right of deduction and its formal justification; invoices, obtention and submission to the Administration (II)

- **Terra Baubedarf-Handel, 29-4-2004, C-152/02**
  - The exercise of the right to deduct is subordinated on the possession of an invoice that meets the requirements established for that purpose by the corresponding Member State.
  - In case of receipt of said invoice after the end of the VAT payment period in which the provision was made, it will be when the invoice is received when the right to deduct may be exercised, not before.



Formal requirements, link between the right of deduction and its formal justification; invoices, obtention and submission to the Administration (III)

- **Petroma Transports and others, 8-5-2013, C-271/12**
  - The VAT Directive does not preclude national legislation under which the right to deduct VAT can be denied to the taxpayers recipients of services that have incomplete invoices, even when these have been completed with the presentation of information intended to prove the reality, the nature and the amount of the operations invoiced after that refusal resolution has been adopted.



Formal requirements, link between the right of deduction and its formal justification; invoices, obtention and submission to the Administration (IV)

- **Senatex, 15-9-2016, C-518/14**

- The VAT Directive is opposed to a national regulation by virtue of which the rectification of an invoice to include a mandatory data, namely, the VAT identification number, does not have retroactive effects, so that the right to deduct the mentioned tax on the rectified invoice can be exercised only in the year in which the initial invoice has been rectified, and not in the year in which it was originally issued.

## Formal requirements, rejection of the right of deduction for mere formal non-compliance

- Being provided with all the **necessary information** for their control activities, the tax authorities cannot deny the right to the deduction for mere breaks in the fulfilment of formal requirements:
  - Pannon Gép Centrum, 15-7-2010, C-368/09
  - Nidera Handelscompagnie, 21-10-2010, C-385/09
  - Polski Trawertyn, 1-3-2012, C-280/10
  - EMS Bulgaria Transport, 12-7-2012, C-284/11
  - Petroma Transports and others, 8-5-2013, C-271/12
  - Dobre, 7-3-2018, C-159/17



# Formal requirements, in particular, reverse charge cases (I)

- **Bockemühl, 1-4-2004, C-90/02**

- The taxable person who is liable for VAT and, as such, required to enter the tax is not obliged to be in possession of an invoice issued in accordance with the Sixth Directive art.22.3 (at present, Dir 2006/112 art.217 s.) to be able to exercise its right to the deduction.

# Formal requirements, in particular, reverse charge cases (II)

- **Ecotrade, 8-5-2008, C-95/07 and C-96/07**

- In a case of self-assessment, the principle of fiscal neutrality requires that the deduction of input VAT be granted if the material requirements are met, even if the taxpayers have omitted certain formal requirements.
- Therefore, since the tax administration has the necessary data to determine that the taxpayer is liable for VAT, as the recipient of the provision of some services, it cannot impose, with respect to the right of said taxpayer to deduct VAT, supplementary requirements that may have the effect of the absolute impossibility of exercising such right.
- In this context, and given that the tax authorities have the necessary information to determine that the taxpayer is liable for the tax, as the recipient, they cannot impose additional requirements that may have the effect of the absolute impossibility of exercising the right to the deduction.

# Formal requirements, in particular, reverse charge cases (III)

- **Uszodaépítő, 30-9-2010, C-392/09**

- In cases of self-assessment, only the modalities established under Dir 2006/112 art.178.f) are required, and it is not mandatory for the exercise of the right to deduct to have an invoice issued in accordance with the formal requirements of the Dir 2006/112.
- The principle of fiscal neutrality requires that the deduction of input VAT be granted if the material requirements are met, even if the taxpayers have omitted certain formal requirements. Therefore, in the cases of self-assessment, being the tax authorities provided with all the information necessary for the identification of the taxpayer, the right of deduction cannot be conditioned to have a complete invoice.
- The VAT Directive is opposed to a national regulation that, within the framework of a self-assessment system, makes the deduction of the VAT corresponding to a construction works to the rectification of the invoices related to these transactions and the filing of a supplementary amending declaration, when the tax authorities have all the necessary information to determine that the taxpayer is obliged to pay the tax as recipient of the operations and to verify the deductible amount.

# Formal requirements, in particular, reverse charge cases (IV)

- **Fatorie, 6-2-2014, C-424/12**

- In cases of self-assessment, only the modalities established under Dir 2006/112 art.178.f) are required, and the invoice issued in accordance with the formal requirements of the Dir 2006/112 is not mandatory for the exercise of the right to deduct.
- The principle of fiscal neutrality requires that the deduction of input VAT be granted if the material requirements are met, even if the taxpayers have omitted certain formal requirements. Therefore, in cases of self-assessment, with the tax authorities providing all the necessary information for the identification of the taxpayer, the right to the deduction cannot be conditioned to the availability of a complete invoice.
- This is not the case when VAT has been improperly paid in a case in which the self-assessment of the tax should have been applied, the previous conclusions not being transferable to this case. The VAT unduly paid to the supplier is not deductible in a situation in which the reverse charge procedure should have been applied, the denial of the right to deduct with Dir 2006/112 and the principle of neutrality being compatible.

# Formal requirements, in particular, reverse charge cases (V)

- **Idexx Laboratories Italy, 11-12-2014, C-590/13**

- The requirements contained in the Sixth Directive art.18.1.d) and 22 (Dir 2006/112 art.178.d) and 250 et seq. at present), related to invoices and their registration, are formal requirements of the right to deduct, whose non-compliance, in the event of carrying out intra-EU acquisitions of goods, cannot result in the loss of that right.
- Mere formal irregularities, such as improper registration of invoices received, cannot prevent the right to deduct VAT corresponding to the intra-EU acquisitions.



# Adjustments of deductions

- General criteria
- Capital goods
  - Use
  - Transmission
  - Definition

# Adjustments of deductions, general criteria (I)

- **Fischer and Brandenstein, 17-5-2001, C-322/99 and C-323/99**
  - If the work performed on a property that is transferred to private USE is not taxed as free operations assimilated to deliveries of goods made for consideration, it must be properly regularized.

# Adjustments of deductions, general criteria (II)

- **PIGI, 4-10-2012, C-550/11**

- The VAT Directive does not oppose a national provision that requires the regularization of VAT when the goods that a taxpayer has acquired have been stolen.



# Adjustments of deductions, general criteria (III)

- **TETS Haskovo, 18-10-2012, C-234/11**
  - The VAT paid for the acquisition of a real estate complex in which there are several buildings that are demolished for replacement by new ones is deductible, without, for this reason, regularization being appropriate.

# Adjustments of deductions, general criteria (IV)

- **SC Gran Via Moinesti, 29-11-2012, C-257/11**

- A company that acquires a plot of land and buildings standing therein in order to demolish them and build a residential complex has the right to deduct the VAT corresponding to the acquisition of said buildings.
- According to the VAT Directive, the demolition of buildings acquired jointly with the land on which they were built, carried out in order to carry out a residential complex in its place, does not imply an obligation of regularize the deduction initially practiced for the acquisition of said buildings.

# Adjustments of deductions, general criteria (V)

- **Pactor Vastgoed, 10-10-2013, C-622/11**
  - The adjustment of VAT quotas cannot be required from a taxpayer other than the one who made the deduction, even if it results in an exempt transaction made by the taxpayer to which the adjustment is required.

# Adjustments of deductions, general criteria (VI)

- **Wolfgang und Wilfried Rey Grundstücksgemeinschaft GbR, 9-6-2016, C-332/14**
  - The VAT Directive requires VAT deductions made in respect of goods or services subject to the proportional deduction to be adjusted following the adoption, during the adjustment period in question, of a VAT allocation key used to calculate those deductions that departs from the method provided for by the directive for determining the deduction entitlement.
  - The general principles of EU law of legal certainty and of the protection of legitimate expectations must be interpreted as not precluding applicable national legislation which does not expressly prescribe an input tax adjustment, following amendment of the VAT allocation key used to calculate certain deductions or lay down transitional arrangements although the input tax allocation applied by the taxable person in accordance with the allocation key applicable before that amendment had been recognised as generally reasonable by the supreme court.

# Adjustments of deductions, general criteria (VII)

- **T – 2, 28-2-2018, C-396/16**

- To the effect of the obligation to adjust the VAT deduction, the reduction of a debtor's obligations resulting from the final approval of an arrangement with creditors constitutes a change in the factors used to determine the amount of VAT to be deducted.
- The reduction of a debtor's obligations resulting from the final approval of an arrangement with creditors does not constitute a case of a transaction remaining totally or partially unpaid that does not give rise to an adjustment of the initial deduction, where that reduction is definitive.
- In order to implement the option provided for in Dir 2006/112 art.185.2, second subparagraph, and require said adjustment even in the referred assumption, a Member State is not required to make express provision for an obligation to adjust the deductions in the case of transactions remaining totally or partially unpaid.

# Adjustments of deductions, general criteria (VIII)

- **SEB bankas, 11-4-2018, C-532/16**

- According to the VAT Directive, the obligation to adjust undue VAT deductions also applies to cases where the initial deduction could not be made lawfully because the transaction giving rise to that deduction was exempt from VAT.
- By contrast, mechanism for the adjustment of undue VAT deductions, related to VAT borne for capital goods, is not applicable in such cases, in particular in a situation such as that at issue in the main proceedings, where the initial VAT deduction was unjustified as it concerned a VAT-exempt transaction relating to the supply of land.

# Adjustments of deductions, general criteria (IX)

- **Kollroß and Wirtl, 31-5-2018, C-660/16**
  - The VAT Directive does not preclude a national law or practice which has the effect of making the adjustment of the VAT relating to a payment on account for the supply of an item conditional upon that payment being refunded by the supplier.

# Adjustments of deductions, general criteria (X)

- **Mydibel, 27-3-2019, C-201/18**

- The VAT Directive does not require the regularization of VAT that is levied on a real property, and that has initially been correctly deducted, when said property has been the subject of a sale and lease back operation (sale with subsequent lease) not subject to VAT in circumstances such as those in the main proceedings.
- The obligation to adjust the VAT initially deducted in circumstances such as those at issue in the main proceedings complies with the principles of VAT neutrality and equal treatment.



# Adjustments of deductions, general criteria (XI)

- **HF, 9-7-2020, C-374/19**

- The VAT Directive does not preclude national legislation pursuant to which a taxable person who has acquired the right to deduct, on a pro-rata basis, of VAT related to the construction of a cafeteria, which is annexed to the retirement home operated by him as an activity exempt from VAT and which is intended to be used for both taxed and exempt transactions, is required to adjust the initial VAT deduction where he has ceased all taxed transactions in that cafeteria's premises, if he has continued to carry out exempt transactions in those premises, thus using them henceforth only for those transactions.

# Adjustments of deductions, general criteria (XII)

- **CTT - Correios de Portugal, 30-4-2020, C-661/18**

- The VAT Directive, read in the light of the EU law principles of fiscal neutrality, effectiveness and proportionality, does not preclude national legislation under which a taxable person who deducted VAT charged on the acquisition of goods and services used both for transactions in respect of which VAT is deductible and for transactions in respect of which VAT is not deductible, using the turnover-based method, is denied the opportunity, once the final proportion has been fixed, to correct those deductions, by using the actual use method in a situation where:
  - The concerned Member State authorizes taxable persons to deduct VAT on the basis of the use made of all or part of the goods and services used both for transactions in respect of which VAT is deductible and for transactions in respect of which VAT is not deductible;
  - the taxable person was unaware, and acting in good faith, when choosing the deduction method, that a transaction which it regarded as exempt was in fact taxable,
  - the general limitation period fixed by the national law for the purposes of adjusting the deductions has not yet expired, and
  - the change in the deduction method makes it possible to establish more precisely the proportion of VAT relating to transactions in respect of which VAT is deductible.

# Adjustments of deductions, general criteria (XIII)

- **World Comm Trading, 28-5-2020, C-684/18**

- According to the VAT Directive, the national tax authorities must impose on a taxable person a regularization of the deduction of VAT initially made, when, following the latter's obtaining of discounts on internal supplies of goods, these authorities consider that the deduction initially made was greater than that that this taxable person was entitled to operate.
- Said regularization is necessary even when the supplier of that taxable person has ceased its activities in that Member State and that supplier can therefore no longer claim reimbursement of part of the VAT he has paid.

# Adjustments of deductions, use of capital goods (I)

- **Lennartz, 11-7-1991, C-97/90**

- The adjustments of the VAT borne in the acquisition of capital goods only applies when the concerned capital good has been acquired with the intention of using it in the economic activity. This procedure cannot be applied when the good was acquired without the aforementioned intention.

# Adjustments of deductions, use of capital goods (II)

- **Seeling, 8-5-2003, C-269/00**

- The use by its owner for private purposes of a property that has been completely affected to the business assets is not exempt as a lease. Consequently, the VAT paid on the acquisition of said property is fully deductible, having to pay the VAT corresponding to the private use of the property as it is produced (judgment relating to events prior to Dir 2010/45, which introduced art.168a in Dir 2006/112).
- The adjustment period for capital goods in the form of immovable property may be extended in the EU to 20 years. As a result, untaxed consumptions can be given through the appropriate regularizations; however, this is the result of the current EU regulations.

# Adjustments of deductions, use of capital goods (III)

- **Gemeente Leusden and Holin Groep, 29-4-2004, C-487/01 and C-7/02**
  - The principles of protection of legitimate expectations and legal certainty do not preclude a Member State from removing the possibility to opt out the exemption in the leasing of immovable property, deriving from this the obligation to adjust the deductions made for the capital goods leased. These same principles do not preclude the abolition of tax provisions which create advantageous situations for taxpayers, even if they are not abusive practices.

# Adjustments of deductions, use of capital goods (IV)

- **Heiser, 3-3-2005, C-172/03**

- A regulation according to which dentists go from a regime of taxation and not exemption to an exemption regime, without requiring the regularization that comes from the VAT paid on the acquisition of capital goods, must be qualified as aid of State, contrary to the TFEU art.107.

# Adjustments of deductions, use of capital goods (V)

- **Uudenkaupungin kaupunki, 30-3-2006, C-184/04**
  - In accordance with the VAT Directive, the adjustment of deductions for capital goods is mandatory, without prejudice to their non-application when the result throws is insignificant.
  - This criterion equally applies in cases in which initially the capital good was used for exempt activity and then went on to be used in subject and non-exempt transactions.
  - In accordance with the VAT Directive, the regularization of deductions for capital goods is mandatory, without prejudice to their non-application when the result throws is insignificant.



# Adjustments of deductions, use of capital goods (VI)

- **Gmina Miedzyzdroje, 5-6-2014, C-500/13**

- In accordance with the VAT Directive and the principle of neutrality, in the event that the utilization of a property asset is modified, having been affected, at first, to a use that does not give right to the deduction and, in a second moment, to a use that does give such a right, a period of regularization of ten years can be applied from the beginning of the use of said good and exclude, therefore, a single regularization in the course of a single fiscal year.



# Adjustments of deductions, transmission of capital goods (I)

- **Ghent Coal Terminal, 15-1-1998, C-37/95**

- The deductibility of the VAT quotas borne regarding capital goods that were never used in the realization of transactions generating the right to deduct for reasons beyond the control of the taxpayer must be understood without prejudice to its corresponding regularization or adjustment.

# Adjustments of deductions, transmission of capital goods (II)

- **Waterschap Zeeuws Vlaanderen, 2-6-2005, C-378/02**

- A body governed by public law that acquires a capital good acting as such, deprived of the condition of VAT taxable person, and that subsequently sells said asset apparently acting as taxable person cannot apply the regularization of capital goods that is regulated in the VAT Directive.

# Adjustments of deductions, transmission of capital goods (III)

- **Centralan Property, 15-12-2005, C-63/04**

- In a leasing operation for 999 years that is accompanied by the delivery of the residual value, being that the first operation is exempt and the second is not, for the purposes of regularizing the VAT paid for the concerned capital goods, it must be considered the whole and perform said regularization in consideration of the relative values of the aforesaid operations.

# Adjustments of deductions, definition of capital goods (I)

- **Verbond van Nederlandse Ondernemingen, 1-2-1977, C-51/76**

- The words «capital goods» appearing in the Second VAT Directive (dated on 1967 and substituted by the Sixth Directive) refer to goods used for the purposes of an economic activity, distinguishable by their durable nature and their value and such that the acquisition costs are not normally treated as current expenditure, but are used over several years.
- The EU Member States have a certain margin of discretion as regards the requirements which must be satisfied concerning the durability and value of the goods, together with the rules applicable for adjustments, provided that they consider the existence of an essential difference between capital goods and the other goods used in their activities.
- This judgment is based on regulations which were repealed when the Sixth Directive was approved and that are not reflected in the current provisions.



# Adjustments of deductions, definition of capital goods (II)

- **Bakcsi, 8-3-2001, C-415/98**
  - The deduction of the operating costs of a vehicle excluded from the business assets do not allow it to be considered as a capital good part of the business assets. Consequently, its sale is not subject to VAT nor to any adjustment.

# ADDITIONAL INFORMATION

Additional information about some of those topics can be found in the book "**ECJ case-law on VAT**", also **available electronically**, which will be **updated shortly**, and whose link is attached:

<https://www.efl.es/catalogo/manuales-juridicos/ecj-case-law-on-vat>