[2021] UKUT 30 (TCC)

Appeal number: UT/2019/0066 (V)

VAT – whether HMRC as a matter of EU law entitled to deny recovery of input tax claimed on invalid invoices - whether it was unreasonable for HMRC to refuse to exercise their discretion to allow the deduction of input tax in respect of the invalid invoices - Articles 168(a), 178(a), 180 & 226 Principal VAT Directive - Regulations 14 and 29 VAT Regulations 1995

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

TOWER BRIDGE GP LIMITED **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: Mr Justice Fancourt
Judge Timothy Herrington

Hearing conducted remotely by video conference deemed to be held in London on 14 and 15 December 2020

Nicola Shaw QC and Michael Jones, Counsel, instructed by Pinsent Masons, Solicitors, for the Appellant

James Puzey, Howard Watkinson and Joshua Carey, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is an appeal from the decision of the First-tier Tribunal (Tax Chamber) (Judge Rupert Jones) (the "FTT") released on 5 March 2019. By that decision (the "Decision") the FTT allowed in part the appeal of the appellant ("Tower Bridge") against a number of decisions made by the respondents ("HMRC") (i) to refuse to grant Tower Bridge the right to deduct input VAT incurred on purchases of carbon credits in VAT periods 03/09, 06/09 and 09/09 and (ii) to make assessments against Tower Bridge in respect of VAT periods 06/09 and 09/09 in consequence of the denial of input tax for those periods.

2. This appeal relates to the following two issues that were before the FTT:

(1) Whether HMRC were entitled to deny Tower Bridge input tax claimed in respect of 17 separate purchases of carbon credits from Stratex Alliance Limited ("Stratex") made between 18 May 2009 and 3 June 2009 on the basis that the invoices held by Tower Bridge in respect of those purchases (the "Stratex Invoices") were invalid, principally because they did not contain a VAT registration number ("VRN") or name the customer as required by Regulation 14 of the VAT Regulations 1995 ("VATR"). The question was whether that decision was in conformity with the Principal VAT Directive ("PVD"), Directive 2006/112/EC. We refer to that issue as the "EU Law Issue".

(2) Whether HMRC's decision to refuse to exercise the discretion under Regulation 29(2) VATR in favour of Tower Bridge to allow the input VAT claimed on the Stratex Invoices on the basis that they were not valid VAT invoices was unreasonable. We refer to that issue, which does not arise if the EU Law Issue is determined in favour of Tower Bridge, as the "Discretion Issue".

3. The FTT upheld HMRC's decision to deny Tower Bridge's claim to deduct input tax in relation to the purchases of carbon credits from Stratex referred to above on the basis that:

(1) Tower Bridge did not hold valid VAT invoices for the input tax claimed in relation to those transactions; and

(2) HMRC had lawfully exercised its discretion against allowing Tower Bridge to deduct the input tax pursuant to Regulation 29(2) VATR.

4. In relation to the EU Law Issue, Tower Bridge contends that because the substantive conditions which give rise to the entitlement to deduct input tax, as prescribed by Article 168(a) of the PVD, have been satisfied in relation to its purchase of the carbon credits in question from Stratex, it therefore has a directly effective right to deduct regardless of whether the formal conditions prescribed by Article 178(a) of the PVD governing the exercise of that right - in particular the holding of a valid VAT

invoice drawn up in accordance with the requirements of Article 226 of the PVD - have been complied with. Tower Bridge contends that the presence of the supplier's VRN and the customer's name on a VAT invoice are only formal requirements.

5. HMRC contend that the wording of Article 178(a) of the PVD makes it clear that the requirement to hold a valid VAT invoice in order to exercise the right to deduct input tax is mandatory and it is not sufficient simply to satisfy the substantive conditions of Article 168(a). HMRC contend that the requirement that the invoice bears the supplier's VRN number and the name of the customer are fundamental requirements since they are necessary for HMRC to monitor whether the supplier has properly accounted for and paid the tax due.

6. In relation to the Discretion Issue, Tower Bridge contends that HMRC's decision not to exercise its discretion to accept alternative evidence and allow deduction of the input tax was unreasonable because HMRC took into account irrelevant matters and/or acted irrationally or otherwise failed properly to exercise their discretion. Specifically, Tower Bridge contends that HMRC had regard to the following considerations: (i) the invoices were invalid; (ii) Stratex was not registered for VAT (iii) the transactions were connected with fraud; and (iv) the taxpayer did not carry out a reasonable level of due diligence. Tower Bridge contends that none of these were relevant considerations because they do not detract from the fact that the substantive conditions prescribed by Article 168(a) have been met.

7. HMRC contend that the considerations referred to at [6] above were all relevant considerations and HMRC were entitled to take them into account when deciding whether to exercise its discretion to allow deduction of the input tax.

8. Permission to appeal against the FTT's findings in relation to the EU Law Issue and the Discretion Issue was granted by the FTT on 10 May 2019.

The Facts

9. Ms Nicola Shaw QC, who appeared with Mr Michael Jones for Tower Bridge, summarised the findings of fact made by the FTT relevant to the issues which arise on this appeal in her skeleton argument. We gratefully adopt that summary in substance, with some limited additions as follows.

10. The Appellant is the representative member of the Cantor Fitzgerald Group VAT group. ("CFG VAT Group").

11. Cantor Fitzgerald Europe Limited ("CFE") was a broker in equities, equity derivatives, foreign exchange markets and contracts for differences and Cantor CO2e Limited ("CO2e") provided brokerage, information and consulting services for products related to environmental markets, including selling carbon credits "over the counter". Both CFE and CO2e were members of the CFG VAT Group.

12. CO2e arranged and undertook the relevant transactions, whereas CFE executed the transactions, and received and issued the invoices.

13. At all material times, CFE was a taxable person.

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

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

16. Given the volume and nature of its trades, Stratex was also a "taxable person" for the purposes of the PVD. Accordingly, VAT was due in respect of the supplies of carbon credits by Stratex to CFE.

17. The Stratex Invoices, which were issued to CFE in respect of the 17 transactions, included amounts of VAT totalling £5,605,119.74, which CFE duly paid. Tower Bridge then claimed a deduction in respect of that input VAT in its VAT return for the period 06/09.

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

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

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

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

22. On 2 September 2009 CFE first confirmed to HMRC that it had not been provided with Stratex's VRN. HMRC Officers visited Stratex on 9 September 2009, finding that its Companies House registered address was the premises of a corporate service provider. A representative of the service provider informed the Officers that it was purely an agent for Stratex, who had come to them from a representative in Russia. Despite HMRC's attempts no contact was made with Stratex.

23. In a decision dated 6 December 2012, HMRC (acting through Officer David Ball) denied Tower Bridge the recovery of the input tax on the Stratex Invoices on the basis that the invoices did not meet the formal legal requirements to be valid VAT invoices.

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

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

26. HMRC knew in advance of issuing their decision of 6 December 2012 that:

(1) CFE was at all material times a taxable person;

(2) the carbon credits in question were supplied to Tower Bridge by Stratex, which, given the volume and nature of its trades, was also a "taxable person" for the purposes of the Principal VAT Directive; and

(3) The carbon credits supplied to Tower Bridge were to be used by Tower Bridge for the purposes of its own onward (taxable) transactions in carbon credits.

Relevant legislation

27. The relevant European law is set out in the Principal VAT Directive ("PVD").

28. Article 2 of the PVD provides, so far as material:

> "The following transactions shall be subject to VAT:
>
> (a) the supply of goods for consideration within the territory of a Member State by a taxable person acting as such…"

29. Article 167 of the PVD provides

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

30. Article 168 of the PVD provides, in as far as is relevant:

> "In so far as the goods and services are used for the purposes of the taxed transactions of a taxable person, the taxable person shall be entitled, in the

Member State in which he carries out these transactions, to deduct the following from the VAT which he is liable to pay:

(a) the VAT due or paid in that Member State in respect of supplies to him of goods or services, carried out or to be carried out by another taxable person;

(b) …"

31. Article 178 of the PVD provides, in as far as is relevant:

"In order to exercise the right of deduction, a taxable person must meet the following conditions:

(a) for the purposes of deductions pursuant to Article 168(a), in respect of the supply of goods or services, he must hold an invoice drawn up in accordance with Articles 220 to 236 and Articles 238, 239 and 240;

…"

32. Article 179 of the PVD provides, in as far as is relevant:

"The taxable person shall make the deduction by subtracting from the total amount of VAT due for a given tax period the total amount of VAT in respect of which, during the same period, the right of deduction has arisen and is exercised in accordance with Article 178."

33. Article 180 of the PVD provides, in as far as is relevant:

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

34. Article 182 of the PVD provides:

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

35. Article 226 of the PVD provides, in as far as is relevant:

"Without prejudice to the particular provisions laid down in this Directive, only the following details are required for VAT purposes on invoices issued pursuant to Articles 220 and 221

(1) the date of issue;

(2) a sequential number, based on one or more series, which uniquely identifies the invoice;

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

(4) …

(5) the full name and address of the taxable person and of the customer;

(6) the quantity and nature of the good supplied, or the extent and nature of the services rendered;

(7) the date on which the supply of goods or services was made or completed… in so far as that date can be determined and differs from the date of issue of the invoice;

(8) the taxable amount per rate or exemption, the unit price exclusive of VAT and any discounts or rebates if they are not included in the unit price;

(9) the VAT rate applied;

(10) the VAT amount payable, except where a special arrangement is applied under which, in accordance with this Directive, such a detail is excluded;

……"

Paragraphs (3) and (5) of Article 226 are the requirements that are central to this appeal.

36. Article 228 of the PVD provides, in as far as is relevant:

> "Member States in whose territory goods or services are supplied may allow some of the compulsory details to be omitted from documents or messages treated as invoices pursuant to Article 219"[1].

37. The relevant domestic law which implements the relevant provisions of the PVD set out above is set out in the Value Added Tax Act 1995 ("VATA") and the VATR.

38. Section 4 VATA provides as follows:

> "(1) VAT shall be charged on any supply of goods or services made in the United Kingdom, where it is a taxable supply made by a taxable person in the course or furtherance of any business carried on by him.
>
> (2) A taxable supply is a supply of goods or services made in the United Kingdom other than an exempt supply."

39. Section 24(1)(a) VATA (so far as is relevant) defines "input tax" in relation to a taxable person as:

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

[1] Article 219 provides that any document or message that amends and refers specifically and unambiguously to the initial invoice shall be treated as an invoice.

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

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

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

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

42. Section 26 VATA (so far as is relevant) provides for input tax allowable under Section 25:

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

43. Regulation 29 VATR provides:

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

44. Regulation 13(2) VATR provides that the particulars of the VAT chargeable on a supply of goods shall be provided on a document containing the particulars prescribed in Regulation 14(1) VATR.

45. Regulation 14(1) VATR states, in as far as is relevant:

> "(1) Subject to paragraph (2) below and regulation 16 save as the Commissioners may otherwise allow, a registered person providing a VAT invoice in accordance with regulation 13 shall state thereon the following particulars—
>
> (a) a sequential number based on one or more series which uniquely identifies the document,
> (b) the time of the supply,
> (c) the date of issue of the document,
> (d) the name, address and registration number of the supplier,
> (e) the name and address of the person to whom the goods or services are supplied,
> (f) …
> (g) a description sufficient to identify the goods or services supplied,
> (h) for each description, the quantity of the goods or the extent of the services, and the rate of VAT and the amount payable, excluding VAT, expressed in any currency,
> (i) the gross total amount payable, excluding VAT, expressed in any currency,
> (j) the rate of any cash discount offered,
> (k)…
> (l) the total amount of VAT chargeable, expressed in sterling,
> (m) the unit price,
> …"

46. In summary, the provisions of the PVD set out above are implemented into UK law by sections 24, 25 and 26 VATA and Regulations 14 and 29 VATR. More particularly:

(1) Section 24 VATA defines "input tax" in relation to a taxable person as, inter alia, VAT on the supply to him of any goods or services used or to be used for the purpose of any business carried on or to be carried on by him.

(2) Section 25 VATA sets out a taxable person's obligation to account for output tax and provides a right to deduct input tax.

(3) Section 26 VATA sets out the input tax allowable under s.25.

(4) Regulation 14 VATR details the particulars that a VAT invoice is to contain.

(5) Regulation 29 VATR governs claims for input tax. It implements the requirement that the taxable person making the claim hold a VAT invoice. It also gives HMRC discretion to allow a claimant to hold alternative documentary evidence of the VAT charge, instead of a VAT invoice.

47. HMRC's "Statement of Practice – VAT Strategy: Input Tax deduction without a valid VAT invoice" of March 2007 set out HMRC's policy at the time of the Decision in relation to invalid VAT invoices. The policy states, among other things, that in order for HMRC to exercise its discretion in favour of the taxpayer, it will need to be satisfied that the taxpayer has undertaken normal commercial checks to establish the bona fides of the supply and the supplier.

The Decision

48. Unless otherwise indicated, a reference to a number in square brackets is a reference to a numbered paragraph of the Decision.

The EU Law Issue

49. At [67] to [74], the FTT reviewed the relevant case law of the Court of Justice of the European Union ("CJEU"[2]) that was cited to it.

50. At [68] the FTT correctly observed that the right to deduct input tax is an integral part of the VAT scheme and in principle may not be limited: see the CJEU's judgment in *Kittel v Belgium* [2008] STC 1537 at [47]. It also observed at [69] that the CJEU had drawn a twofold distinction between (i) the "substantive conditions" which must be met in order for the right to deduct to arise, and (ii) the "formal conditions" for the right to be exercised.

51. The FTT observed at [184] to [185] that the Stratex Invoices did not comply with the formal conditions or requirements of Article 226 of the PVD and Regulation 14 VATR and had never been corrected. At [186] the FTT referred to its findings that Stratex was not registered for VAT and had fraudulently defaulted on its obligations to account for and pay over the sums charged as VAT on the invalid invoices. It then said at [187] and [188]:

> "187. Therefore, the absence of VRN on the Stratex invoices was not simply the absence of a technical formality on a document but evidence of a lack of VAT registration on the part of Stratex. There was a tax loss occasioned by these invoices and it was fraudulently occasioned when Stratex failed to account for and pay over the sums charged as VAT on the invalid invoices.
>
> 188. For the purposes of this issue it is unnecessary and not relevant for the Tribunal to take account its finding…that CFE failed to take reasonable care and check that Stratex were VAT registered before making payments to them."

52. At [195] and [196] the FTT held that the particular requirement for a supplier's VRN to appear on a VAT invoice was not merely a "formal" condition and, on that basis alone, HMRC was entitled to apply the provisions of Regulation 14 VATR and to deny the claim for input tax in respect of the Stratex Invoices. It then said at [197] and [198]:

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[2] In this Decision, any reference to the Court of Justice of the European Union (or the abbreviation "CJEU") includes, where appropriate, its predecessor, the European Court of Justice.

"197. The absence of information meeting some of the formal conditions on the invoices betrayed a much greater deficiency with the invoices as is set out above ie. that they were connected to a fraudulent loss of VAT. For example, it is not that the absence of VRN was oversight – there was no VRN to record on the invoices because Stratex was not registered for VAT. There was no payment by Stratex (the supplier) of the tax for which a deduction is sought by the Appellant.

198. There is no binding authority that HMRC, or the Tribunal, must disapply the domestic law under Reg 14 VATR, as it implements Art 226 of PVD, and give direct effect only to the substantive requirements of Art 168 in the circumstances of a case such as this. HMRC were lawfully entitled to deny input tax upon the Stratex invoices in conformity with EU law."

53. The FTT reinforced this reasoning by placing reliance on principles that it derived from the judgment of Henderson LJ in the Court of Appeal's judgment in *Zipvit v HMRC* [2018] EWCA Civ 1515 (*"Zipvit"*) , which we refer to in further detail later in this decision. The FTT summarised those principles at [200] to [206] as follows:

"200. One of the main purposes of the mandatory requirement for a VAT invoice is to enable the taxing authorities to monitor payment by the supplier of the tax for which a deduction is sought - [112] of *Zipvit*.

201. Whether a taxable person in possession of an invalid VAT invoice can provide any evidence that the supplier of that invoice has paid any of the VAT on that invoice to HMRC is relevant to the question of whether the conditions for the right to deduct to arise are met - [112- 113] of *Zipvit*.

202. The exercise of the right to deduct is subject to a mandatory requirement to produce a VAT invoice which must contain the specified particulars. Where a person seeking deduction cannot produce invoices that satisfy the requirements of Article 226 (9) and (10) of the PVD and is also unable to produce any supplementary evidence showing payment by its supplier of the relevant VAT, a necessary precondition for the exercise of the right to deduct remains unsatisfied - [113] of Zipvit.

203. The distinction between a "substantive" and "formal" requirement does not necessarily imply that compliance with it is optional, or that a failure to satisfy it is always capable of being excused and *Barlis*[3] was confined to failure to comply with Articles 226(6) and (7) of the PVD.

204. Some of the requirements in Article 226 of the PVD must be dispensed with if the tax authorities are provided with the information necessary to establish that the substantive conditions of the right to deduct are satisfied, but that cannot extend to a failure to comply with a fundamental requirement relating to the payment of the relevant tax. Provision of an invoice that complies with those fundamental requirements is essential to the proper performance by HMRC of their monitoring functions in relation to VAT, and is needed as evidence that the supplier has duly paid or accounted for the tax to HMRC - [114] of *Zipvit.*

[3] Case C-516/14, *Barlis 06 – Investimentos Imobiliários e Turísticos SA v Autoridade Tributária e Aduaneira,* EU:C:2016:690, a judgment of the CJEU to which we refer below at [108] to [122].

205. There is an obvious detriment to the public purse where the taxpayer can obtain a deduction without first showing that the tax in question has been paid by its supplier; the ordinary way of doing that is by the production of a fully compliant VAT invoice.

206. Where a person seeking a deduction does not have a fully compliant VAT invoice and cannot show that the VAT in question was paid by the supplier there will be no grounds upon which HMRC could properly conclude in the exercise of their discretion that the taxpayer in question should be allowed a deduction to the detriment of the general body of taxpayers. It would be offensive to fiscal justice if a mechanical accounting exercise can generate a very substantial input tax credit where, for whatever reason, none of the tax in question has been paid by the supplier."

54. The FTT applied these principles to the circumstances of this appeal at [208] to [216] as follows:

"208. Firstly, the Appellant's general proposition that once the "substantive" requirements are met the right to deduct can be exercised regardless of failures to comply with the invoicing requirements is inconsistent with Henderson, LJ's judgment in *Zipvit*. The Tribunal does not consider the Appellant's broad proposition to be correct.

209. Secondly, the particular deficiencies in the Stratex invoices are such that the "fundamental" requirements of VAT invoices, viz. those necessary for the taxing authority to monitor payment by the supplier of the tax in question, have not been met. Where those requirements have not been met, and the person seeking to reclaim the input tax cannot provide other evidence that the supplier has paid the VAT due on the invoices, it is apparent that a necessary precondition for the right to deduct remains unsatisfied.

210. In this case, Stratex's invoices bore neither the name of its customer, nor, more importantly, its own VRN. These are fundamental requirements, since they are necessary for HMRC to monitor whether the supplier has paid the tax due. Moreover, there is authority that the requirement imposed by Article 226(10) is a fundamental condition of the right to deduct, it makes no sense to speak of a sum of VAT being payable by virtue of an invoice if that invoice fails to identify the person required to pay the sum in question.

211. The VRN identifies the particular taxable person who has made the supply and is due to account for the output tax and the customer name identifies the counterparty with sufficient particularity that the invoice could not, for example, be issued multiple times. These symmetrical requirements cumulatively mirror the operation of the principle of fiscal neutrality. Together, therefore, these requirements amount to a fundamental requirement of a VAT invoice that has not been met by the Appellant.

212. At the second stage of the analysis, the Appellant cannot show that the VAT charged on the Stratex invoices has been paid, since it is common ground that Stratex fraudulently failed to account for it. Therefore, since the invoices relied upon by the Appellant fail to satisfy a fundamental requirement of a VAT invoice, and the Appellant cannot provide any evidence that Stratex paid the

VAT charged on the invoices, in the language of *Zipvit* at [113] a necessary precondition for the exercise of the right to deduct therefore remains unsatisfied.

213. Henderson, LJ made plain the importance of establishing the payment of the output tax where an invoice is invalid for VAT purposes by iterating the point that *Zipvit* could not do so on no less than five occasions at: [112, 113, 115, 116 and 117].

214. What is more, the Judge's analysis of the importance of either the invoice, or alternative evidence where the invoice is invalid, establishing that the tax has been paid by the supplier must have been explicitly intended to go beyond the facts of *Zipvit*, since otherwise the parenthesis in [116] is inexplicable:

"…It would, I think, be offensive to most people's sense of fiscal justice if a mechanical accounting exercise of this nature were permitted to generate a very substantial input tax credit, in circumstances where (for whatever reason) none of the tax in question has been paid by the supplier."

215. In terms of the exercise of HMRC's discretion to allow the Appellant's input tax deduction in the absence of a valid VAT invoice and where there is no evidence that the supplier has paid the output VAT charged, it is now to be inferred from *Zipvit* at [116] that there will no grounds upon which HMRC could properly conclude that such a deduction could be permitted.

216. This also disposes of the Appellant's assertion, which will be considered as part of the Second Issue, that the decision-making officer's reliance in making his decision upon the fact that Stratex had fraudulently failed to account for the output tax was somehow an irrelevant factor. To the contrary, in the light of Henderson, LJ's. analysis in *Zipvit*, the fact of non-payment by the supplier (for whatever reason) is of real importance to a decision not to exercise HMRC's discretion in such circumstances."

55. The FTT therefore concluded at [217] that HMRC were lawfully entitled to deny Tower Bridge the right to deduct input tax upon the Stratex Invoices in conformity with domestic and EU law.

The Discretion Issue

56. At [244] the FTT correctly stated that the effect of Regulation 29(2) VATR is that HMRC has a discretion to allow a credit for input tax notwithstanding that the taxable person does not have a valid VAT invoice: see *Kohanzad v CEE* [1994] STC 967 at 969 per Schiemann J.

57. At [246] to [250] the FTT directed itself as to the correct approach to be taken when considering an appeal against the exercise of HMRC's discretion as follows:

"246. The Tribunal exercises a supervisory jurisdiction when hearing an appeal against the exercise of HMRC's discretion. Thus, the Tribunal's jurisdiction is to consider whether HMRC have acted in a way in which no reasonable panel of Commissioners could have acted or whether they have taken into account some irrelevant matter or disregarded something to which they should have given weight. The Tribunal should also consider whether HMRC have erred as a matter

of law (see e.g. *Revenue & Customs v GB Housley Ltd* [2014] UKUT 320 ("*GB Housley*") per Warren, J. at [10]).

247. If HMRC have failed to exercise their discretion properly (including by not exercising it at all) the exercise of that discretion must be revisited; the Tribunal cannot exercise the discretion itself. However, there is an exception to this where HMRC are able to show that had the discretion been properly exercised the decision would inevitably have been the same again (see e.g. *GB Housley* at [11]).

248. In *McAndrew Utilities Ltd v Revenue & Customs* [2012] UKFTT 749 (TC) the Tribunal considered the relevance of the fact that the transactions for which there were invalid invoices took place in a market known to be vitiated by fraud. The Tribunal concluded at [120-122]:

"120. The respondents say that the appellant's failure to carry out any meaningful due diligence commercial checks in a market affected by fraud is a factor in the exercise of its discretion to accept alternative evidence of the charge to VAT. We accept that submission. In such a market we would expect the appellant to have made considerably more effort than it did to satisfy itself as to the identity and legitimacy of persons it was dealing with. The absence of reliable evidence as to the identity and status of the suppliers arises because of the appellant's failure to carry out any meaningful checks.

121. We bear in mind that the alternative evidence referred to in regulation 29(2) is of the charge to VAT. The questions in Appendix 2 of the statement of practice must therefore be read in the context that they are seeking to establish that there has been a taxable supply to the appellant by a taxable person for which payment has been made. It is evidence to establish the following matters which will be particularly relevant:

(1) The identity of the supplier,

(2) The nature and extent of the goods and services being supplied,

(3) The use to which the goods and services were put in the appellant's business,

(4) Payment for the goods and services.

122. We also consider that the alternative evidence required is evidence to the same level of detail as that which would be contained in a valid invoice, the absence of which gives rise to the discretion."

249. The Tribunal's jurisdiction is strictly supervisory; not appellate nor "substitutionary." Thus, the Tribunal must focus not on whether it agrees with the decision nor whether it would have come to a different decision; but whether the decision falls within the ambit of one that a reasonable body of Commissioners could have reached.

250. The burden of proof is upon the Appellant, both to establish the facts that it relies upon in challenging the decision, and to show that the decision was unreasonable."

58. At [310] the FTT recorded that the reasons Officer Ball gave for not accepting Tower Bridge's alternative evidence were that (i) Stratex was not registered for VAT; (ii) the transactions were connected to fraud and (iii) that Tower Bridge failed to conduct reasonable due diligence in relation to the transactions.

59. At [312] the FTT rejected Tower Bridge's submissions that these reasons were irrelevant factors which Officer Ball should not have taken into account and that it was unreasonable for Officer Ball to rely on the matters he did in refusing to exercise his discretion.

60. At [319] the FTT held that the extent to which the taxpayer seeking deduction establishes that his supplier was a bona fide VAT registered trader was relevant to the exercise of HMRC's discretion. At [320] the FTT said that it was evident to Officer Ball that Tower Bridge had failed to carry out the most basic of checks on Stratex. The FTT found that to be a reasonable conclusion and therefore a relevant matter for the Officer to take into account because it bears directly on how the tax loss has come about.

61. As regards the connection to fraud, at [322] the FTT quoted with approval the following passage from *HMRC v Boyce* [2017] UKUT 177 (TCC) ("*Boyce*") at [19], and [22 – 23] per Arnold J, sitting in the Upper Tribunal:

> "19. Furthermore, counsel submitted….The FTT had failed to take into account the fact that there was a real and obvious risk of fraud in that the VAT invoices made out to the Named Purchasers could be used in order to make duplicate claims for the recovery of the VAT shown on them. That risk distinguished this case from one where no VAT invoice had been issued at all.
>
> ……
>
> 22. Finally counsel submitted that, in addition to the real and obvious risk of fraud mentioned above, the FTT had failed to keep in mind when assessing the Commissioners' decision that: (i) the rule, as a matter of both EU and UK VAT law, is that without a valid VAT invoice there can be no input tax deduction; (ii) the use of the discretion in regulation 29(2) involves creating an exception to that rule; and (iii) it is therefore entirely reasonable for the Commissioners to insist on strict adherence to that rule unless and until the taxpayer can demonstrate that why an exception to it should be made……
>
> 23. In my judgment the FTT erred in law in reaching its conclusion for all of the reasons given by counsel for HMRC……"

62. Consequently, the FTT held that the connection to fraud and the absence of reasonable commercial checks were factors relevant to the exercise of HMRC's discretion. Its reasoning was set out at [324] to [331] and [333] to [336] as follows:

> "324. Accordingly, the Tribunal is satisfied that the Appellant's submissions that fraud is irrelevant to the exercise of HMRC's discretion is not correct. The Tribunal accepts that the application of the *Kittel* test is quite separate and independent of the discretion to accept alternative evidence but Officer Ball only

relied on the connection to fraud and the poor commercial checks (due diligence) carried out by CFE. He did not rely on an allegation of knowledge or means of knowledge in the exercise of his discretion, simply the connection to fraud.

325. That the transactions were connected to fraud was a material factor for HMRC to take into account in exercising their discretion for the reasons set out above. This is independent of the separate grounds for denial of input tax on the *Kittel* basis. The connection of these transactions to fraud is undisputed. Denial on the basis of *Kittel* requires HMRC to prove knowledge or means of knowledge of such connection to fraud …

326. Likewise, Officer Ball properly took into account that Stratex was not VAT registered and that the Appellant failed to perform reasonable commercial checks in exercising his discretion to refuse to accept alternative evidence for the invalid invoices and to deny input tax upon them.

327. The absence of a VRN from the Stratex invoices did not simply render them invalid for the purposes of Regulations 13 and 14 of VATR on a technical deficiency or oversight. This was no simple failure to meet a procedural requirement but was an indicator of a substantive absence – that Stratex was not VAT registered at the time of the supplies. This was a relevant factor for the exercise of HMRC's discretion.

328. The lack of reasonable commercial checks or due diligence carried out by the Appellant on Stratex was also a relevant factor for HMRC to take into account in exercising the discretion. The most obvious failure by the Appellant was to check that Stratex had a valid VAT Registration number at the time of the transactions. This failure to perform reasonable due diligence and commercial checks was an example of a real and substantial failure to take reasonable care. A simple check would have revealed that Stratex was not VAT registered.

329. The context in which this failure occurred is striking. The Appellant was a leading multinational and profitable company. In addition to the traders conducting the transactions it had its own internal credit department and tax departments together with in-house legal advisers. It also had access to external expertise. All of this was in addition to the published HMRC, JMLSG and FATF guidance available to the Appellant.

330. Yet despite all of the above, the Appellant conducted 17 transactions between 18 May and 3 June 2009 to a value totalling around €40 million attracting over £5 million in VAT on which it paid out this very large sum in VAT. These transactions were connected to a fraudulent loss of VAT to the exchequer. The absence of VRN on the part of Stratex was a material indicator of fraud. It must have been reasonable for HMRC to take account of, what can be considered to be a failure to take reasonable care on the part of the Appellant, in failing to conduct the most basic of checks upon its supplier.

331. To the extent that Officer Ball relied on other failures by the Appellant to conduct further commercial checks, as set out in his witness statement at paragraphs 416 to 421, the Tribunal is satisfied that these failures have been proved as a matter of fact and that it was reasonable to take them into account…."

…..

"333. There would be no point in having a formal system of requirements for a VAT invoice if the only question was whether the substantive requirements for the charge of VAT were met. A taxpayer could simply assert that it had received a taxable supply without any invoice at all and providing its evidence met the required standard of proof it would be able to deduct -- it would have an unimpeded right to deduct.

334. However, the reason there are formal requirements is in part to make it harder to commit fraud. It is no answer to say one can leave those requirements out of account because HMRC have the ability to deduct input tax based upon Kittel. Kittel requires proof of means of knowledge, not simply the connection of the invoice to the fraudulent evasion of VAT. The formal requirements for the validity of invoices are meaningful. They make it easier to carry out oversight of the system on the part of the national authority. They make it harder to undertake a fraud and get away with.

335. The manner in which the EU and UK legislation is drafted is such that the holder of an invalid invoice does not have the right to deduct. They may be permitted that right but the starting point is that they do not. The discretion under regulation 29(2) VATR is not simply a technocratic provision whereby the existence of a taxable supply answers all questions.

336. What regulation 29(2) demands is alternative evidence. Simply asking whether the supply has taken place does not give a complete answer…"

63. The FTT therefore concluded at [344] that HMRC reasonably exercised the discretion to refuse to accept alternative evidence and to deny the input tax claimed in respect of the Stratex Invoices.

Grounds of Appeal and issues to be determined

64. Tower Bridge was granted permission to appeal on the following two grounds:

(1) The FTT erred, as a matter of EU law, when it concluded that HMRC could refuse Tower Bridge the right to deduct input tax in respect of the Stratex Invoices because those invoices were not valid VAT invoices, notwithstanding that the substantive conditions for the right to deduct prescribed by Article 168(a) of the PVD had been satisfied. Tower Bridge contends that the presence of the supplier's VRN and the customer's name on a VAT invoice are only formal requirements, the purpose of which is to permit HMRC to monitor the payment of tax and verify the existence of the right to deduct, thus enabling HMRC to audit the transaction concerned.

(2) The FTT erred in refusing to interfere with HMRC's discretion exercised against Tower Bridge not to accept alternative evidence of the charge to VAT in the absence of valid invoices. Tower Bridge contends

that the FTT erred in law by holding that HMRC acted reasonably in refusing to exercise its discretion because it wrongly concluded that HMRC were entitled to take into account the connection of the transactions concerned to fraud. In particular, Tower Bridge contends that the FTT wrongly held that whether the VAT concerned had been paid to HMRC by Stratex was a relevant factor, in terms of Tower Bridge's right of deduction, in circumstances where Tower Bridge had no knowledge or means of knowledge of the fraud. Tower Bridge also contends that HMRC are not entitled to exercise a discretion to penalise Tower Bridge for failing to undertake appropriate due diligence on Stratex. Tower Bridge contends that HMRC's discretion extends only to the sufficiency of alternative evidence of the charge to VAT, that is alternative evidence to a valid VAT invoice that the substantive conditions for the exercise of the right to deduct have been met.

65. As far as the first ground of appeal is concerned, which relates to the EU Law Issue, it appears to us that the key question to be determined is whether, as Tower Bridge submits, the authorities demonstrate that in circumstances where, as was common ground is the case here, the substantive conditions of Article 168(a) of the PVD have been satisfied, the taxpayer has a directly effective right to deduct the input tax in the absence of any knowledge or means of knowledge on the part of the taxpayer of the fact that the transactions concerned were connected to fraud, such right not being affected by non-compliance with two of the formal requirements prescribed by Regulation 14 VATR. The requirements in question in this case are the requirement to show a VRN and the name of the customer.

66. As far as the second ground of appeal is concerned, which relates to the Discretion Issue, the key question is whether, in circumstances where alternative evidence of the satisfaction of the *substantive conditions* of Article 168(a) of the PVD has been provided, HMRC cannot lawfully refuse to exercise their discretion in favour of the taxpayer on the grounds that (a) the relevant invoices did not show a valid VRN or the name of the customer, (b) the transactions concerned were connected to fraud and (c) the taxpayer failed to carry out appropriate due diligence on the supplier.

67. We shall therefore determine the appeal by dealing with the EU Law Issue and the Discretion Issue in turn.

The EU Law Issue

The authorities

68. We turn first to the relevant CJEU and domestic authorities. In view of Tower Bridge's first ground of appeal, it is necessary to review the EU authorities in detail. These are retained EU case law within the meaning of the European Union (Withdrawal) Act 2018 and continue to apply and which this Tribunal must follow

following the end of the transitional period on 31 December 2020. Tower Bridge's position is that those authorities draw a distinction between the substantive conditions that need to be satisfied to give rise to the right to deduct input tax and the formal requirements. Tower Bridge contend that the requirements of the formal conditions must yield if it is demonstrated that the substantive conditions of Article 168(a) of the PVD are met.

69. HMRC's position is that the authorities do not establish that wide proposition. HMRC contend that in none of the cases did the CJEU consider the discretion afforded to Member States by the PVD in the absence of valid invoices, where there were no corrected invoices, where the invoices did not name the customer and did not show the supplier's VRN. Furthermore, HMRC contend, the CJEU has explicitly avoided stating that the particular requirement for a supplier's VRN to appear on a VAT invoice is merely a formal condition the absence of which can never justify a decision to deny input tax deduction.

70. The starting point is that the right to deduct input tax given by what is now Article 168(a) of the PVD has direct effect. The provisions confer rights on which individuals may rely before a national court in order to challenge national rules which are incompatible with those provisions: see *BP Supergas v Greece*, Case C - 62/93 [1995] STC 805 at [35] and [36].

71. As the CJEU stated in its well-known judgment in *Kittel v Belgium*, Joined Cases C-439/04 and C-440/04 [2008] STC 1537 at [47], the right to deduct is an integral part of the VAT scheme and in principle may not be limited. As the Court said at [48], the rules governing deduction are meant to relieve the trader entirely of the burden of the VAT payable or paid in the course of all his economic activities. The common system of VAT consequently ensures neutrality of taxation of all economic activities, whatever their purpose or results, provided that those activities are themselves subject in principle to VAT.

72. The court also said at [49] that the question whether the VAT payable on prior or subsequent sales of the goods concerned has or has not been paid to the Treasury is irrelevant to the right of the taxable person to deduct input VAT.

73. As the CJEU said at [52] of *Kittel*, it follows that where a recipient of a supply of goods under a transaction is a taxable person who did not and could not know that the transaction concerned was connected with a fraud committed by the seller, a rule of national law which causes the taxable person to lose the right to deduct is precluded.[4]

74. Article 168(a) of the PVD sets out the substantive conditions which must be met in order for the right to deduct to arise: see *Senatex GmbH v Finanzamt Hannover-*

[4] In this case the FTT allowed Tower Bridge's appeal against HMRC's decision denying Tower Bridge the right to deduct input tax in relation to certain of CFE's transactions (including those that were the subject of the Stratex Invoices) on the basis that CFE knew or ought to have known that the transactions concerned were connected with fraud. There is no appeal by HMRC against that finding of the FTT.

Nord, Case C-518/14 [2017] STC 205 (*"Senatex")* at [28]. Those conditions require that:

> (1) the person seeking deduction is a taxable person; and
>
> (2) the goods or services must be used by the purchaser for the purposes of his own taxable transactions and supplied to him by another taxable person.

75. It is common ground in this case that these substantive conditions are satisfied in relation to the transactions which were the subject of the Stratex Invoices, even though Stratex was not registered for VAT.

76. The dispute in this case centres around the extent to which the failure to comply with some of the detailed form and content requirements of VAT invoices prescribed by Article 178(a) and Article 226 of the PVD affects the right to deduct.

77. On its face, Article 178(a) is expressed in mandatory terms. It says that "in order to exercise the right of deduction" the taxpayer "must" hold an invoice that complies with those requirements, subject to the power given to Member States by Article 180 to specifically authorise a deduction where those requirements are not met.

78. That position was recognised in a case dealing with the corresponding provisions under the Sixth Directive, which were substantially in the same terms as Article 178(a). In Joined Cases C-123/87 and C-330/87 *Lea Jorion (née Jeunehomme) v Belgian State* (1988), a car dealer was denied a deduction in respect of invoices which contained numerous irregularities, including false addresses and inadequate descriptions of the vehicles concerned. Advocate General Slynn said at page 4534:

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

79. This passage clearly indicates the distinction between the right to deduct and the conditions that must be satisfied before it can be exercised. In the absence of the "ticket of admission" in the form of a valid invoice, the onus is clearly on the taxpayer to establish by other means his right to exercise the right to deduct. The passage also clearly indicates the purpose of the invoice, which is to enable the transaction concerned to be verified and, by implication, that where the taxpayer is unable to satisfy reasonable formal conditions laid down by the domestic law of the Member State concerned for the purpose, then his right to deduct may indeed be defeated.

80. In *Reisdorf v Finanzampt Koln-West* (C-85/95) [1997] STC 180, the CJEU upheld the decision of the German authorities to refuse the right of deduction where a copy, rather than original, VAT invoice had been provided. In contrast to the position under the PVD, where the requirements for a valid VAT invoice are prescribed by Article 226, under the terms of the Sixth Directive (which were the relevant provisions in that case) the invoice was required by Article 22(3)(b) to state clearly the price exclusive of tax and the corresponding tax at each rate as well as any exemptions, but pursuant to Article 22(3)(c) of the Sixth Directive it was for the Member State to determine the criteria for considering whether a document served as an invoice. Article 22(8) of the Sixth Directive permitted Member States to impose other obligations which they deemed necessary for the correct levying and collection of the tax and for the prevention of fraud.

81. At [18] of his Opinion, Advocate General Fennelly described the role of the invoice in the operation of the VAT system as "pivotal". At [19] he observed that the court had left no room for doubt as to the necessity for the taxable person "in order to be entitled to deduct the value-added tax payable or paid in respect of goods delivered or to be delivered or services supplied or to be supplied by another taxable person [to] hold an invoice drawn up in accordance with art 22(3) of the Sixth Directive" and accordingly a Member State would have to adopt criteria pursuant to Article 22(3)(c) if it were to accept a document other than the original invoice. He went on to say at [21] that, in relation to such criteria that may be adopted, any alternative document would have to record the minimum information required by Article 22(3)(b) and that "the need to counter irregularity or fraud would have to be borne in mind."

82. In its judgment, the court did not depart from the Advocate General's opinion. It emphasised the distinction between the right to deduct and the proof of the right. It said at [19] of its judgment that the distinction between exercise of the right and proof of it on subsequent inspections is inherent in the operation of the VAT system. At [21] the court observed that Article 22(3) contained "mandatory rules" for the drawing up of invoices and at [22] that the exercise of the right to deduct input tax is normally dependent on possession of the original of the invoice complying with the criteria laid down by the relevant Member State.

83. At [24] the Court observed that the power conferred on the member states under Article 22(3)(c) was "consistent with one of the aims of the Sixth Directive, that of ensuring that VAT is levied and collected, under the supervision of the tax authorities", and referred in that regard to *Jeunehomme*.

84. It is undoubtedly the case, as Ms Shaw submitted, that the CJEU has held that the fundamental principle of the neutrality of VAT requires deduction of input VAT to be allowed if the substantive requirements of Article 168 (a) are satisfied, even if the taxable person concerned has failed to comply with some formal conditions.

85. An example of such a case is *Albert Collée v Finanzamt Limburg an der Lahn*, Case C-146/05 [2008] STC 757. The case concerned an intra-community supply of cars. Following an investigation, the tax authority refused to allow the taxpayer to deduct input tax invoiced on a particular transaction on the grounds that the sale was a

sham. In the light of that decision, the taxpayer amended its accounts so as to show the sale proceeds as exempted intra-community supplies and recorded the transaction thus in its VAT return. The tax authority refused to allow a tax exemption in respect of that supply on the basis that the prescribed records had not been updated regularly and completed immediately after the relevant transaction.

86. The issue for the CJEU was whether Article 28c(A)(a) of the Sixth Directive, which exempted intra-community supplies of goods subject to conditions laid down by Member States for the correct and straightforward application of the exemptions, should be interpreted as precluding the refusal by the tax authority of the Member State to allow an intra-community supply – which actually took place – to be exempt from VAT solely on the ground that the evidence of such a supply was not produced in good time.

87. At [31] of its judgment, the Court held that because there was no dispute about the fact that an intra-community supply was made, the principle of fiscal neutrality requires that an exemption from VAT be allowed if the substantive requirements are satisfied, even if the taxable person has failed to comply with some of the formal requirements. The Court said that the only exception is if non-compliance with such formal requirements would effectively prevent the production of conclusive evidence that the substantive requirements have been satisfied.

88. At [36] of its judgment, however, the Court observed that it was for the national Court to verify, taking into account all the relevant circumstances of the case, whether the delay in the production of the accounting evidence could lead to a loss in tax revenues or jeopardise the levying of VAT, which was not held to be the position in that case.

89. Accordingly, the Court held at [41] that Article 28c(A)(a) of the Sixth Directive precluded refusal by the tax authority of a member state to allow an intra-community supply which actually took place to be exempt from VAT solely on the ground that the evidence of such a supply was not produced in good time.

90. We observe that, on the facts of the *Albert Collée* case, the information that would demonstrate that the substantive conditions for the exemption had been met was in fact available and capable of being produced and was later produced. Accordingly, the requirements of the Member State that it should be produced within a particular period went further than was necessary to protect the revenue and accordingly should not, on the facts of that case, prevent the substantive right to the exemption being exercised.

91. In *Ecotrade SpA v Agenzia delle Entrate***,** Joined Cases C-95/07 and C-96/07 [2008] STC 2626, the taxpayer misunderstood the application of a reverse charge procedure and erroneously treated a number of transactions subject to that procedure as exempt from VAT. Accordingly, the taxpayer failed to follow the necessary formalities so as to exercise his right of deduction.

92. At [62] the CJEU observed that although Member States were permitted to lay down formalities relating to the exercise of the right to deduct in the case of the reverse charge procedure, misapprehension of those formalities by the taxable person cannot deprive him of his right to deduct. At [63], referring to *Albert Collée*, the Court stated that the principle of fiscal neutrality requires deduction of input tax to be allowed if the substantive requirements are satisfied, even if the taxable person has failed to comply with some of the formal requirements. It then held at [64] that where the tax authority has information necessary to establish that the taxable person is - as the recipient of the supply of services in question - liable to VAT, it cannot impose additional conditions which may have the effect of rendering the right of that taxable person to deduct tax ineffective for practical purposes.

93. We observe, as was the case in *Albert Collée,* that this was a case where the requirements imposed by the Member State went beyond what was necessary for the taxpayer to establish his right to deduct, so that the failure to comply with those additional requirements could not defeat that right. The Court was clearly of the view there was no risk of loss to the revenue because of the failure to comply with the additional formalities. The case does not address the monitoring function of a VAT invoice referred to in *Jeunehomme* and *Reisdorf.*

94. In *Polski Trawertyn v Dyrektor*, Case C-280/10 [2012] STC 1085 a partnership was founded by two individuals. A property which had previously been acquired by those individuals was then contributed by them to the partnership after it was set up. Invoices were issued to the partners and the partnership for the purchase of the property and the setting up of the partnership respectively. The Polish tax authority found that the partnership had overstated its claim for input tax deduction by entering the invoices in its VAT return for the relevant year. The tax authority stated that the partnership did not have the right to deduct the input tax in the first invoice since the acquirers of the property had not been the partnership itself but the natural persons who contributed the property to the partnership after it was set up. It also stated that the partnership did not have the right to deduct the input tax in the second invoice because the invoice had been issued before the date on which the partnership was registered in the companies register.

95. The partnership contended that since the acquisition of the property was effected with the intention of using it for an economic activity for the partnership, which was subsequently registered as a taxable person, it might reasonably be concluded that the partners acted as a taxable person with the right to deduct immediately the input tax paid on expenditure incurred for the purposes of the transactions that it intended to carry out. The question for the CJEU was therefore whether the PVD precluded the national legislation, which did not permit either the partners or the partnership to exercise a right to deduct input tax on costs incurred by those partners before the creation and registration of the partnership with a view to its economic activity. That right had been denied due to the fact that the invoice, drawn up before the registration and identification of the partnership for the purposes of VAT, was issued in the name of the future partners of that partnership.

96. Having held at [38] of its judgment that the PVD precluded national legislation which permitted neither partners nor their partnership to exercise a right to deduct input VAT on costs incurred by those partners before the creation and registration of the partnership for the purposes of and with the view to its economic activity, the Court considered whether Articles 168 and 178(a) of the PVD must be interpreted as precluding national legislation under which, in the circumstances of that case, input tax paid could not be deducted by a partnership because the invoice - drawn up before the registration and identification of the partnership for the purposes of VAT - was issued in the name of the future partners of the partnership.

97. The Court repeated at [40] the well-established principle that the right to deduct is an integral part of the VAT scheme and in principle may not be limited, but also observed at [41] that the exercise of the right is subject to the holding of an invoice complying with the requirements of Article 226 of the PVD. In particular, the Court observed that, pursuant to those requirements, the date of issue of the invoice and the full name as well as the address of the taxable person and of the customer must appear on the invoice.

98. The Court then observed at [42] that it was not open to Member States to make the exercise of the right to deduct dependent on compliance with conditions relating to the content of invoices which were not expressly laid down by the PVD. The Court then repeated at [43] the principle referred to in the cases mentioned above that the principle of VAT neutrality requires that deduction of input tax be allowed if the substantive requirements are satisfied, even if the taxable person has failed to comply with some of the formal requirements, in circumstances where the tax authority has information necessary to establish that the taxable person is, as the recipient of the supplies in question, liable to VAT.

99. At [44] the Court observed that the material conditions laid down by Article 168 had been satisfied as regards the acquisition of the property and that the transaction was performed for the purposes of the partnership's taxable transactions. The Court therefore considered that the inability to provide an invoice in the name of the partnership, in circumstances where the partnership and those who make it up were one and the same, resulted from a "purely formal obligation": see [45] of the judgment.

100. Accordingly, at [46] the Court stated that compliance with that obligation was not required where its effect would be to render the right of deduction ineffective and therefore call into question the neutrality of VAT. The Court noted at [48] and [49] that there are circumstances in which the data may be legitimately established by means other than by an invoice and that in this case the data necessary to ensure reliable and efficient collection of VAT had been established. It therefore concluded at [50] that Articles 168(a) and 178 precluded national legislation under which input VAT paid cannot be deducted by a partnership when the invoice, drawn up before the registration and identification of the partnership for VAT purposes, was issued in the name of the partners of that partnership.

101. In our view it is important to note in relation to that case that the information required by Article 178 was obtained by other means, in particular evidence that the partnership had been duly registered for VAT purposes. The Court held that the individual partners who originally issued the invoice and the partnership could be treated as one and the same person notwithstanding the fact that the partnership had not been formed or registered for VAT at the time of the supply in question. The supply could therefore be treated as having been made to the partnership which was duly registered for VAT. The Court therefore regarded the failure to have an invoice in the name of the partnership as a technicality. There was no risk of any loss of tax in this situation.

102. In *Petroma Transporta SA v Belgium*, Case C-271/12 [2013] STC 1466 ("*Petroma*"), during inspections the tax authorities questioned various invoices which had resulted in deductions in previous years on the basis that those invoices were incomplete and could not be shown to correspond to actual services. The tax authority therefore disallowed the deductions on the basis of non-compliance with provisions of Belgian tax law concerning information required on the tax invoice. In particular, information on the invoices was insufficient to enable the tax authority to determine the exact amount of tax collected. The taxpayers subsequently provided additional information, but the tax authorities still declined to permit the exercise of the right to deduct.

103. The questions for the CJEU were (i) whether the provisions of the Sixth Directive had to be interpreted as precluding national legislation under which the right to deduct VAT could be refused to taxable persons who were recipients of services and were in possession of invoices which were incomplete, in a case where those invoices were then supplemented by the provision of information seeking to prove the occurrence, nature and amount of the transactions invoiced, and (ii) whether the principle of fiscal neutrality had to be interpreted as precluding a tax authority from refusing to refund the VAT paid by a company providing services where the exercise of the right to deduct VAT had been denied by reason of the irregularities confirmed in invoices issued by the supplier.

104. The Court held that the scheme of VAT does not prohibit the correction of incorrect invoices, whether that correction takes place before or after the decision to refuse the deduction has been made. Accordingly, where all of the material conditions required in order to benefit from the right to deduct VAT are satisfied and the taxable person submits a corrected invoice before the decision to deny the benefit of that right is made, the deduction cannot in principle be refused: see [34] of the judgment.

105. The Court noted at [35] that because the invoices were not corrected by the time the decision to refuse the deduction had been made, until that time the tax authority was not able to ensure the correct collection of VAT and "permit supervision thereof." Accordingly, at [36] the Court held that national legislation which denied the right to deduct where the invoices concerned were not corrected until after the decision to refuse the exercise of the right to deduct had been made was not precluded.

106. At [43], the Court observed that the services in question had actually been provided and the VAT relating to the relevant transactions had been correctly paid. Nevertheless, the Court said that the principle of fiscal neutrality could not be invoked to justify the refund of VAT in this case because "any other interpretation would be liable to encourage situations that may prevent the correct collection of VAT which Article 22 of the Sixth Directive[5] seeks specifically to avoid."

107. In our view it is important to note that this was a case where the right to deduct was denied despite there being no dispute that the services concerned had been provided and the correct amount of VAT had been paid. This was therefore a case where it was clear that the substantive conditions giving rise to the right to deduct had been satisfied, but the Court emphasised the role of the invoice in imposing discipline on taxable persons with a view to ensuring the correct amount of tax could be paid and to enable the tax authorities to carry out their monitoring function.

108. The twin objectives of the invoice in monitoring the payment of the correct amount of tax and proving the right to deduct was further emphasised in *Barlis 06 – Investimentos Imobiliários e Turísticos SA v Autoridade Tributária e Aduaneira*, EU:C:2016:690, ("*Barlis*"). In that case, the taxpayer was the recipient of legal services. The invoices for the fees for those services did not contain an adequate description of the services provided and deduction of input tax was denied on the basis that the invoices did not comply with the requirements of the national law. The taxpayer then produced a more detailed description of the services provided but the Portuguese tax authority refused the deduction on the grounds that the invoices themselves still did not meet the legislative requirements.

109. As regards the first of those objectives, Advocate General Kokott said this at [32] to [38]:

> "32. An invoice is intended first to enable a check on whether the person issuing the invoice has paid the tax.
>
> 33. This follows from Article 178(a) of the VAT Directive. It provides that in order to exercise the right of deduction, the recipient of a supply must hold an invoice. According to the case-law, this requirement is intended to ensure that VAT is levied and supervised. This is because, pursuant to this provision, deduction of input tax is allowed only if, in the form of the invoice, the tax authority can at the time obtain access to a document which, because of the particulars required by Article 226 of the VAT Directive, contains the information necessary to ensure the corresponding payment of VAT by the person who issued the invoice. This access to the person who issued the invoice is supported by Article 203 of the VAT Directive. According to it, the VAT shown in an invoice is payable by the person who issued it, regardless of whether a liability to tax has actually arisen, and in particular of whether any supply has actually been made. In such cases this saves the tax authority from requiring other evidence.

[5] Article 22 set out the requirement that a taxable person issue an invoice stating clearly the price exclusive of tax and the corresponding tax.

> 34. So the invoice is a type of insurance for the fiscal authority, in that in a certain sense it links the input tax deduction to payment of the tax. The invoice, without which no input tax deduction may be made, gives the fiscal authority at least the possibility of recovering from the person who issued the invoice the amount of money that goes out by way of input tax deduction, in that the tax authority is able to monitor payment of the corresponding tax by him.
>
> 35. However, this insurance function requires only certain details to be in an invoice, in particular the complete name and address of the taxable person who makes the supply (Article 226(5) of the VAT Directive), supplemented by his VAT identification number (Article 226(3)). By contrast, specification of the 'nature' of the supply is not necessary in the invoice in order to monitor the simple payment of the tax by the person who issued it. In accordance with Article 203 of the VAT Directive, as we have seen, the person who issued the invoice is in any event liable for the VAT shown in the invoice which the recipient claims by way of input tax deduction. For this purpose, it is not at all necessary to link the invoice to any supply actually carried out.
>
> 36. The fact that the mandatory details in an invoice under Article 226 of the VAT Directive thus obviously also include details which are not necessary for checking the simple payment of the tax clearly shows that this does not exhaust the function of an invoice. These details include not only the nature of the goods supplied or services rendered (Article 226(6)), but in particular also the date of the supply (Article 226(7)), the taxable amount (Article 226(8)) and the applicable rate of tax (Article 226(9)) or, as appropriate, the applicable exemption (Article 226(11))."

110. We note in particular, the emphasis put by the Advocate General at [35], where describing the "insurance function" performed by the invoice, on the requirement to include the name and address of the supplier and its VAT registration number.

111. As regards the second of those objectives the Advocate General said this at [46]:

> "In addition, the invoice and its contents do not merely enable payment of the correct tax by the person who issued it to be monitored. As likewise appears from the legislative history of Article 226 of the VAT Directive, the invoice is intended to fulfil the function of 'proving' its recipient's right of deduction."

112. At [76] and [78] the Advocate General emphasised the distinction between having a right of deduction and proving that it can be exercised. She also emphasised that the possession of an invoice was mandatory:

> "76. On its wording the legislative provision is clear. If the taxable person does not hold an invoice which satisfies the requirements of Article 226 of the VAT Directive, he may indeed have a right of deduction under Article 168(a). However, pursuant to Article 178(a) of the VAT Directive, he cannot *exercise* this right so long as he does not hold an invoice which meets the requirements of Article 226 of the VAT Directive.
>
> ….

> 78. The case-law of the Court of Justice also confirms, in result, this fundamental necessity of holding a properly drawn up invoice in order to exercise the right of deduction where a service is supplied for consideration."

113. The Advocate General observed at [80] that although the exercise the right of deduction depends on the invoice containing the details required by Article 226 of the PVD, the member states must "merely" not make exercising it subject to additional requirements not provided for in the Directive.

114. Accordingly, at [87] the Advocate General expressed the opinion that the fact that the invoice did not comply with the requirements of Article 226 "in principle" precludes exercising the right of deduction, and in order to be entitled to exercise that right the taxable person in such a case must obtain a corrected invoice from the person who issued the invoice.

115. However, the Advocate General recognised, at [96], that in a case where there was no doubt that the substantive requirements for the right of deduction had been met, it would be disproportionate to require a taxable person exercising the right of deduction to obtain from the person who issued the invoice anything to supplement it, because the need for the invoice to support monitoring of the entitlement of the right to deduct was now otiose.

116. Nevertheless, the Advocate General was of the opinion that it was still proportionate to require a duly corrected invoice in order to monitor the payment of the correct tax by the person who issued it. She said this at [97] and [98]:

> "97. However, as already seen the invoice also serves for monitoring of the payment of the correct tax by the person who issued it. In the present case, all he holds is a copy of an invoice which does not meet the requirements of Article 226 of the VAT Directive. To that extent the invoice, and in particular its correction, still perform a monitoring function. First, the request by the recipient of the invoice that the invoice be corrected requires the person who issued it himself to check whether he has correctly accounted for tax on the supply which is the subject of the invoice. Secondly, correcting the invoice also provides the tax authorities having jurisdiction over the person who issued it with a sounder basis for monitoring whether the person who issued the invoice correctly paid tax on his supply.
>
> 98. In the light of this monitoring function of the invoice as regards the person who issued it, in a case such as the present it is thus in principle proportionate to require the taxable person, in order to exercise his right of deduction, to obtain a corrected invoice from his contracting partner…"

117. Again, these passages illustrate that the invoice can still be a mandatory requirement in circumstances where the right of deduction can be proved by other means.

118. In its judgment at [27], the Court approved the observations of the Advocate General at [32] and [46] of her opinion, as set out above, and at [41] the Court

observed that the exercise of the right of deduction is subject to holding an invoice drawn up in accordance with Article 226 of the PVD.

119. Nevertheless, citing *Polski Trawertyn* in support at [42], the Court stated that the fundamental principle of the neutrality VAT requires deduction of input VAT to be allowed if the substantive requirements are satisfied, even if the taxable persons have failed to comply with "some" formal conditions. In this particular case, the formal conditions concerned were those required by Articles 226(6) and (7) of the PVD, namely the extent and nature of the services rendered and the date on which the supply of services was made. The Court held at [43] that the tax authorities cannot refuse the right to deduct on the sole ground that an invoice does not satisfy those conditions if they have available all the information to ascertain whether the substantive conditions for that right are satisfied.

120. The Court further held at [44] that the authorities cannot restrict themselves to examining the invoice itself but must take account of the additional information provided by the taxable person.

121. It therefore held at [45] that it was for the referring tribunal to take into account all the information included in the invoices at issue and the supplemental information provided by Barlis in order to ascertain whether the substantive conditions for its right to deduct VAT are satisfied and, at [46], that it was for the taxable person seeking deduction of VAT to establish that he meets the conditions for eligibility.

122. Thus, in this case, the requirements concerned were capable of being satisfied by means other than the information contained on the invoice and, in those circumstances, the Court was of the view that it would be disproportionate to refuse the right to deduct. As mentioned above, the Court approved the observations of the Advocate General in relation to requirements such as the VAT registration number which was relevant to the "insurance" role of the invoice.

123. *Senatex* was another case where an inspection carried out by the tax authorities revealed that a number of deductions of input tax VAT had been claimed by the taxpayer on its tax returns some years earlier in circumstances where there were no regular invoices within the meaning of national legislation. In that case, the documents concerned did not contain the addressee's tax number or VAT registration number and did not refer to any other document from which those details could be deduced. While inspection was in progress, the taxpayer corrected the invoices concerned for the years 2009 – 2011, but in July 2013 the tax office issued amended tax notices for 2008 – 2011 in which, on the basis of the findings made during their inspection, they reduced the sums that the taxpayer was entitled to deduct. This was on the ground that the conditions for deduction had not been satisfied for those years but were met only as from the time of correction of the invoices in 2013. The tax office was of the view that, since the conditions for the deduction of VAT were satisfied only from the time of correction of the invoices, the correction of an invoice could not have retroactive effect from the date of supply of the service to which the invoice related. The taxpayer contended that the corrections had retroactive effect, as

they were carried out before the final administrative decision of the tax office dismissing its objection.

124.The question for the CJEU was whether articles 167, 178(a), 179 and 226(3) of the PVD precluded national legislation under which the correction of an invoice in relation to the VAT identification number did not have retroactive effect, so that the right to deduct VAT exercised on the basis of the corrected invoice related not to the year in which the invoice was originally drawn up but to the year in which it was corrected.

125.At [32] of its judgment, the Court referred to Article 219 of the PVD, which provides for the possibility of correcting an invoice from which certain mandatory details have been omitted.

126.At [38] the Court reiterated the findings of its previous judgments to the effect that the fundamental principle of the neutrality of VAT requires deduction of input VAT to be allowed if the substantive requirements are satisfied, even if the taxable person has failed to comply with some formal conditions.

127.In the light of those considerations, the Court held at [43] that the relevant provisions of the PVD precluded national legislation at issue in that case under which the correction of an invoice in relation to the VAT identification number does not have retroactive effect, so that the right to deduct VAT exercised on the basis of the corrected invoice relates not to the year in which the invoice was originally drawn up but to the year in which it was corrected.

128.We note that although the Court clearly found on the facts of that case that the national legislation in question impermissibly operated so as to preclude the exercise of the right of deduction in respect of the year in which the invoice was originally drawn up, it did so in circumstances where the invoices concerned had in fact been corrected to include details regarding the VAT registration number. The Court clearly referred to the fact that invoices were capable of being corrected as a relevant consideration. This, of course, differs from the facts in this appeal, where it is not possible for the Stratex Invoices to be corrected so as to include Stratex's VAT registration number as Stratex was never registered for VAT. The CJEU did not address that situation in *Senatex*.

129. In *Geissel v Finanzamt Neuss*, Joined Cases C-374/16 and C-375/16, ECLI:EU:C:2017:867, the CJEU emphasised that some of the formal requirements of Article 178(a) of the PVD are more important than others, as regards the monitoring role of an invoice. The relevant facts in the case were that the transactions concerned were connected with fraud, although the taxpayer who was seeking to exercise his right of deduction did not know, nor ought to have known that fact. The address on the invoices was a "letterbox" address, rather than the place where the supplier carried out its economic activity. There were two questions for the CJEU: first whether the address shown on an invoice had to show the place where the supplier carried out its economic activity, in order to comply with Article 178(a); and secondly, when can the taxpayer argue that he acted in good faith as regards the correctness of the invoices, in

order to deduct input tax, where the tax authority finds that the author of the invoice was involved in fraud or abuse.

130. As regards the first question referred, the Advocate General said at [38] of his opinion that a strict interpretation of the concept of "address" is not justified in the light of the function of the invoice within the VAT system. He said at [40] that the indication of the address of the issuer invoice serves – in combination with his name and VAT identification number – the purpose of establishing a link between a given transaction and the issuer of the invoice, that is, it allows the issuer of the invoice to be identified. He observed at [41] that identification is essential for the tax authorities to be able to perform the necessary checks as to whether the amount of VAT is declared and paid. He also said that the identification number also allows taxable person to verify whether the issuer is a taxable person for the purposes of the VAT rules.

131. However, at [42] he said that the existence of actual economic activities at the address indicated on the invoice was not necessary to enable a correct identification of the issuer in the invoice and to contact him. He did, however, say that the VAT identification number of the supplier "is of particular importance", referring to the fact that the number can be easily verified by the authorities and by anybody else online.

132. As regards the second question, the Advocate General said this at [61]:

> "Obviously, when a taxable person finds concrete indications which appear to point to fraud or abuse, he may be expected to make certain additional inquiries regarding his supplier, in order to ascertain the trustworthiness of the supplier. However, in that case too, the tax authorities may not oblige a taxable person, in view of the risk that the right to deduct may be refused, to undertake complex and far-reaching checks, de facto transferring their own investigative tasks to him. It is unthinkable, for example, that a taxable person should be required to verify that the address of a supplier on an invoice is where the latter actually exercises its economic activities or has business premises, or that the supplier is lawfully or genuinely established at that address."

133. In the light of the Advocate General's earlier remarks as to the particular importance of the VAT registration number and the ease with which it could be checked, it may be inferred that a check by the taxpayer as to that requirement would not be regarded as a "complex and far-reaching check".

134. The Court declined to answer the second question because it decided that it was not a requirement that the VAT invoice show the address where the economic activities of the supplier carried out in order to exercise the right of deduction. The Court endorsed the Advocate General's opinion on the first question. Having observed at [38] of its judgment that it was not open to Member States to make the exercise of the right to deduct dependent on compliance with conditions relating to the content of invoices that are not expressly laid down by the provisions of the PVD and that the right to deduct VAT may not, in principle be limited, it said this at [40] to [45]:

"40 The Court has held, in that regard, that holding an invoice showing the details referred to in Article 226 of the VAT Directive is a formal condition of the right to deduct VAT. The deduction of input VAT must be allowed if the substantive requirements are satisfied, even if the taxable persons have failed to comply with certain formal conditions.… It follows that the detailed rules regarding the indication of the address of the issuer of the invoice cannot be a decisive condition for the purposes of the deduction of VAT.

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

42 In that respect, as the Advocate General noted, in essence, in points 40 and 41 of his Opinion, the aim of indicating the address, name and VAT identification number of the issuer of the invoice is to make it possible to establish a link between a given economic transaction and a specific economic operator, namely the issuer of the invoice. The identification of the issuer of the invoice allows the tax authorities to check whether the amount of VAT giving rise to the deduction has been declared and paid. Such identification also allows the taxable person to check whether the issuer of the invoice is a taxable person for the purposes of the VAT rules.

43 In that regard, it should be noted that the VAT identification number of the supplier of the goods or services is an essential piece of information in that identification. That number is easily accessible and verifiable by the tax authorities.

44 Moreover, as the Advocate General noted in point 43 of his Opinion, in order to obtain a VAT identification number, undertakings must complete a registration process in which they are required to submit a VAT registration form, along with supporting documentation.

45 It follows that the aim of indicating the address of the issuer of the invoice, in conjunction with his name and VAT identification number, is to identify the issuer of the invoice and thus to enable the tax authorities to carry out the checks referred to in paragraph 41 above."

135. It is to be noted from these passages that, although the formal requirements of Article 178(a) are not to be construed strictly, and details such as the business address of the supplier are not essential, the Court observed that the VAT identification number was an essential piece of information in order that the "insurance function" of the invoice can operate.

136. In *Zipvit* the Court of Appeal reviewed some of the judgments of the CJEU referred to above.

137. The relevant facts were that Zipvit, a VAT registered trader, received supplies of services which were treated at the material time by the supplier (Royal Mail) and HMRC as exempt from VAT. The contract between the parties stated that the consideration which the taxpayer paid for the supplies was "exclusive of VAT" and

the invoices provided by the supplier specified that the supplies were exempt from VAT. However, following a ruling of the CJEU, those supplies were found to have been properly chargeable to VAT. Zipvit made a claim pursuant to Article 168 of the PVD to recover as input tax credit the tax element of the consideration it paid for the supplies. This claim was refused, partly on the basis that Zipvit had been unable to produce invoices from the supplier which met the conditions in Article 226 of the PVD, as required by Article 178.

138. Henderson LJ gave the only reasoned judgment. At [1] he identified the basic question as follows: Where the recipient of services which were wrongly assumed by the parties to the relevant transactions and HMRC to be exempt from VAT at the time of supply and were later discovered to have been subject to the standard rate of tax when they were made and the recipient of those services was itself a registered trader which made taxable supplies on which it accounted for output tax, whether:

> "… the recipient is in principle entitled to recover as an input tax credit the tax element of the consideration which it paid for the original supplies. If so, does it make any difference if the supplier has failed to pay the tax which should have been paid on the original supplies, and if the recipient is in consequence unable to produce a tax invoice from the supplier showing the amount of the input tax which it seeks to recover?"

139. It is clear from [48] of his judgment that Henderson LJ was fully aware of the principle that the right to deduct is not dependent on showing that the input tax in question has been paid by the supplier. He quoted the following passage from [28] of the judgment of the CJEU in *Bonik EOOD*, Case C-285/11 [2013] STC 773:

> "The question whether the VAT payable on the prior or subsequent sales of the goods concerned has or has not been paid to the public purse is irrelevant to the right of the taxable person to deduct input VAT. VAT applies to each transaction by way of production or distribution after deduction of the VAT directly borne by the various cost components…"

140. However, he went on to say this at [49]:

> "Nevertheless, this principle cannot be applied in isolation, and in particular does not in my judgment override the requirement for a person exercising the right of deduction to produce a VAT invoice evidencing payment of the relevant VAT by the supplier…"

141. At [92], Henderson LJ, having observed that Article 168(a) set out the substantive conditions of the right to deduct input tax, said:

> "It will also be noted that the language of Article 178(a) is mandatory: the taxable person *must* hold an invoice drawn up in accordance with the specified Articles."

142. At [100] Henderson LJ accepted Zipvit's submission that the invoices provided to Zipvit purported to be VAT invoices, in the sense that they contained all the information which the supplier considered was required by the terms of Regulation 14

VATR, but they obviously did not contain details of the charge to VAT, which should have been added to the contract price on the footing that the supplies were standard rated.

143. At [101] Henderson LJ recorded Zipvit's basic submission that the existing invoices should have been treated by HMRC as defective VAT invoices, and the defects were then remedied when the necessary further information was provided to HMRC following the CJEU's judgment, leading to the conclusion that the supplies should have been standard rated.

144. At [102] to [103] Henderson LJ referred to *Petroma* and observed that the CJEU clearly recognised that "at least some deficiencies in incorrect invoices can be made good *before* a decision is taken".

145. At [104] to [106] Henderson LJ reviewed *Barlis*, noting that Zipvit placed the case at the forefront of its submissions. In particular, he referred to the Court's approval at [27] of its judgment of the Advocate General's observations at [32] and [46] of her opinion quoted at [109] and [111] above as regards the objectives of the formal requirements regarding the content of VAT invoices. Henderson LJ then quoted in full paragraphs [40] to [46] of the Court's judgment, which we have summarised [118] to [121] above.

146. At [107] Henderson LJ recorded Zipvit's submission, in reliance on [40] to [46] of *Barlis*, that it had provided HMRC with further information which they needed in order to supplement the details provided in the original invoices, in particular a schedule giving a figure for "gross postage" for each quarter, with a corresponding figure for the VAT claimed on the basis of the gross postage being treated as VAT inclusive. Accordingly, Zipvit contended that it was not open to HMRC to refuse deduction of the input tax claimed.

147. Henderson LJ rejected Zipvit's submissions. He said this at [108]:

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

148. At [109] to [111], Henderson LJ quoted extensively from the Advocate General's opinion as to the twin objectives of the VAT invoice, and in particular the passages at [32] to [36] which we have set out at [109] above and the passage at [46] which we have set out at [111] above. He then went on to say at [112] to [117]:

> "112. I have referred to these parts of the Advocate General's opinion because they were expressly endorsed by the Court in paragraph 27 of its judgment. I have already quoted that paragraph, but will repeat the critical sentence:
>
> > "As the Advocate General observes in points 30, 32 and 46 of her Opinion, the objective of the details which must be shown in an invoice is to allow the tax authorities to monitor payment of the tax due and, if appropriate, the existence of the right to deduct VAT."
>
> Properly understood, therefore, the decision of the Court in ***Barlis*** appears to me to expose a fatal flaw in Zipvit's case. One of the main purposes of the mandatory requirement for a VAT invoice is to enable the taxing authorities to monitor payment by the supplier of the tax for which a deduction is sought, or as the Advocate General put it "to enable a check on whether the person issuing the invoice has paid the tax." Zipvit remains wholly unable to satisfy this condition, because the only invoices which it can supply show the complete opposite, namely that no tax was paid because the supplies were considered to be exempt. Nor can it be said that the position was remedied by the exiguous further information supplied with the letter of claim in September 2009. All this did was to show the VAT component of the original purchase prices, on the assumption that the supplies were taxable. It provided no evidence that a penny of that tax had been paid by Royal Mail to HMRC, and still less did it do so in the form of an invoice issued by Royal Mail.
>
> 113. Mr Thomas argues that none of this matters, because Zipvit was entitled to exercise its right to deduct input tax referable to the supplies which it made to its own customers, on which it accounted for output tax in the usual way. To deny a deduction on the sole basis that Royal Mail cannot be shown to have paid tax on the relevant supplies which it made to Zipvit is, he submits, to rely on a wholly irrelevant consideration, because it would offend the well-established principle that the right of deduction is unaffected by the question whether VAT due at an earlier stage in the chain of supply has been paid to the public purse. In my view, however, this objection misses the point. Exercise of the right to deduct is subject to a mandatory requirement to produce a VAT invoice, which must contain the specified particulars. Zipvit is unable to produce invoices which satisfy the requirements of Article 226(9) and (10), and it is also unable to produce any supplementary evidence showing payment of the relevant tax by Royal Mail. A necessary precondition for exercise of the right to deduct therefore remains unsatisfied.
>
> 114. I also fail to see how Zipvit could hope to circumvent this fundamental difficulty by arguing that the requirement for a compliant VAT invoice is one of form rather than substance, and by invoking the discretion which HMRC have to accept alternative evidence under regulation 29(2) of the 1995 Regulations. It is true that *Barlis* (at paragraphs 40 and 41), and a number of other cases which we were shown, consistently draw a distinction between the substantive conditions which must be met in order for the right to deduct VAT to arise, and the formal conditions for the exercise of that right. But to describe

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

115. It needs to be remembered in this context that the amounts for which Zipvit is claiming a deduction have not been paid by Zipvit in response to a request by Royal Mail for payment once the taxable status of the supplies had been established. In that situation, Royal Mail would have rendered an invoice showing the VAT due, and would then have been liable to account for it to HMRC as output tax in the usual way. In those circumstances, there would have been no difficulty about Zipvit deducting the amount shown on the new invoice as input tax. All that has actually happened, however, is that Zipvit now wishes to treat the payments which it originally made to Royal Mail, on the common understanding that the supplies were exempt, as comprising an element of VAT, and to obtain a deduction for that element on the strength of nothing more than the original payment.

116. Even if it is open to Zipvit to recharacterise the original payment in this way (which at this stage of the argument must be assumed in Zipvit's favour), there would be an obvious detriment to HMRC and the public purse if Zipvit were able to obtain such a deduction without first showing that the tax in question had been paid by Royal Mail. The normal way of fulfilling that obligation is by production of a fully compliant VAT invoice. Since Zipvit is unable to produce such an invoice, I am unable to see any grounds upon which HMRC could properly conclude that Zipvit should nevertheless be allowed the deductions claimed, to the detriment of the general body of taxpayers. In effect, a retrospective recharacterisation of sums originally paid on the footing that the supplies in question were exempt would now yield an uncovenanted bonus to Zipvit, generated by nothing more than Zipvit's unilateral decision to treat the amounts originally paid as VAT-inclusive. It would, I think, be offensive to most people's sense of fiscal justice if a mechanical accounting exercise of this nature were permitted to generate a very substantial input tax credit, in circumstances where (for whatever reason) none of the tax in question has been paid by the supplier.

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

> although I would (with respect) not adopt their analysis of the position in terms of the absence of an "economic burden" on Zipvit. That way of looking at the matter seems to me misconceived, because Zipvit did bear the economic burden of paying the original purchase price for the supplies. The real issue, as I see it, is whether Zipvit can claim a deduction for VAT by treating the original price as VAT-inclusive, without producing evidence that the tax in question has been duly paid by the supplier."

149. It is clear that Henderson LJ placed particular reliance on the "insurance function" of a compliant invoice, as identified by the Advocate General in *Barlis*. Therefore, notwithstanding the (assumed) satisfaction of the substantive conditions which gave rise to the right to deduct through the production of other evidence of the correct charge to VAT, in circumstances where, as Henderson LJ found to be the position in *Zipvit*, non-compliance with the formal requirements went well beyond the kind of technical failures identified in *Barlis*, the exercise of the right of deduction could properly be denied.

150. Although Henderson LJ referred at the end of [117] of his judgment to the lack of evidence in that case that the tax in question had been duly paid by the supplier, he was not, in our view, going so far as to say that the exercise of the right to deduct was dependent upon the tax having been paid. He was indicating that evidence of an essential part of the information provided by a valid invoice was lacking, namely that tax had been charged and was being accounted for.

151. This is consistent with the view expressed on this point by Mann J in his judgment on various issues that arose in the context of litigation brought by various claimants to establish that they were entitled to demand VAT invoices from Royal Mail in respect of supplies that had previously been made on the basis that the supplies concerned were not subject to VAT. That, as we have mentioned above, was found not to be the case following the judgment of the CJEU. In the case concerned, *The Claimants in the Royal Mail Group Litigation v Royal Mail Group Limited* [2020] EWHC 97 (Ch) Mann J said this at [91] and [92] in relation to Henderson LJ's observation at the end of [117] of *Zipvit*:

> "91. I do not consider that Henderson LJ was going that far. He was delivering his judgment in a striking case in which it was actually apparent that the output tax had not been paid. That was highly likely to be the case, if not inevitable, where both parties had treated the supplies as exempt throughout, and the supplier did not change its mind; and it is his express finding in paragraph 116 of his judgment. His judgment focuses mainly on the invoice as evidence of payment and accounting, and the effect of the absence of that evidence. He acknowledged the offence to fiscal justice if the situation were to generate a claim to input tax where the output tax had plainly not been paid, in those exceptional circumstances. His reference to the need for evidence of payment of output tax by the supplier is made in that context. In my view what he is saying is that where it is plain that originally the supplier did not account for output tax because no-one thought it was payable, then HMRC was not obliged to accept some form of alternative evidence based on a re-characterisation of the transaction unless Zipvit also produced evidence that the situation had changed and the tax had in fact been paid. He was not laying down a general rule

applicable to all circumstances in which an alternative case was sought to be made.

92. I believe that that view is supported by the normal way in which VAT operates in practice. Generally, a customer will not have any idea whether its supplier has duly accounted for and paid the output tax on the transaction or not. He generally does not need to know, and as was pointed out in *Zipvit* an ability to deduct input tax is not generally independent of proper accounting for output tax. Furthermore, in practice a customer is almost never going to be able to demonstrate that output tax was properly accounted for, because it will not have access to the relevant records, and even it did it may be impossible to answer the question if for any reason the supplier has not accounted for all output tax due to the transaction in question. If some output tax remains due it will not be possible to say in respect of which transactions it was not paid. If a customer seeking to invoke HMRC's discretion in the absence of an invoice had to demonstrate payment then the discretion would never in practice be exercisable. That cannot, in my view, be the position. It would place improper obstacles in the way of the exercise of a discretion which is mandated by the Directives…."

152. In support of the view expressed at [92] of his judgment, Mann J placed reliance on the latest judgment from the CJEU on the circumstances in which the right to deduct cannot be denied in the absence of a valid VAT invoice. That case is *Lucreţiu Hadrian Vădan v Agenţia Naţională de Administrare Fiscală*, Case C-664/160, ECLI:EU:C:2018:933 ("*Vădan*").

153. In *Vădan* the relevant facts were that the taxpayer was unable to produce any invoices at all in support of the exercise of the right to deduct, nor other alternative evidence such as till receipts. All he had was an expert report as to the likely input tax that would have been incurred in relation to the transactions concerned. At the time the supplies were made, the taxpayer had not been registered for VAT because he did not believe that it was necessary to do so, although he subsequently became registered. The national court referred to the CJEU the question of whether a taxable person who is unable to provide evidence of the amount of input VAT paid, by producing invoices or any other document, can benefit from a right to deduct VAT solely on the basis of an assessment resulting from an expert report commissioned by a national court.

154. The Advocate General's opinion commenced at [1] by stating that the invoice was an "essential element of the taxable person's right to deduct input VAT", referring to its early description as a "ticket of admission" of the right of deduction given that it has an "insurance function" for the national fiscal authority in linking input tax deduction to the payment of tax.

155. At [5] the Advocate General observed that to date the case law had generally pertained to situations involving defects associated with an otherwise properly drawn up invoice, whereas in this case the question was whether the approach followed in those cases should be followed in circumstances involving the taxable person's failure to supply any invoices at all.

156. In its judgment, in reiterating the principles derived from the earlier case law, the CJEU placed particular emphasis on the need not disproportionately to prevent the taxable person from benefiting from fiscal neutrality relating to his transactions by the strict application of the substantive requirement to produce invoices. It said this at [37] to [44]:

> "37 According to settled case-law of the Court, the right to deduct VAT is a fundamental principle of the common system of VAT, which in principle may not be limited, and is exercisable immediately in respect of all the taxes charged on the taxable person's input transactions …
>
> 38 That system is designed to relieve the trader entirely of the burden of the VAT due or paid in the course of all his economic activities. The common system of VAT consequently ensures that all economic activities, whatever their purpose or results, provided that they are themselves subject to VAT, are taxed in a wholly neutral way …
>
> 39 Under Article 167 of the VAT Directive, a right of deduction arises at the time the deductible tax becomes chargeable. The substantive conditions which must be met in order for the right to arise are set out in Article 168(a) of that directive. Thus, for that right to be available, first, the person concerned must be a taxable person within the meaning of that directive and, secondly, the goods or services relied on to give entitlement to the right of deduction must be used by the taxable person for the purposes of his own taxed output transactions and those goods or services must be supplied by another taxable person as inputs …
>
> 40 As regards the formal conditions for the right of deduction, it is apparent from Article 178(a) of the VAT Directive that the exercise of that right is subject to holding an invoice drawn up in accordance with Article 226 of that directive …
>
> 41 The Court has held that the fundamental principle of the neutrality of VAT requires deduction of input VAT to be allowed if the substantive requirements are satisfied, even if the taxable persons have failed to comply with some formal conditions. It follows that the tax authorities cannot refuse the right to deduct VAT on the sole ground that an invoice does not satisfy the conditions required by Article 226(6) and (7) of the VAT Directive if they have available all the information to ascertain whether the substantive conditions for that right are satisfied …
>
> 42 Thus, the strict application of the substantive requirement to produce invoices would conflict with the principles of neutrality and proportionality, inasmuch as it would disproportionately prevent the taxable person from benefiting from fiscal neutrality relating to his transactions.
>
> 43 Nevertheless, it is for the taxable person seeking deduction of VAT to establish that he meets the conditions for eligibility …
>
> 44 Accordingly, the taxable person is required to provide objective evidence that goods and services were actually provided as inputs by taxable persons for the purposes of his own transactions subject to VAT, in respect of which he has actually paid VAT."

157. Referring to the facts in that case, the Court stated at [47] that the expert report would not be able to establish that the taxpayer actually paid VAT in respect of the input transactions carried out for the purposes of his business.

158. Accordingly, this was a case where the taxpayer failed to meet the substantive conditions that gave rise to the right to deduct. Therefore, the Court held at [48] that a taxable person who was 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.

159. We accept that in this case the Court strongly emphasised that the provisions of Article 178(a) should not be applied strictly so as to deny the right to deduct. However, the Court did not go so far as to say that in all cases where it could be demonstrated that the substantive conditions of Article 168(a) have been met the right to deduct must be granted, notwithstanding the failure to comply with requirements of Article 178(a). It went no further than the earlier case law in stating that the right to deduct could not be denied circumstances where "some" of the formal requirements of Article 178(a) had not been met. Even though none of the formal conditions were met in this case because there were no invoices at all, the case was not dealing with circumstances where, as in this appeal, the supplier was never registered for VAT and therefore not all of the formal requirements could ever be satisfied by the production of alternative evidence.

160. Furthermore, although it was not specifically referred to in the Court's judgment, the Advocate General emphasised at the outset of his opinion the "essential" role of the invoice as an "insurance function" in linking the input tax deduction to the payment of VAT.

161. We can summarise the principles to be derived from our review of the authorities as follows:

> (1) The substantive conditions which must be met in order for the right to deduct to arise require that (i) the person seeking deduction is a taxable person and (ii) the goods or services must be used by the purchaser for the purpose of his own taxable transactions and supplied to him by another taxable person (*Senatex*).
>
> (2) In order to exercise the right to deduct it is mandatory for the taxable person to hold an invoice drawn up in accordance with the formal requirements of the specified Articles of the PVD and the relevant domestic requirements, so long as those requirements go no further than the express requirements laid down by the PVD (*Jeunehomme, Reisdorf, Polski Trawertyn, Barlis and Zipvit*).
>
> (3) However, the taxable person cannot be deprived of the right to deduct simply because the invoice which he holds does not comply in some respects with the formal requirements for a VAT invoice. Member States have a discretion to accept alternative evidence which establishes that the

substantive conditions for the right to deduct have arisen and the formal requirements in domestic law for the exercise of the right have been sufficiently satisfied. The burden is on the taxable person in that regard, but strict application of the substantive requirements to produce compliant invoices would disproportionately prevent the taxable person from benefiting from fiscal neutrality (*Albert Collée, Ecotrade, Polski Trawertyn, Barlis* and *Vadan*).

(4) Nevertheless, the taxable person can be denied the right to deduct in circumstances where he has not subsequently corrected invoices which are non-compliant or provided sufficient alternative evidence of the requirements in question. That can be the case even where the substantive conditions giving rise to the right to deduct have arisen because the invoice serves not only to demonstrate satisfaction of the substantive conditions but also has an "insurance function" because of the need to counter irregularity and fraud; the invoice assists the tax authority in carrying out its verification and monitoring duties and ensure that the tax due is paid (*Reisdorf, Barlis, Zipvit*).

(5) Thus, where the compliance failures are technical, have subsequently been corrected or otherwise established by satisfactory evidence, have resulted in no loss of tax and have not impaired the exercise by the tax authority of its monitoring function it would be disproportionate to deny the right to deduct (*Albert Collée, Polski Trawertyn, Barlis, Senatex).*

(6) However, not all compliance failures are capable of being excused. That will be the case where there is a failure to comply with those requirements which are essential to the proper performance by the tax authority of their monitoring functions and are needed as evidence that the supplier has duly paid or accounted for the tax (*Petroma, Zipvit, Geissel*).

(7) That is not to say that evidence of payment of the tax is necessarily required before the right to deduct can be exercised; nor can it be denied simply because the transactions are connected to fraud in circumstances where the taxable person did not and could not know of the connection to fraud (*Kittel*). But it may be appropriate to require evidence of proper accounting for the charge to tax before a discretion in favour of the taxpayer can be exercised (*Zipvit*).

Discussion

162. We now turn to apply the principles we have identified from the authorities to the facts of this appeal, in the light of the parties' submissions.

163. Ms Shaw submits that it is not in dispute that the substantive conditions were met in relation to the Stratex transactions. In particular, Tower Bridge has satisfied HMRC

that the carbon credits in question were actually provided as inputs by Stratex, as a taxable person, for the purposes of CFE's own transactions subject to VAT, in respect of which CFE has actually paid VAT. Tower Bridge has also satisfied HMRC as to the amount of VAT that was charged to and paid by CFE.

164. Accordingly, in these circumstances Ms Shaw submits that Tower Bridge has a directly effective right to deduct the input tax incurred in respect of the Stratex transactions, irrespective of the formal requirements for its exercise, and that that right must be given effect in domestic law. Insofar as UK law is inconsistent with that right, by requiring a person to hold a VAT invoice containing the particulars listed in Regulation 14 VATR notwithstanding that the substantive conditions for the deduction of tax have been shown to be met, it must be made to conform with EU law.

165. It follows, Ms Shaw submits, the FTT erred in law in concluding otherwise. In particular, Ms Shaw submits that the FTT made the three following errors of law in its reasoning.

166. First, at [198] where it said that there is no binding authority that domestic law under Regulation 14 VATR, as it implements Article 226 of the PVD, must be disapplied and that the FTT should give direct effect only to the substantive requirements of Art 168 in the circumstances of a case such as this. Ms Shaw submits that *Senatex*, *Ecotrade*, *Barlis*, *Polski Trawertyn* and *Vădan* are all authority for the contrary position.

167. Second, at [202], [204], [208] and [212] to [216] in placing the reliance it did on Henderson LJ's judgment in *Zipvit*. In particular:

(1) It was a central part of the FTT's reasoning that the fact that Stratex did not account for the VAT shown on the Stratex Invoices was relevant to the right to deduct input tax. However, it is irrelevant to the right to deduct input tax that Stratex did not account for the VAT. The FTT was, therefore, wrong to conclude that payment of the VAT by the supplier is a fundamental requirement of the right to deduct.

(2) The FTT was wrong to conclude that Tower Bridge's general proposition that once the substantive requirements are met the right to deduct can be exercised regardless of failures to comply with the invoicing requirements is inconsistent with Henderson LJ's judgment in *Zipvit.*

(3) The FTT was wrong to say that a failure to comply with a fundamental requirement relating to payment of the relevant tax cannot be dispensed with and that provision of an invoice that complies with those fundamental requirements is essential to the proper performance by HMRC of their monitoring functions in relation to VAT and is needed as evidence that the supplier has duly paid or accounted for the tax to HMRC.

(4) The FTT understood Henderson LJ to be laying down as a "necessary precondition for the exercise of the right to deduct" a requirement that the taxpayer evidence payment by its supplier of the relevant VAT. That

requirement was one that Tower Bridge could not satisfy, and it was wrong to read Henderson LJ's judgment in this way. What Henderson LJ should be taken to be saying is that information as to the rate of VAT and amount of VAT payable is necessary in circumstances where it was clear that no output tax would have been paid, since both parties considered the supplies in question to be exempt and the invoices reflected that. He should not be taken to be saying that the right to deduct is dependent upon the supplier accounting for the VAT or on the taxpayer evidencing the same. Indeed, he expressly accepts that it is not.

168. Third, in its conclusions at [209] and [210] that including the VRN and the customer's name were "fundamental" requirements of VAT invoices, and that those requirements which are necessary for the taxing authority to monitor payment by the supplier of the tax in question have not been met, with the consequence that a necessary precondition for the right to deduct remains unsatisfied.

169. Ms Shaw submitted in that regard:

(1) Unlike in *Zipvit*, the requirements of Article 226(9) and (10) were met. Further, HMRC were provided with the information necessary to establish that the substantive requirements for the right to deduct were met.

(2) *Senatex* was specifically concerned with the requirement in Article 226(3) for an invoice to show the supplier's VRN. It is clear CJEU authority that the absence of that particular, like those particulars in Article 226(6) and (7), cannot be used to deny deduction if the tax authorities are supplied with the information necessary to establish that the substantive requirements of the right to deduct are satisfied. There is no authority for the proposition that the inclusion of the VRN, which is a technical requirement, can never be dispensed with. Likewise, as regards the requirement to identify the customer (Article 226(5)), the CJEU has confirmed that it is of a similar nature: see *Polski Trawertyn***.** Accordingly, there is clear authority that the requirements in issue in this case can be dispensed with, as per the principle set out in *Barlis*.

(3) The purpose of the formal conditions is to enable the revenue authorities to monitor payment of the tax due and the existence of the right to deduct VAT. As such, where the revenue authorities have the information necessary to establish that the substantive conditions have been satisfied, the right to deduct cannot be denied solely on the basis that the invoice does not satisfy some of the formal conditions in Article 226.

(4) The Stratex Invoices recorded the name and address of the supplier and identified the goods which had been supplied to CFE as well as the VAT rate applied and the VAT amount payable. As such, and notwithstanding the absence of a VRN and the name of the customer, HMRC were still in a position to audit the transactions, as they in fact did.

170. It will be readily apparent from our distillation of the principles to be derived from the authorities, as summarised at [160] above, that in substance Ms Shaw's submissions are not supported by the authorities on which she relies.

171. In essence, Ms Shaw's submissions are predicated on the proposition that where a taxable person holds a non-compliant invoice, once evidence has been provided that the substantive conditions that give rise to the right to exercise the right to deduct have been satisfied, the taxable person must be permitted to exercise that right without more, except in a case like *Zipvit* where it is clear that no VAT was charged by the supplier.

172. As we have said that proposition is not established by the authorities relied on by Ms Shaw. On the contrary, as we have said, the authorities make it clear that the requirements for a valid VAT invoice are mandatory, subject to the domestic authority's power to accept other evidence instead of a compliant invoice. The "formal" requirements in Article 226 have twin objectives, first to prove the existence of the taxpayer's right to deduct and second to perform an "insurance function" of ensuring correct accounting for the tax, because of the need to counter irregularity and fraud: the invoice assists the tax authority in carrying out its verification and monitoring duties and ensure that the tax due is paid.

173. That second function clearly emerges from the passages from the Advocate General's opinion in *Barlis*, which we have quoted above at [109] and which were approved by the Court in that case. As we have observed, the Advocate General drew a distinction between fundamental details such as the identity of the supplier, including its VRN, which are needed to verify payment of the tax by the supplier, and other details that are relevant to the amount of tax due.

174. As we have observed at [148] above, that distinction was also made by Henderson LJ in *Zipvit*, relying on *Barlis*. In our view, *Zipvit* is binding authority for the proposition that, in relation to the "insurance function" of the VAT invoice, there are some fundamental requirements which cannot be dispensed with, even if the taxpayer can demonstrate satisfaction of the substantive conditions of the right to deduct. In the *Zipvit* case the missing information was the amount of a standard-rated charge to VAT and there was no alternative evidence that VAT had been charged and correctly accounted for. In such circumstances, Henderson LJ said that there was no difference between saying that there was no discretion for HMRC and saying that the statutory discretion could only be exercised one way.

175. It is also clear from our review of the authorities that the CJEU has stressed the "essential" or "pivotal" role of the VRN. We endorse the reasoning of the FTT at [211] of the Decision, as set out at [54] above, as regards this requirement and the requirement to state the customer's name as being "symmetrical requirements that cumulatively mirror the operation of the principle of fiscal neutrality" and which are therefore fundamental.

176. As Mr Puzey for HMRC submitted, in none of the cases relied on by Tower Bridge did the CJEU consider the discretion afforded to Member States by the PVD

and domestic legislation where there were no corrected VAT invoices, where the invoices did not name the customer and did not show the supplier's VRN where the supplier was not registered for VAT. In all the cases cited, the missing details were capable of being completed either belatedly, by amendment, or by the provision of alternative evidence, whereas in this case the VRN cannot be provided because Stratex was never registered for VAT and Tower Bridge has no evidence that the VAT was being properly accounted for by Stratex.

177. As Mr Puzey also submitted, the CJEU has stated in none of the judgments relied on that the particular requirement for a supplier's VRN to appear on a VAT invoice is a merely formal condition the absence of which cannot justify a decision to deny input tax deduction.

178. We therefore agree with the FTT's rejection of the broad proposition advanced by Tower Bridge in this case at [208] of the Decision. EU law is not that the right to deduct can be exercised provided only that evidence of the substantive right is adduced. It therefore follows, as the FTT found at [209] of the Decision, once it is accepted that Tower Bridge's broad proposition is unsustainable, that it is necessary to consider whether the particular deficiencies in the Stratex Invoices are such that the "fundamental" requirements of VAT invoices, that is those necessary for the taxing authority to monitor payment by the supplier of the tax in question, have been met. As the FTT said, where those requirements have not been met, and the person seeking to reclaim the input tax cannot provide other evidence that the necessary requirements to monitor the proper operation of the VAT system exist, namely a VAT registration number for Stratex, it is apparent that a necessary precondition for the right to deduct remains unsatisfied.

179. In this case, as Mr Puzey submitted, there was no VAT number by which Stratex's identity and VAT history could be checked because it was never registered. Nor was there other evidence of proper accounting for and payment of the tax. As the FTT found, by the time that Tower Bridge had filed its VAT return and was making its claim for deduction, Stratex could not be traced. In these circumstances, it is no answer to say, as Ms Shaw submitted, that in the event HMRC obtained sufficient details as to the identity of the customer which enabled it to identify the supplier.

180. Neither do we accept Ms Shaw's submission that the absence of the identity of the customer on the invoices was a failure to comply with a mere technical requirement, as was found to be the case in *Polski Trawertyn*. One can see why, on the facts of that case, the absence of the customer's name could be regarded as a technical matter, where the partnership and its members were effectively one and the same person. That is not the situation in this case and, as the FTT observed, the absence of the customer's name gives rise to a clear risk of fraud, with the possibility of the invoice being used more than once, particularly where the supplier's VRN is absent.

181. We do, however, accept Ms Shaw's submission that the FTT was wrong to place the emphasis it did on the fact that Stratex did not account for the VAT that Tower Bridge paid. We think in that regard the FTT did misinterpret Henderson LJ's judgment in *Zipvit*. In our view, what emerges from the authorities is that what is

relevant is the opportunity that a valid invoice provides for the tax authority to monitor the payment of the tax. A valid invoice is in itself evidence of proper accounting for the tax. The question as to whether in fact the tax has been paid is only relevant in that context.

182. However, the conclusions that the FTT came to at [208] to [211] of the Decision, as set out at [54] above and which we endorse, are sufficient to support its conclusion that HMRC were lawfully entitled to deny Tower Bridge the right to deduct input tax upon the Stratex Invoices in conformity with domestic and EU law. In those circumstances, Tower Bridge's exercise of the right to deduct input tax in relation to the Stratex Invoices is wholly dependent upon HMRC exercising its discretion under Regulation 29(2) VATR.

183. We therefore determine the EU Law Issue in favour of HMRC.

The Discretion Issue

Relevant Law

184. Neither party took issue with the FTT's summary of the powers of the FTT and the approach to be taken in relation to appeals against the exercise of HMRC's discretion under Regulation 29(2) VATR, as set out at [56] and [57] above.

185. In short, the exercise of HMRC's discretion can only be challenged by the taxpayer on the ground that it was a decision that no reasonable body of Commissioners could have reached: see *CEE v Peachtree Enterprises Ltd* [1994] STC 747 at 752 and *Kohanzad v CEE* [1994] STC 967 at 969.

Discussion

186. The discretion in issue is that contained in the tailpiece to Regulation 29(2) VATR, which for convenience we reproduce here with emphasis added:

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

187. The dispute between the parties centres around the question as to what documentary evidence Regulation 29 (2)VATR is directed at.

188. Tower Bridge contends that the evidence concerned is, as the Regulation states, "evidence of the charge to VAT". That means, it contends, evidence that the substantive conditions of Article 168(a) have been met. Therefore, HMRC's discretion is limited to a discretion to accept alternative evidence that the substantive conditions have been met, i.e. evidence that CFE was a taxable person, that the goods supplied were used for its own taxable transactions, and that they were supplied by another taxable person. Accordingly, Tower Bridge contends that if HMRC took into

account factors that do not relate to those conditions, then its discretion will have been improperly exercised.

189. Tower Bridge contends that the matters HMRC took into account in refusing to exercise their discretion in this case were irrelevant and accordingly they failed properly to exercise their discretion. Specifically, HMRC had regard to the fact that (i) the Stratex Invoices were invalid; (ii) Stratex was not registered for VAT; (iii) the transactions were connected with fraud; and (iv) CFE did not carry out a reasonable level of due diligence.

190. Tower Bridge contends that none of the facts set out at [189] above were relevant considerations because they do not undermine the other evidence of the charge to tax. In other words, they do not detract from the fact that the substantive conditions for the right to deduct have been met.

191. HMRC contend that the discretion extends to acceptance of evidence of compliance with the formal requirements of Article 178(a), as implemented by Regulation 14 VATR, since apart from this discretion compliance with those requirements is mandatory. HMRC is therefore necessarily not restricted to considering evidence about whether the substantive requirements of the right to deduct are established. In that context, bearing in mind the "insurance function" of the invoice and the particular importance of the VRN, HMRC are entitled to take into account the matters specified at [189] above.

192. In the light of our conclusions on the EU Law Issue we can deal with this issue relatively briefly.

193. If read literally, the wording in Regulation 29(2) VATR might suggest that HMRC's discretion is of limited application. Evidence of the "charge to VAT" can be construed as evidence that the transaction concerned is a taxable transaction in that the supply is made by a taxable person in the course of its business and the recipient of the goods is a taxable person who uses the goods or services for the purpose of its own taxable transactions. If that is the right interpretation the discretion would, as Ms Shaw submits, be limited to accepting other documentary evidence that the substantive conditions giving rise to the right to deduct have been met.

194. However, in our view that submission is unsustainable in the light of the CJEU's jurisprudence as to the important role of the compliant VAT invoice in making it easier for the tax authorities to carry out effective oversight of the VAT system, in particular in ensuring the payment of the tax and in minimising the risk of fraud.

195. In conformity with that jurisprudence, our view is that evidence of the "charge to tax" must be construed as extending to evidence establishing the formal requirements of Regulation 14 VATR, implementing Article 226 of the PVD. Regulation 29(2) VATR allows alternative evidence to be accepted, which in context must mean evidence in place of a fully compliant VAT invoice, not merely evidence of a taxable transaction. We are unable, in view of the EU jurisprudence, to accept Ms Shaw's submission that the formal requirements in Article 226 and Regulation 14 VATR go

no further than what is necessary to evidence the substantive right to deduct input tax. They go further because they are performing a different function from merely showing that the transaction is taxable.

196. We are reinforced in that view by Henderson LJ's judgment in *Zipvit*, where as he found at [117] of his judgment the inability of Zipvit to produce a compliant VAT invoice in support of its claim to deduct input tax was "fatal". That was not because of any failure to provide alternative evidence that the substantive conditions giving rise to the right to deduct were satisfied, but because evidence of the requirements of Article 226(9) and (10), viz "details of the VAT rate applied" and "the VAT amount payable", coupled with evidence of payment of that amount by Royal Mail, had not been provided: see [108] of the judgment, as set out at [147] above.

197. Henderson LJ regarded Articles 226(9) and (10) as "fundamental requirements" because they were essential to the proper performance by HMRC of their monitoring functions and were needed to prove that the supplier had duly paid or accounted for the tax to HMRC: see [114] of the judgment. Although the right to deduct is not dependent on the tax in fact being paid, that point in itself demonstrates why compliance with the fundamental requirements of Article 226 and the corresponding domestic legislation is important, in the context of the "insurance function" of the VAT invoice. That is why Henderson LJ said at [113] of *Zipvit* that the fact that the right of deduction is unaffected by the question whether the tax has been paid "misses the point" that a valid VAT invoice is a "necessary precondition" for exercise of the right to deduct.

198. Although in *Zipvit* there had in fact been no VAT charged or paid, whereas in this case CFE paid VAT to Stratex and so has the right to deduct it, exercise of that right is dependent on possession of a valid invoice or other documentary evidence of satisfaction of the formal conditions. As with the evidence of the amount of VAT payable and the rate charged in *Zipvit*, so in this case we consider that the VRN is a fundamental requirement, because of its importance to the exercise by HMRC of its monitoring function: see [178] to [180] above. We have also said that the absence of the customer's name gives rise to a clear risk of fraud. In the absence of a valid invoice or evidence of payment of the tax by Stratex, there would need to be some other sufficient evidence of proper accounting for the tax charged to CFE for HMRC to exercise its discretion under Regulation 29(2) VATR in favour of allowing deduction.

199.The question is therefore whether in those circumstances, it was open to HMRC to deny the right to deduct where it was not possible to produce evidence of the VRN and, in coming to that decision, to take account of the factors that it did.

200. It follows from our analysis of the importance of the VRN that HMRC were, in our view, fully entitled to have regard to the fact that in this case the Stratex Invoices were invalid (which was only the starting point for exercise of the discretion) and that one aspect of that invalidity, the failure to include the VRN, could not be rectified by the provision of alternative evidence. It is clear on the facts found by the FTT that the

absence of the VRN impaired HMRC's ability to trace Stratex before it had defaulted on its obligations to pay the VAT.

201.For the reasons given by Henderson LJ in *Zipvit*, the failure to pay the VAT was also a relevant factor to the exercise of discretion in circumstances where a valid VAT invoice performed an "insurance function". The non-payment was because of fraud, the risk of which was heightened by the absence of a VRN on the Stratex Invoices, indicating the non-registration of Stratex. HMRC were therefore, in our view, fully entitled to take that factor into account when considering whether (in effect) to waive the requirement for the VRN.

202.Likewise, the failure on the part of CFE to undertake the basic check of Stratex's VAT status before it traded meant that it thereby failed to identify a clear indication of possible fraud. We agree with Arnold J's conclusion in *Boyce*, as set out at [61] above, to the effect that the fact that there was a real and obvious risk of fraud as a result of the invoices not complying with the formal requirements was a relevant factor to be taken into account when deciding whether to exercise the discretion, in contrast to the position where the question is whether the right to deduct has arisen. That is also consistent with the Advocate General's observations in *Geissel*, referred to at [132] above.

203. It follows that we can detect no error of law in the FTT's reasoning on this issue, as set out at [62] above, and we fully endorse it. On the facts of this case, the decision of HMRC not to exercise its discretion under Regulation 29(2) VATR in favour of Tower Bridge was one that was reasonably open to it.

204. We therefore determine the Discretion Issue in favour of HMRC.

Reference to the CJEU

205. Tower Bridge submitted that the law was not *acte clair* in HMRC's favour so that we should not determine the EU Law Issue in favour of HMRC without making a reference to the CJEU.

206.Under the terms of the United Kingdom's withdrawal from the EU, any such reference had to be made before 1 January 2021. Accordingly, we informed the parties of our decision on the reference question immediately after the conclusion of the hearing of this appeal.

207.On the basis of our analysis of the relevant EU jurisprudence and our finding that the relevant issues have been fully considered in *Zipvit* on the basis of that jurisprudence, a decision which is binding on us, we are satisfied that the relevant principles of EU law are sufficiently clear from existing CJEU decisions, and we have therefore been able to resolve the issues on this appeal without doubt about the effect of EU law. We therefore decided not to refer any question to the CJEU.

Disposition

208. The appeal is dismissed.

Signed on Original

MR JUSTICE FANCOURT **JUDGE TIMOTHY HERRINGTON**
UPPER TRIBUNAL JUDGES

RELEASE DATE:
12 February 2021