Provisional text

JUDGMENT OF THE COURT (Fourth Chamber)

28 February 2018 (*)

(Reference for a preliminary ruling — Taxation — Value added tax (VAT) — Directive 2006/112/EC — Deduction of input tax — Article 183 — Refund of overpaid VAT — Late refund — Amount of default interest due under national law — Reduction of that amount for reasons not attributable to the taxable person — Whether permissible — Fiscal neutrality — Legal certainty)

In Case C?387/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Lietuvos vyriausiasis administracinis teismas (Supreme Administrative Court of Lithuania), made by decision of 5 July 2016, received at the Court on 12 July 2016, in the proceedings

Valstybin? mokes?i? inspekcija prie Lietuvos Respublikos finans? ministerijos

v

Nidera BV,

intervening party:

Vilniaus apskrities valstybin? mokes?i? inspekcija,

THE COURT (Fourth Chamber),

composed of T. von Danwitz, President of the Chamber, C. Vajda (Rapporteur), E. Juhász, K. Jürimäe and C. Lycourgos, Judges,

Advocate General: M. Szpunar,

Registrar: R. Schiano, Administrator,

having regard to the written procedure and further to the hearing on 8 June 2017,

after considering the observations submitted on behalf of:

– Nidera BV, by I. Misi?nas, V. Vi?ius and I. Pašvenskait?, acting as Agents,

– the Lithuanian Government, by D. Kriau?i?nas, R. Butvydyt? and R. Krasuckait?, acting as Agents,

– the Czech Government, by M. Smolek and J. Vlá?il, acting as Agents,

– the European Commission, by L. Lozano Palacios and J. Jokubauskait?, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 5 October 2017,

gives the following

Judgment

1 The present request for a preliminary ruling concerns the interpretation 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) (‘the VAT Directive’).

2 The request has been made in proceedings between the Valstybin? mokes?i? inspekcija prie Lietuvos Respublikos finans? ministerijos (State Tax Inspectorate attached to the Ministry of Finance of the Republic of Lithuania; ‘the State Tax Inspectorate’) and Nidera BV concerning the amount of default interest due in virtue of a late refund to Nidera BV of overpaid value added tax (VAT).

Legal context

European Union law

3 The first paragraph of Article 183 of the VAT Directive provides:

‘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.’

Lithuanian law

4 Article 91(10) of the Lietuvos Respublikos prid?tin?s vert?s mokes?io ?statymas (Law of the Republic of Lithuania on value added tax), as amended by Law No IX?751 of 5 March 2002, provided that overpaid VAT was to be refunded in accordance with the procedure and within the time limits laid down in the Lietuvos Respublikos mokes?i? administravimo ?statymas (Law of the Republic of Lithuania on tax administration).

5 Article 8(3) of the Law of the Republic of Lithuania on tax administration, as amended by Law No X?1249 of 3 July 2007, (‘the Law on Tax Administration’) provides:

‘For the purpose of the administration of taxes, the tax authority shall respect the criteria of reasonableness and fairness.’

6 According to Article 87(5) to (7) and (9) of the Law on Tax Administration:

‘5. Tax amounts overpaid by the taxpayer that remain after setting off such amounts against arrears in payments shall be refunded at the request of the taxpayer. ...

6. The tax authority shall have the right to verify, in accordance with the procedure and within the time limits laid down in this law, whether or not the taxpayer’s request for a refund of the tax overpayment is substantiated.

7. ... The tax authority shall refund the tax overpayment to the taxpayer as follows:

(1) the tax overpayment shall be refunded within 30 days from the date of receipt of a written request to refund the tax overpayment. If the tax authority requests further documents from the taxpayer, the time limit of 30 days shall be calculated from the date of receipt of those documents. ... The time limits referred to in this paragraph shall not apply in the cases referred to in subparagraph 2 of this paragraph;

(2) in cases where a tax investigation is conducted with respect to refunding a tax overpayment or where issues related to the refunding of a tax overpayment constitute an integral part of the investigation carried out by the tax authority in respect of the taxpayer, the tax overpayment shall be refunded not later than within 20 days after the tax authority's decision, wherein the tax and (or) related amounts are calculated anew and the taxpayer is instructed to pay them, (or a certificate where no violations have been established) is communicated to the taxpayer.

...

9. If the tax authority fails to refund the tax overpayment within the time limit laid down in paragraph 7 of this article, it shall calculate interest thereon for the benefit of the taxpayer until the tax overpayment is refunded. The amount of such interest shall be equal to the amount of default interest for late payment of tax.'

7 Article 99 of the Law on Tax Administration provides:

'The Minister for Finance shall set the rate of default interest and its method of calculation, having regard to the weighted average annual interest rate for government bonds issued by auction in the previous calendar quarter by the Lithuanian State. The rate of default interest shall be calculated by increasing the abovementioned average rate by 10 percentage points.'

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

8 Between February and May 2008, Nidera, a company established in the Netherlands, purchased wheat in Lithuania from suppliers of agricultural produce. The total amount of VAT paid, in accordance with the invoices of those suppliers, amounted to 11 743 259 Lithuanian litai (LTL) (approximately EUR 3 400 000). During the same period, Nidera exported that grain to third countries, applying the 0% VAT rate provided for under Lithuanian law.

9 On 12 August 2008, Nidera was registered as a taxable person for the purposes of VAT in Lithuania. In its VAT declaration for the period from 12 to 31 August 2008, it declared that the above amount of VAT had been paid and requested a refund.

10 By decision of 19 March 2009 approving the inspection report, the Vilniaus apskrities valstybin? mokes?i? inspekcija (Vilnius District State Tax Inspectorate, Lithuania) refused that refund on the ground that, at the time when the wheat in question was delivered, Nidera was not registered as a taxable person for the purposes of VAT, with the result that, under Lithuanian law, it was not entitled to deduct the VAT paid.

11 However, following the judgment of 21 October 2010, *Nidera Handelscompagnie* (C?385/09, EU:C:2010:627), the Mokestini? gin?? komisija prie Lietuvos Respublikos Vyriausyb?s (Tax Disputes Commission attached to the Government of the Republic of Lithuania) held, by decision of 24 November 2010, that Nidera was entitled to deduct the input VAT paid and ordered the tax authority to refund the amount in question. On 22 December 2010, the State Tax Inspectorate refunded Nidera overpaid VAT in the amount of LTL 11 743 259 (approximately EUR 3 400 000).

12 Nidera subsequently requested payment of interest due by reason of the initial refusal to

refund it the overpaid VAT. On 11 August 2011, the Vilnius District State Tax Inspectorate paid to it LTL 214 902.27 (approximately EUR 60 000) by way of interest on the overpaid VAT relating to the period between the delivery of that judgment and the date on which the overpaid VAT was refunded. By contrast, the Inspectorate refused to pay default interest for the period prior to the delivery of that judgment. By decision of 2 October 2013, the State Tax Inspectorate rejected the complaint lodged by Nidera against that decision.

13 Nidera brought an action before the Vilniaus apygardos administracinis teismas (Regional Administrative Court, Vilnius, Lithuania) seeking annulment of the decision of the State Tax Inspectorate and an amendment to the decision of the Vilnius District State Tax Inspectorate, ordering the Inspectorate to refund to it the amount of LTL 3 864 706.66 (approximately EUR 1 100 000) in interest. It claimed that interest had to be calculated from the date of commencement of the tax inspection, that is to say, 21 November 2008, until the date on which the overpaid VAT was refunded. That court upheld Nidera's action in part and ordered the Vilnius District State Tax Inspectorate to pay to Nidera interest in respect of the period from 17 February 2009 to the date of the refund. The State Tax Inspectorate appealed against that decision before the referring court.

14 That court states that it follows, in particular, from the judgment of 12 May 2011, *Enel Maritsa Iztok 3* (C?107/10, EU:C:2011:298), that Article 183 of the VAT Directive, read in the light of the principle of fiscal neutrality, precludes national legislation under which the normal period for refunding overpaid VAT, at the expiry of which default interest is payable on the sum to be refunded, is extended in the case where a tax investigation is instigated. The referring court considers that this therefore suggests that the interest due to Nidera should be calculated from the expiry of the period referred to in Article 87(7)(1) of that law, namely within 30 days from the date of receipt of the request for a refund, rather than from the expiry of the period referred to in Article 87(7)(2) of the Law on Tax Administration.

15 However, the referring court harbours doubts as to the competence of the national authorities, including the courts, to reduce the interest due on the ground of the particular circumstances of the case in the main proceedings. In particular, the referring court is uncertain whether it has any discretion regarding the substantiation and correctness of the interest due, taking into account, inter alia, the relationship between that amount and that of the non-refunded overpayment, the period during which the overpayment was not refunded and the underlying reasons — in this case the national-law prohibition on persons not registered as taxable persons for the purposes of VAT from deducting input VAT —, as well as the loss actually incurred by the taxable person.

16 According to the referring court, the judgment of 24 October 2013, *Rafin?ria Steaua Român?* (C?431/12, EU:C:2013:686, paragraph 25) may indicate that the amount of interest due cannot be reduced in the light of circumstances unrelated to the actions of the taxable person himself. However, in so far as the purpose of such interest is to compensate the taxable person for the loss that he incurred owing to the unavailability of the corresponding funds, the referring court considers that a long period of unavailability of funds may give rise to a disproportionate amount of interest when compared with the loss actually incurred and that the criteria of reasonableness and fairness, which guide both the tax administration, in accordance with Article 8(3) of the Law on Tax Administration, and the national court, may lead to a reduction in that amount.

17 Nevertheless, given the purposes of the VAT refund, inter alia that of not exposing the taxable person to any financial risk, the referring court observes that the adverse financial consequences resulting from the unavailability of funds may occur after their refund. Consequently, the fact of linking the amount of interest due to the loss actually incurred by the taxable person, so as to reduce the amount of that interest, does not eliminate all financial risk and

places the taxable person at a disadvantage, since the onus of proving the loss incurred would lie with him.

18 In those circumstances, the Lietuvos vyriausiasis administracinis teismas (Supreme Administrative Court of Lithuania) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Should Article 183 of [the VAT Directive], read in conjunction with the principle of fiscal neutrality, be interpreted as precluding a reduction in the interest that is normally payable under national law on overpaid (excess) VAT which was not refunded (offset) in due time, which takes into account circumstances other than those resulting from the actions of the taxable person himself, such as the relationship between the interest and the overpaid amount not refunded in due time, the period of time during which the overpayment was not refunded and the underlying reasons for this, as well as the losses actually incurred by the taxable person?’

Consideration of the question referred

19 As a preliminary point, it should be noted that it is clear from the grounds of the request for a preliminary ruling that, following the delivery of the judgment of 12 May 2011, *Enel Maritsa Iztok 3* (C?107/10, EU:C:2011:298), the referring court decided that it is necessary, for the purposes of the dispute before it, to calculate the default interest due to Nidera on the amount of overpaid VAT refunded from the expiry of the period referred to in Article 87(7)(1) of the Law on Tax Administration, which Nidera and the Lithuanian Government confirmed at the hearing. The referring court therefore asks the Court for a ruling, not on the date from which default interest is payable, but solely on the possibility of reducing the amount of such interest.

20 By its question, the referring court asks, in essence, whether Article 183 of the VAT Directive, read in the light of the principle of fiscal neutrality, must be interpreted as precluding a reduction in the amount of interest normally payable under national law on overpaid VAT which was not refunded in due time due to circumstances not attributable to the taxable person, such as the high amount of interest when compared with the amount of the overpaid VAT, the period of time during which the overpayment was not refunded and the underlying reasons for this, as well as the loss actually incurred by the taxable person.

21 It should be noted that, although Article 183 of the VAT Directive does not lay down any obligation to pay interest on a refund of overpaid VAT or the date from which such interest is payable, it cannot be concluded from that fact alone that that article must be interpreted as meaning that no control may be exercised under EU law over the procedures established by Member States for the refund of overpaid VAT (judgments of 12 May 2011, *Enel Maritsa Iztok 3*, C?107/10, EU:C:2011:298, paragraphs 27 and 28, and of 6 July 2017, *Glencore Agriculture Hungary*, C?254/16, EU:C:2017:522, paragraph 18).

22 First, while the implementation of the right to a refund of overpaid 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, judgments of 12 May 2011, *Enel Maritsa Iztok 3*, C?107/10, EU:C:2011:298, paragraph 29; of 19 July 2012, *Littlewoods Retail and Others*, C?591/10, EU:C:2012:478, paragraph 27; and of 24 October 2013, *Rafin?ria Steaua Român?*, C?431/12, EU:C:2013:686, paragraph 20).

23 Second, it follows from the Court’s case-law that certain specific rules must be complied with by the Member States in implementing the right to a refund of overpaid VAT arising from Article 183 of the VAT Directive, interpreted in the light of the general context and principles governing

VAT (judgments of 24 October 2013, *Rafin?ria Steaua Român?*, C?431/12, EU:C:2013:686, paragraph 21, and of 6 July 2017, *Glencore Agriculture Hungary*, C?254/16, EU:C:2017:522, paragraph 19).

24 Thus, while the Member States have a certain freedom in determining the conditions for the refund of overpaid 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 overpaid VAT. This implies that the refund is made within a reasonable period of time and that, in any event, the method of refund adopted does not entail any financial risk for the taxable person (judgments of 12 May 2011, *Enel Maritsa Iztok 3*, C?107/10, EU:C:2011:298, paragraph 33, and of 6 July 2017, *Glencore Agriculture Hungary*, C?254/16, EU:C:2017:522, paragraph 20).

25 In that regard, when the refund to the taxable person of the overpaid VAT is not made within a reasonable period, the principle of fiscal neutrality of the VAT system requires that the financial loss incurred by the taxable person on account of the unavailability of the sums of money at issue be compensated through the payment of default interest. In the absence of EU legislation on VAT, it is for the internal legal order of each Member State to lay down the conditions under which default interest must be paid, particularly the rate of that interest and its method of calculation, whilst nevertheless observing the principle of fiscal neutrality (see, to that effect, judgments of 12 May 2011, *Enel Maritsa Iztok 3*, C?107/10, EU:C:2011:298, paragraphs 33, 53 and 54; of 19 July 2012, *Littlewoods Retail and Others*, C?591/10, EU:C:2012:478, paragraph 27; and of 24 October 2013, *Rafin?ria Steaua Român?*, C?431/12, EU:C:2013:686, paragraphs 22 and 23).

26 With regard to the dispute in the main proceedings, the referring court states that, in accordance with Article 87(9) of the Law on Tax Administration, the rate of interest due in the event of late payment of overpaid VAT to the taxable person is the same as that of interest applicable to taxable persons in the event of late payment of the tax. In accordance with Article 99 of that law, that rate of interest is calculated by increasing the weighted average annual interest rate for government bonds issued in the previous calendar quarter by the Republic of Lithuania by ten percentage points.

27 The referring court takes the view that, where a particularly late refund of overpaid VAT results in a long period of unavailability of funds, such a calculation could lead to an amount of compensatory interest that is disproportionate to the loss actually incurred by the taxable person. It states that, in those circumstances, the criteria of reasonableness and fairness entitle both the tax authorities, pursuant to Article 8(3) of the Law on Tax Administration, and the national courts to fix a reduction in that amount for the reasons mentioned in the question referred for a preliminary ruling, which are not related to the conduct of the taxable person. However, according to the reply of the Lithuanian Government to a question put by the Court at the hearing, up to the present, such a reduction has never been applied by the national courts.

28 As regards, in the first place, a reduction on account of the amount of interest normally due, under the rules of national law, having regard to the amount of the overpaid VAT, as the Advocate General observed in point 35 of his Opinion, that interest is only compensation for the loss of income resulting from the duration of the non-payment of the principal. It follows that a reduction in that amount which is motivated solely by its significance in comparison with the principal amount to be refunded would imply for the taxable person the risk that the payment of default interest does not cover the entire period during which the principle of fiscal neutrality requires, according to the case-law cited in paragraphs 24 and 25 above, that the unavailability of the sums in question be compensated by the payment of default interest.

29 In the second place, as regards the duration of the period of non-payment, it follows from the previous paragraph that that duration cannot in itself justify a reduction in the default interest, since the amount of that interest is specifically intended to compensate the financial losses incurred by the taxable person during that period. In addition, the possibility of reducing the amount of the interest due on account of the period of non-payment could mean that the tax authorities would not be encouraged to refund the overpaid VAT as soon as possible, which is also capable of giving rise to a financial risk for the taxable person contrary to the principle of fiscal neutrality.

30 Furthermore, it must be made clear that the refusal of the tax authorities to refund the overpaid VAT claimed by Nidera before delivery of the judgment of 21 October 2010, *Nidera Handelscompagnie* (C?385/09, EU:C:2010:627), also cannot justify a reduction in the amount of default interest. It must be borne in mind that the interpretation which the Court, in the exercise of the jurisdiction conferred upon it by Article 267 TFEU, gives to a rule of EU law clarifies and, where necessary, defines the meaning and scope of that rule as it must be, or ought to have been, understood and applied from the time at which it entered into force (judgments of 27 March 1980, *Denkavit italiana*, 61/79, EU:C:1980:100, paragraph 16, and of 14 April 2015, *Manea*, C?76/14, EU:C:2015:216, paragraph 53 and the case-law cited).

31 Moreover, from the perspective of the taxpayer, there is no material difference between a refund delayed because a claim was dealt with administratively after the expiry of the periods and one delayed by administrative measures which unlawfully preclude the refund and are subsequently annulled by a ruling of the Court of Justice (see, by analogy, judgment of 24 October 2013, *Rafin?ria Steaua Român?*, C?431/12, EU:C:2013:686, paragraph 25).

32 As regards, in the third place, the possibility for a national court to reduce the amount of interest normally due under national rules in order to take account of the losses actually incurred by a specific taxable person by reason of having been deprived, during the period of non-payment, of the amount of overpaid VAT to be refunded, such a possibility implies that it is for the taxable person to demonstrate the real financial losses which he has incurred by reason of being deprived of those funds.

33 Nevertheless, the Lithuanian Government maintains, first, that the rate of interest provided for in Article 99 of the Law on Tax Administration not only aims to offset the loss incurred by the taxable person but entails, by virtue of the increase by ten percentage points of the annual interest rate for government bonds, a punitive element equivalent to a penalty. It submits that, in accordance with Article 87(9) of that law, the rate of interest due to the taxable person in the event of non-payment of overpaid VAT within the stipulated period is the same as the rate of interest applicable to taxable persons in the event of late payment of the tax.

34 Second, it submits, the rate set in Article 99 of the Law on Tax Administration applies only to the period from the date of the decision of the tax authority or, where appropriate, of the courts

upholding the request for a refund to the date at which the overpaid VAT was refunded to the taxable person in full. The Lithuanian Government infers from this that the application of that rate to the period preceding that decision would result in overcompensation for the loss incurred by the taxable person due to the unavailability of the funds to be refunded, which would enrich the taxable person unjustifiably.

35 In that regard, it should be noted that the Lithuanian Government's arguments are based on an interpretation of the Lithuanian legislation which differs from that set out by the referring court. The order for reference does not state that the default interest at issue in the main proceedings is punitive in nature. Furthermore, as has been noted in paragraph 19 above, the referring court decided that the date from which interest is payable must be determined in accordance with Article 87(7)(1) of the Law on Tax Administration, which sets a period of 30 days from the date of receipt of the request for a refund, not from the date of the decision ruling on that request. It is for the referring court alone to interpret national legislation and it is for the Court to answer the question referred on the basis of the referring court's interpretation of that legislation (see, to that effect, judgment of 12 May 2011, *Enel Maritsa Iztok 3*, C?107/10, EU:C:2011:298, paragraph 38).

36 In any event, in the context of the freedom to establish the conditions for a refund of overpaid VAT set out in paragraph 23 above, the Member States are entitled to lay down default interest at a flat rate in order to ensure compensation according to rules which are easily managed and supervised by the tax authorities. As the Advocate General noted in point 33 of his Opinion, although in some special cases the amount of compensatory interest may exceed the actual loss incurred by the taxable person, this is merely a result of applying compensation at a flat rate, which by its very nature reflects the loss which the taxable person might, in the view of the national legislature, incur and not the loss actually incurred. In specific cases, compensation in the form of interest may be greater or less than the actual loss.

37 However, if national legislation, such as that at issue in the main proceedings, provides for the payment of such default interest at a flat rate, it cannot, at the same time, provide for the possibility of excluding the payment of such default interest and merely compensating actual loss on the basis of the criteria of reasonableness and fairness, as the Lithuanian Government maintains. Such national legislation would mean that the taxable person is unable to foresee the circumstances in which it can expect to receive the payment of default interest at a flat rate and thus to adjust its activity accordingly. It is thus apparent that such legislation does not enable the taxable person, in appropriate circumstances, to recover the entirety of the credit arising from the overpaid VAT without being exposed to any financial risk, which is contrary to the principle of fiscal neutrality (see, by analogy, judgment of 12 May 2011, *Enel Maritsa Iztok 3*, C?107/10, EU:C:2011:298, paragraphs 57 and 58).

38 In the light of all the foregoing considerations, the answer to the question referred is that Article 183 of the VAT Directive, read in the light of the principle of fiscal neutrality, must be interpreted as precluding a reduction in the amount of interest normally payable under national law on overpaid VAT which was not refunded in due time for reasons connected to circumstances not attributable to the taxable person, such as the high amount of that interest when compared with the amount of the overpaid VAT, the period of time during which the overpayment was not refunded and the underlying reasons for this, as well as the losses actually incurred by the taxable person.

Costs

39 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 (Fourth Chamber) hereby rules:

Article 183 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, read in the light of the principle of fiscal neutrality, must be interpreted as precluding a reduction in the amount of interest normally payable under national law on overpaid value added tax which was not refunded in due time for reasons connected to circumstances not attributable to the taxable person, such as the high amount of that interest when compared with the amount of the overpaid value added tax, the period of time during which the overpayment was not refunded and the underlying reasons for this, as well as the losses actually incurred by the taxable person.

[Signatures]

* Language of the case: Lithuanian.