Case C-107/10

Enel Maritsa Iztok 3 AD

v

Direktor 'Obzhalvane i upravlenie na izpalneniet' NAP

(Reference for a preliminary ruling from the

Administrativen sad Sofia-grad)

(Reference for a preliminary ruling – VAT – Directives 77/388/EEC and 2006/112/EC – Refund – Time-limit – Interest – Set-off – Principles of fiscal neutrality and proportionality – Protection of legitimate expectations)

Summary of the Judgment

1. *Tax provisions – Harmonisation of laws – Turnover taxes – Common system of value added tax – Deduction of input tax – Refund of excess*

(Council Directive 2006/112, as amended by Directive 2006/138, Art. 183)

2. *Tax provisions – Harmonisation of laws – Turnover taxes – Common system of value added tax – Deduction of input tax – Refund of excess*

(Council Directive 2006/112, as amended by Directive 2006/138, Art. 183)

3. *Tax provisions – Harmonisation of laws – Turnover taxes – Common system of value added tax – Deduction of input tax – Refund of excess*

(Council Directive 2006/112, as amended by Directive 2006/138, Art. 183)

1. Article 183 of Directive 2006/112 on the common system of value added tax, as amended by Directive 2006/138, in conjunction with the principle of the protection of legitimate expectations, is to be interpreted as precluding national legislation which provides, with retrospective effect, for the extension of the period within which excess value added tax is to be refunded, in so far as that legislation deprives the taxable person of the right enjoyed before the entry into force of the legislation to obtain default interest on the sum to be refunded.

(see para. 41, operative part 1)

2. Article 183 of Directive 2006/112 on the common system of value added tax, as amended by Directive 2006/138, in the light of the principle of fiscal neutrality, is to be interpreted as precluding national legislation under which the normal period for refunding excess valued added tax, at the expiry of which default interest is payable on the sum to be refunded, is extended when a tax investigation is instigated, the effect of the extension being that such interest is payable only from the date on which the investigation is completed, the excess having already been carried forward during the three tax periods following that in which it arose. On the other hand, the fact that the normal period is 45 days is not contrary to that provision.

(see para. 61, operative part 2)

3. Article 183 of the Directive 2006/112 on the common system of value added tax, as amended by Directive 2006/138, is to be interpreted as not precluding the refund of excess valued added tax by way of set-off.

Member States have a certain freedom as regards the conditions for the refund of excess value added tax, provided that the refund is made within a reasonable period of time by a payment in liquid funds or equivalent means and the taxable person is not exposed to any financial risk.

(see paras 64, 67, operative part 3)

JUDGMENT OF THE COURT (Third Chamber)

12 May 2011 (*)

(Reference for a preliminary ruling – VAT – Directives 77/388/EEC and 2006/112/EC – Refund – Time-limit – Interest – Set-off – Principles of fiscal neutrality and proportionality – Protection of legitimate expectations)

In Case C?107/10,

REFERENCE for a preliminary ruling under Article 267 TFUE from the Administrativen sad Sofia-grad (Bulgaria), made by decision of 15 February 2010, received at the Court on 25 February 2010, in the proceedings

Enel Maritsa Iztok 3 AD

v

Direktor ‘Obzhalvane i upravlenie na izpalnenieto’ NAP,

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, D. Šváby, R. Silva de Lapuerta, E. Juhász and T. von Danwitz (Rapporteur), Judges,

Advocate General: Y. Bot,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 20 January 2011,

after considering the observations submitted on behalf of:

– Enel Maritsa Iztok 3 AD, by L. Ruessmann, avocat, and S. Yordanova, advokat,

– the direktor ‘Obzhalvane i upravlenie na izpalnenieto’ NAP, by A. Georgiev and I. Atanasova Kirova, acting as Agents,

– the Bulgarian Government, by T. Ivanov and E. Petranova, acting as Agents,

– the European Commission, by D. Triantafyllou and S. Petrova, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 18(4) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1), as amended by Council Directive 2006/98/EC of 20 November 2006 (OJ 2006 L 363, p. 129) (‘the Sixth Directive’), and the first paragraph of Article 183 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1), as amended by Council Directive 2006/138/EC of 19 December 2006 (OJ 2006 L 384, p. 92) (‘the VAT Directive’).

2 The reference was made in proceedings between Enel Maritsa Iztok 3 AD (‘Enel’) and the direktor ‘Obzhalvane i upralvenie na izpalnenieto’ NAP (Director of the ‘Appeals and the Administration of Enforcement’ Office at the Central Administration of the National Revenue Agency) (‘the Direktor’) concerning the relevant date from which default interest on a refund of value added tax (‘VAT’) is payable.

Legal context

European Union law

3 Article 18(2) and (4) of the Sixth Directive provides as follows:

‘2. The taxable person shall effect the deduction by subtracting from the total amount of value added tax due for a given tax period the total amount of the tax in respect of which, during the same period, the right to deduct has arisen and can be exercised under the provisions of paragraph 1.

However, Member States may require that as regards taxable persons who carry out occasional transactions as defined in Article 4(3), the right to deduct shall be exercised only at the time of the supply.

…

4. Where for a given tax period the amount of authorised deductions exceeds the amount of tax due, the Member States may either make a refund or carry the excess forward to the following period according to conditions which they shall determine.

However, Member States may refuse to refund or carry forward if the amount of the excess is insignificant.’

4 Article 183 of the VAT Directive is worded as follows:

‘Where, for a given tax period, the amount of deductions exceeds the amount of VAT due, the Member States may, in accordance with conditions which they shall determine, either make a refund or carry the excess forward to the following period.

However, Member States may refuse to refund or carry forward if the amount of the excess is insignificant.’

5 Article 252 of the VAT Directive provides as follows:

‘1. The VAT return shall be submitted by a deadline to be determined by Member States. That deadline may not be more than two months after the end of each tax period.

2. The tax period shall be set by each Member State at one month, two months or three months.

Member States may, however, set different tax periods provided that those periods do not exceed one year.’

National law

6 In accordance with Article 87 of the Law on Value Added Tax (Zakon za danak varhu dobavenata stoynost) (‘the Law on VAT’), the tax period is generally set at one month.

7 Article 92 of the Law on VAT, in the version applicable until 18 December 2007, provided as follows:

‘(1) The tax to be refunded pursuant to Article 88(3) shall be offset, deducted or refunded as follows:

1. If there are other tax debts and debts relating to social security contributions collected by the National Revenue Agency which are due but have not been paid, such debts having arisen prior to the date of submission of the tax return, the revenue authorities shall offset those debts against the tax refund claimed in the tax return; if there is any balance, the procedure set out in subparagraph 2 below shall apply.

2. If there are no other tax debts which are due but have not been paid in accordance with subparagraph 1, or if the total amount of those debts is lower than the tax refund claimed in the tax return, the registered person shall deduct the tax to be refunded or the balance referred to in subparagraph 1 from the tax to be paid as declared in the tax returns for the next three consecutive tax periods.

…

4. If, after expiry of the period referred to in subparagraph 2, there remains a balance of tax to be refunded, the revenue authorities shall offset this balance for the purposes of discharging other tax debts which are due but have not been paid or debts relating to social security contributions collected by the National Revenue Agency, or shall refund the balance within 45 days after submission of the most recent tax return.

…

(8) Tax to be refunded which, without reason or for a reason which has lapsed (including where a notice is set aside), has not been refunded within the periods prescribed in this statute shall be refunded together with statutory default interest, which shall accrue, regardless of the suspension

and resumption of any time-limits during tax proceedings, from the date on which the tax should have been refunded in accordance with this statute until it is paid in full. Tax which has not been refunded for a reason which is no longer valid also arises where, after a tax investigation, it is established, in relation to the part to be refunded, that the amount of the tax refund as assessed is equal to or less than the amount declared.'

8 Article 92 of the Law on VAT, in the version in force since 19 December 2007, is worded as follows:

'…

(8) Notwithstanding the provisions of Article 92(1)(4) and Article 92(3) to (6), where a tax investigation has been instigated in relation to the person concerned, the period for the tax refund shall be the same as the period for the issue of the amended tax assessment notice, except in cases in which the person concerned provides security in the form of money, government bonds or an unconditional and irrevocable bank guarantee …

…

(10) Tax to be refunded, which without reason or for a reason which has lapsed (including where a notice is set aside), has not been refunded within the periods prescribed in this statute, shall be refunded together with statutory default interest, which shall accrue, regardless of the suspension and resumption of any time-limits during tax proceedings, from the date on which the tax should have been refunded in accordance with this statute until it is paid in full.'

9 Article 93(1) of the Law on VAT, in the version applicable until 18 December 2007, provided as follows:

'The periods for refund under Article 92(1)(4) and Article 92(3) and (4) shall be suspended:

…

5. in the event of the commencement of a tax investigation in relation to the person concerned, until that investigation is concluded within the period prescribed in Article 114 of the Code of Procedure for Tax and Social Security.'

10 Article 93(1)(5) of the Law on VAT was repealed with effect from 19 December 2007.

11 Article 114 of the Code of Procedure for Tax and Social Security states as follows:

'(1) The period for carrying out a tax investigation shall be three months and shall commence on the date of notification of the decision ordering the investigation.

(2) If the period referred to in paragraph 1 proves to be insufficient, it may be extended by up to one month by the authority which ordered the tax investigation by means of a notice of extension.'

12 Article 117 of the Code of Procedure for Tax and Social Security provides as follows:

'(1) The tax investigation report shall be drawn up by the revenue authorities responsible for carrying out the investigation at the latest 14 days after expiry of the period in which the investigation is to be carried out.

…

(5) The person subject to the tax investigation may lodge a written objection with the authorities

which carried out the investigation and submit evidence to those authorities within 14 days after service of the investigation report. If that period is insufficient, on application by the person concerned, it may be extended for one month at most.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

13 On 11 October 2007, Enel submitted a tax return which showed tax to be refunded by the Bulgarian tax authorities in the sum of BGN 2 273 514.85. That sum was arrived at as the total deductions exceeded the total VAT due for the tax period in question and Enel had not been in a position to make those deductions during earlier tax periods. In accordance with Article 92(1)(4) of the Law on VAT, in the version in force until 18 December 2007, the period for refunding that tax, namely 45 days, would normally have expired on 26 November 2007, triggering an obligation on the part of the tax authorities, in accordance with Article 92(8) of that law, to pay default interest from that date.

14 On 8 November 2007, a decision ordering a tax investigation was served on Enel with a view to establishing VAT liabilities for the period from 1 January 2005 to 30 September 2007 and liabilities in relation to other taxes in respect of 2005 and 2006.

15 By notice of deduction and refund of 19 December 2007, VAT in the sum of BGN 1 364 108.91 was refunded on the basis of the tax return of 11 October 2007 and that sum was transferred to the company's account on 21 December 2007.

16 The tax investigation gave rise to a report of 13 March 2008, to which Enel lodged an objection, claiming that it was entitled to default interest on the sum of BGN 1 364 108.91 that had already been refunded for the period from 27 November 2007 to 21 December 2007 and on the outstanding balance to be repaid for the period from 27 November 2007 to the date of actual reimbursement.

17 An amended notice of assessment was issued on 29 April 2008. That notice did not contain any reference to payment of default interest.

18 The amount of tax to be refunded to Enel on the basis of that amended notice of assessment was set off against the tax liabilities and default interest for 2005 and 2006 set out in the amended notice. On 13 May 2008, the balance of BGN 179 092.25 was transferred to Enel's account without any decision having been made concerning default interest accrued.

19 On 20 May 2008, Enel lodged an application for administrative review of the amended notice of assessment of 29 April 2008, disputing the tax liabilities and default interest, the set-off of those liabilities against the amount to be refunded to it and the implied refusal to pay to it the default interest claimed in its objection of 13 March 2008.

20 That application gave rise to Decision No 1518 of 20 October 2008 of the Direktor. In that decision, default interest was awarded on the sum of BGN 179 092.25 for the period from the date on which the amended notice of assessment was issued, namely 29 April 2008, to the date of actual repayment of that sum on 13 May 2008. As to the remainder, the application was regarded as unfounded.

21 On 31 October 2008, Enel brought an action before the Administrativen sad Sofia-grad (Administrative Court, Sofia), claiming, inter alia, that default interest on the total VAT to be refunded should be paid from 27 November 2007 to the date of actual repayment of that amount in full.

22 The Administrativen sad Sofia-grad considers that an interpretation of the relevant provisions of the Sixth Directive or the VAT Directive is necessary to enable it to rule on that claim. In its view, the Sixth Directive is applicable *ratione temporis* in the light of Article 2 of the Act concerning the conditions of accession of the Republic of Bulgaria and Romania and the adjustments to the treaties on which the European Union is founded (OJ 2005 L 157, p. 203) and Annex VI, Chapter 6, paragraph 1, of that act.

23 The Administrativen sad Sofia-grad therefore decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

‘Must Article 18(4) of the [Sixth Directive] and Article 183(1) of the [VAT Directive] be interpreted as not precluding, in the circumstances in the main proceedings, the following situations:

(1) that as a result of a statutory amendment with the objective of preventing tax evasion, the period for the refund of VAT is extended to the date on which an amended tax assessment notice is issued because, within 45 days of submission of the tax return, a tax investigation has been instigated in respect of the person concerned, without interest being payable for this period on the amount to be refunded, if at the same time the following conditions are met:

(a) prior to this amendment, the period of 45 days laid down by statute for the tax refund had expired and interest had started to run on the amount to be refunded regardless of the fact that the tax investigation had been instigated;

(b) the tax investigation established that the amount of the tax refund claimed in the tax return was correct;

(c) the only legal recourse available to the taxable person to shorten this period consists in providing security in the form of money, government bonds or an unconditional and irrevocable bank guarantee for a certain duration in the sum of the amount to be refunded;

(2) that the legislation provides that a VAT refund is to be made within 45 days from the date of submission of the tax return for this tax and that it is possible under the law to suspend that period and subsequently extend it by instigating a tax investigation during this period, when the tax period for calculating this tax is one month;

(3) that a refund of VAT is made by means of an amended tax assessment notice, in which the amount to be refunded is set off against VAT liabilities and against other tax liabilities assessed by the same notice and other State claims relating to various tax periods and interest charged on those sums up to the date on which the amended tax assessment notice was issued, if the tax investigation established that the amount of the tax refund claimed in the tax return was correct and, at the same time, the following conditions are met:

(a) there has been no requirement during the tax investigation procedure to provide provisional security in respect of the State’s future claims which might be established in the course of the procedure leading up to the issue of an amended tax assessment notice;

(b) national legislation does not provide for setting off against claims of the State as a means of enforcement or as a measure for providing security;

(c) the periods for challenging and voluntarily paying the principal sums and interest which had been offset have not expired, because they were assessed by means of the same amended tax assessment notice, and part of them have been challenged before the court;

(4) that the State, if the investigation has established that the amount of the tax refund claimed in the tax return was correct, sets off that amount against the tax liabilities as assessed in the amended tax assessment notice relating to periods before the date on which the tax return in question was submitted and against interest accrued on those liabilities on the date on which the amended tax assessment notice was issued rather than the date of the tax return, whereas the State is not required to pay interest during the period laid down by statute for the refund of sums owing and charges interest on the offset taxes from the date on which the tax return was submitted to the date on which the amended tax assessment notice was issued.'

Consideration of the questions referred

Preliminary observations

24 Since the questions referred relate to both the provisions of the Sixth Directive and those of the VAT Directive, it should be noted that the relevant facts in the main proceedings postdate 1 January 2007, when the VAT Directive entered into force and replaced the Sixth Directive, as is apparent from Articles 411 and 413 of the VAT Directive.

25 Article 411(2) of the VAT Directive provides that references to the Sixth Directive are to be construed as references to the VAT Directive. Accordingly, the fact that section 6 of the list referred to in Article 20 of the Protocol concerning the conditions and arrangements for admission of the Republic of Bulgaria and Romania to the European Union (OJ 2005 L 157, p. 29) refers to the Sixth Directive does not mean that the VAT Directive was not applicable in Bulgaria from 1 January 2007.

26 Therefore, an interpretation of the provisions of the VAT Directive alone, in this instance Article 183 thereof, is relevant for the purpose of examining the questions referred, which relate solely to the calculation of default interest payable on the total amount of excess VAT to be refunded.

27 It is true, as pointed out by the Bulgarian Government, that, according to its wording, that provision does not lay down any obligation to pay interest on a refund of excess VAT or the date from which such interest is payable.

28 However, it cannot be concluded from that fact alone that that provision must be interpreted as meaning that no control may be exercised under European Union law over the procedures established by Member States for the refund of excess VAT (see, to that effect, Case C?472/08 *Alstom Power Hydro* ECR I?0000, paragraph 15).

29 First, while the implementation of the right to a refund of excess VAT provided for in Article 183 of the VAT Directive falls, as a general rule, under the procedural autonomy of the Member States, the fact remains that that autonomy is circumscribed by the principles of equivalence and effectiveness (see, to that effect, *Alstom Power Hydro*, paragraph 17). Moreover, the Court has consistently held that the principle of the protection of legitimate expectations must be observed by the Member States when they exercise the powers conferred on them by European Union directives (see Case C?62/00 *Marks & Spencer* [2002] ECR I?6325, paragraph 44 and the case-law cited).

30 Second, it is necessary to examine to what extent Article 183 of the VAT Directive, interpreted in the light of the general context and principles governing VAT, contains specific rules to be complied with by the Member States in implementing the right to reimbursement of excess VAT (see, by analogy, Case C?314/09 *Strabag and Others* [2010] ECR I?0000).

31 In that connection, it has been consistently held that the right of taxable persons to deduct the VAT they have already paid on goods purchased and services received as inputs from the VAT which they are liable to pay is a fundamental principle of the common system of VAT established by the relevant European Union legislation (see, inter alia, Joined Case C?286/94, C?340/95, C?401/95 and C?47/96 *Molenheide and Others* [1997] ECR I?7281, paragraph 47; Case C?78/00 *Commission* v *Italy* [2001] ECR I?8195, paragraph 28; and Case C?25/07 *Sosnowska* [2008] ECR I?5129, paragraph 14).

32 As the Court has consistently held, it is clear that the right to deduct is an integral part of the VAT scheme and as a general rule may not be limited. In particular, that right is exercisable immediately in respect of all the taxes charged on transactions relating to inputs (see, notably, Case C?62/93 *BP Supergas* [1995] ECR I?1883, paragraph 18; Case C?386/06 *Cedilac* [2007] ECR I?12327, paragraph 31; and *Sosnowska*, paragraph 15).

33 As regards the possibility, under Article 183 of the VAT Directive, of providing that excess VAT is to be carried forward to the following tax period or refunded, the Court has made it clear that, while the Member States have a certain freedom in determining the conditions for the refund of excess VAT, those conditions cannot undermine the principle of fiscal neutrality by making the taxable person bear the burden of the VAT in whole or in part. In particular, such conditions must enable the taxable person, in appropriate circumstances, to recover the entirety of the credit arising from that excess VAT. This implies that the refund is made within a reasonable period of time by a payment in liquid funds or equivalent means, and that, in any event, the method of refund adopted must not entail any financial risk for the taxable person (see *Commission* v *Italy*, paragraphs 32 to 34, and *Sosnowska*, paragraph 17).

34 It is therefore in the light of those preliminary considerations that the questions referred are to be examined.

Question 1

35 By its first question, the Administrativen sad Sofia-grad seeks to ascertain, essentially, whether Article 183 of the VAT Directive, in conjunction with the principle of the protection of legitimate expectations, is to be interpreted as precluding national legislation which provides, with retrospective effect, for the extension of the period within which excess VAT is to be refunded.

36 According to the Administrativen sad Sofia-grad, the period within which the excess VAT was to be refunded in the main proceedings expired on 26 November 2007. Under the national legislation in force until 18 December 2007, default interest on the sum to be refunded would have been payable from 26 November 2007, irrespective of the fact that a tax investigation had been instigated on 8 November 2007. However, under the domestic legislation which entered into force on 19 December 2007, the effect of a tax investigation having commenced is that the period for refunding excess VAT and, consequently, the time from which default interest is payable, is extended until an investigation report has been adopted, such a report having been adopted in the present case only on 13 March 2008.

37 As regards the referring court’s interpretation of the national legislation in force until 18 December 2007 to the effect that default interest was payable in the main proceedings from 27

November 2007 because the point at which the period for refunding excess VAT expired was not affected by a tax investigation, the Direktor and the Bulgarian Government submit that, even before that legislation was amended, default interest was payable only after the tax investigation had concluded, since the refund period was suspended during the investigation.

38 On that point, while it is for the referring court alone to determine whether, under national legislation such as that in force until 18 December 2007, default interest was payable in the main proceedings as from 27 November 2007, it is for the Court to answer the question referred on the basis of the referring court's interpretation of the national legislation and to provide that court with all the criteria for the interpretation of European Union law which may enable it to determine whether that legislation is compatible with Article 183 of the VAT Directive and the principle of the protection of legitimate expectations (see, to that effect, Case C?293/06 *Deutsche Shell* [2008] ECR I?1129, paragraphs 25 and 26, and Case C?201/08 *Plantanol* [2009] ECR I?8343, paragraph 45).

39 In that regard, it should be noted that, according to the Court's settled case-law, it is perfectly permissible and, as a general rule, consistent with the principle of the protection of legitimate expectations for new rules to apply to the future consequences of situations which arose under the earlier rules (Case C?60/98 *Butterfly Music* [1999] ECR I?3939, paragraph 25 and the case-law cited). However, a legislative amendment retroactively depriving a taxable person of a right he has derived from earlier legislation is incompatible with the principle of the protection of legitimate expectations (see, to that effect, *Marks & Spencer*, paragraph 45).

40 It follows that, in a situation such as that in the main proceedings, the principle of the protection of legitimate expectations precludes a national legislative amendment which retroactively deprives a taxable person of a right enjoyed prior to that amendment to obtain default interest on a refund of excess VAT (see, to that effect, *Marks & Spencer*, paragraph 46).

41 In the light of the foregoing, the answer to Question 1 is that Article 183 of the VAT Directive, in conjunction with the principle of the protection of legitimate expectations, is to be interpreted as precluding national legislation which provides, with retrospective effect, for the extension of the period within which excess VAT is to be refunded, in so far as that legislation deprives the taxable person of the right enjoyed before the entry into force of the legislation to obtain default interest on the sum to be refunded.

Question 2

42 By its second question, the Administrativen sad Sofia-grad seeks to ascertain, in essence, whether Article 183 of the VAT Directive, in the light of the principle of fiscal neutrality, is to be interpreted as precluding national legislation, such as that at issue in the main proceedings, under which the period for refunding excess VAT is usually 45 days, at the end of which default interest is payable on the sum to be refunded, but which also provides that that period may be extended if a tax investigation is instigated, the effect of the extension being that interest is payable only from the date on which the investigation is completed.

43 In order to answer this question, it is necessary to refer to the particular features of the national legislation at issue in the main proceedings.

44 First, that legislation expressly provides that default interest is to be paid on a refund of excess VAT. The Court is therefore required to rule solely on the issue concerning the point from which such interest is payable under Article 183 of the VAT Directive, in the light of the principle of fiscal neutrality.

45 Next, it should also be noted that the option available under the second paragraph of Article 183 of the VAT Directive of refusing to refund or carry forward if the amount of the excess is insignificant, which applies a fortiori to interest, is not in issue in the main proceedings.

46 Lastly, the national legislation at issue in the main proceedings provides that excess VAT is to be refunded only if it has not been possible to set it off against the total amount of taxes due during the three tax periods following that in which the excess arose, which therefore means that that legislation combines the two means of reimbursing excess VAT provided in the first paragraph of Article 183 of the VAT Directive, namely by way of refund and carrying forward.

47 With regard, first, to such a combination of carrying forward and refunding excess VAT, it should be observed that neither the referring court nor any of the parties which submitted observations to the Court has – correctly – called into question the possibility available to a Member State of providing that excess VAT is to be reimbursed by being carried forward in the first instance and then refunded. Indeed, Article 183 of the VAT Directive cannot be interpreted as meaning that refunding and carrying forward are mutually exclusive. Otherwise, a Member State which had opted for carrying forward as the means of reimbursing excess VAT would be prevented, in breach of the principles referred to at paragraphs 29 to 33 above, from refunding that excess if, in the tax period during which it was carried forward, the amount of tax due is insufficient to enable the excess to be set off.

48 Second, as regards carrying forward excess VAT to the three tax periods following that in which the excess arose, it is true that the first paragraph of Article 183 of the VAT Directive provides that the Member States can carry forward the excess to ‘the following period’.

49 However, it cannot be inferred from the wording of that provision that the carrying forward mechanism as provided for by the national legislation at issue in the main proceedings is irreconcilable with that provision. Account must be taken of the fact, referred to by the Bulgarian Government, that that legislation set the tax period, which may vary between one month and a year, in accordance with Article 252(2) and (3) of the VAT Directive, at one month. Accordingly, the fact that the excess is carried forward to the three tax periods following that in which the excess in question arose does not, in itself, affect the principles referred to at paragraphs 29 to 33 above. Such a carrying forward mechanism, under which the tax is reimbursed within a period of three months, is consistent with the freedom enjoyed by Member States in determining the conditions for refunding excess VAT.

50 Third, under the national legislation at issue in the main proceedings, excess VAT is refunded as a general rule within 45 days, a period which is, in itself, consistent with Article 183 of the VAT Directive, and default interest on the sum to be reimbursed is payable on the expiry of that period. However, if the tax authorities instigate a tax investigation, default interest is payable only from the date on which the investigation is completed.

51 Regarding such legislation under which the requirement on the part of the tax authorities to pay interest is contingent upon the completion of a tax investigation, it has been consistently held by the Court that calculation of the interest payable by the Treasury which does not take as its starting point the date on which the excess VAT would have had to be repaid in the normal course of events in accordance with the VAT Directive would be contrary, in principle, to the requirements of Article 183 of that directive (see, to that effect, *Molenheide and Others,* paragraphs 63 and 64).

52 In that regard, it should be noted that the normal functioning of the common system of VAT requires that the tax be collected accurately. Every Member State is under an obligation to take all legislative and administrative measures appropriate for ensuring collection of all the VAT due on

its territory. In that regard, Member States are required to check taxable persons' returns, accounts and other relevant documents, and to calculate and collect the tax due (Case C?188/09 *Profaktor Kulesza, Frankowski, Jó?wiak, Or?owski (formerly Profaktor Kulesza, Frankowski, Trzaska)* [2010] ECR I?0000, paragraph 21).

53 It follows that the period for refunding excess VAT may, as a general rule, be extended in order to carry out a tax investigation without there being any need for such an extended period to be regarded as unreasonable provided that the extension does not go beyond what is necessary for the successful completion of the investigation (see, by analogy, *Sosnowska*, paragraph 27). However, in so far as the taxable person is deprived on a temporary basis of funds corresponding to the excess VAT, he is at an economic disadvantage which can be compensated for by payment of interest, thus ensuring compliance with the principle of fiscal neutrality.

54 Since the legislation at issue in the main proceedings combines carrying forward and refunding as means of reimbursing excess VAT, it is necessary to examine, in the fourth place, whether it is consistent with the principles referred to at paragraphs 29 to 33 above to put back the date from which default interest is payable to the point at which a tax investigation is completed, even though the excess has already been carried forward for three tax periods following that in which the excess arose.

55 In that regard, it should be noted, first, that the effect of the application of the legislation at issue in the main proceedings is not only to deprive the taxable person for a considerable period, namely approximately eight months, of funds corresponding to the excess VAT but also to deprive that person of the right to receive interest that is normally payable under that legislation.

56 Second, that legislation empowers the tax authorities to instigate a tax investigation at any time, even at a date close to that on which the period for refunding excess VAT expires, thus making it possible to extend considerably the period in which the refund is to be made and, at the same time, to defer the date from which default interest is payable on the sum to be refunded.

57 Therefore, the taxable person may not only suffer financial disadvantages but is also unable to predict the date from which funds corresponding to the excess VAT will be made available to him, thus entailing an additional burden for that person.

58 In those circumstances, the conditions laid down by the national legislation at issue in the main proceedings do not, contrary to the principles referred to at paragraph 33 above, enable the taxable person, in appropriate circumstances, to recover the entirety of the credit arising from the excess VAT without being exposed to any financial risk.

59 However, it is still necessary to answer the question raised by the referring court concerning the implications, in assessing the national legislation at issue in the main proceedings, of the option available to the taxable person of curtailing the period in which the refund is to be made by providing security in the form of money.

60 It should be recalled that the effect of the option of providing such security cannot be that the date from which default interest is payable on the total amount of excess VAT to be refunded may legitimately be deferred until a tax investigation has concluded. As the Court held at paragraph 32 in *Sosnowska*, the effect of the obligation to put in place such a security deposit, in order to be able to take advantage of the period which ordinarily applies, is, in reality, only to replace the financial burden associated with the fact that funds corresponding to the excess VAT are tied up for the duration of the investigation with the burden consequent on the amount of the security deposit being tied up.

61 In view of the foregoing, the answer to Question 2 is that Article 183 of the VAT Directive, in the light of the principle of fiscal neutrality, is to be interpreted as precluding national legislation under which the normal period for refunding excess VAT, at the expiry of which default interest is payable on the sum to be refunded, is extended where a tax investigation is instigated, the effect of the extension being that such interest is payable only from the date on which the investigation is completed, the excess having already been carried forward during the three tax periods following that in which it arose. On the other hand, the fact that the normal period is 45 days is not contrary to that provision.

Questions 3 and 4

62 In the light of the answer to Question 2, Questions 3 and 4, which it is appropriate to consider together, must be understood as asking, essentially, whether Article 183 of the VAT Directive precludes the refund of excess VAT by means of set-off.

63 Set-off results in the two mutual obligations being extinguished in whole or in part, thus enabling the Member State to discharge its refund obligation.

64 In accordance with the case-law cited at paragraph 33 above, Member States have a certain freedom as regards the conditions for the refund of excess VAT, provided that the refund is made within a reasonable period of time by a payment in liquid funds or equivalent means and the taxable person is not exposed to any financial risk.

65 Having regard to those principles, there is no reason in general terms why excess VAT should not be refunded by way of set-off, since such a method results in the immediate liquidation of the tax payer's claim without any financial risk for that person.

66 That analysis is also valid where the claim of the Member State concerned is disputed by the taxable person, provided, as pointed out by the European Commission, that effective legal remedies are available to the taxable person to put forward his point of view on the debt to the State relied on for the purposes of set-off.

67 In the light of the foregoing, the answer to Questions 3 and 4 is that Article 183 of the VAT Directive is to be interpreted as not precluding the refund of excess VAT by way of set-off.

Costs

68 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

1. **Article 183 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, as amended by Council Directive 2006/138/EC of 19 December 2006, in conjunction with the principle of the protection of legitimate expectations, is to be interpreted as precluding national legislation which provides, with retrospective effect, for the extension of the period within which excess value added tax is to be refunded, in so far as that legislation deprives the taxable person of the right enjoyed before the entry into force of the legislation to obtain default interest on the sum to be refunded.**

2. **Article 183 of Directive 2006/112, as amended by Directive 2006/138, in the light of the principle of fiscal neutrality, is to be interpreted as precluding national legislation under which the normal period for refunding excess valued added tax, at the expiry of which default interest is payable on the sum to be refunded, is extended where a tax investigation**

is instigated, the effect of the extension being that such interest is payable only from the date on which the investigation is completed, the excess having already been carried forward during the three tax periods following that in which it arose. On the other hand, the fact that the normal period is 45 days is not contrary to that provision.

3. **Article 183 of the Directive 2006/112, as amended by Directive 2006/138, is to be interpreted as not precluding the refund of excess valued added tax by way of set-off.**

[Signatures]

* Language of the case: Bulgarian.