

Provisional text

OPINION OF ADVOCATE GENERAL

SZPUNAR

delivered on 5 October 2017 (1)

**Case C-387/16**

**Valstybinė mokesčių inspekcija prie Lietuvos Respublikos finansų ministerijos,**

**intervening parties:**

**Nidera B.V.,**

**Vilniaus apskrities valstybinė mokesčių inspekcija**

(Request for a preliminary ruling from the Lietuvos vyriausiasis administracinis teismas (Supreme Administrative Court, Lithuania))

(Reference for a preliminary ruling — Taxation — Value added tax — Directive 2006/112/EC — Article 183 — Deduction of input tax — Refund of overpaid tax — Payment of interest on a refund of overpaid tax made after the time limit had passed — Possibility of reducing interest due for reasons beyond the taxable person's control — Fiscal neutrality — Principles of equivalence and effectiveness — Legal certainty and protection of legitimate interests)

## **Introduction**

1. Overpaid tax must be refunded to the taxable person concerned within a reasonable period. If it is not refunded within a reasonable period, the taxable person must be compensated in the form of default interest. Those rules arise from the provisions of EU law and the case-law of the Court. However, in extreme cases the application of those rules may lead to a taxable person receiving, by way of interest, amounts which are substantial in relation to the amount of tax to be refunded. Therefore, the referring court in the present case asks whether, in those particular circumstances, those rules are subject to restrictions. In my view, they are not, for the reasons which I will set out in this Opinion.

## **Legal Framework**

### **EU law**

2. In accordance with the first paragraph of Article 183 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax: (2)

‘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**

3. In Lithuanian law the rule on refunding overpaid value added tax (‘VAT’) was laid down in Article 91(10) of the Lietuvos Respublikos pridėtinės vertės mokesčio įstatymas (Law on VAT). That refund is to be made pursuant to the Lietuvos Respublikos mokesčių administravimo įstatymas (Law on tax administration).

4. Under Article 87(6), (7) and (9) of that law, improperly levied taxes are to be refunded at the request of the taxable person, as a rule within 30 days. In situations requiring tax investigations, the refund is to be made within 20 days of the decision finding that, as a result of the investigation, the refund should be granted. Where the above time limits for refunding overpaid tax are not observed, interest in an amount equal to the default interest charged for the late payment of tax by a taxable person is to be added to the amount of the refund.

5. Under Article 99 of that law, the Minister for Finance is to set the amount of interest, having regard to the average annual interest rate for government bonds issued in the previous three months. The amount of interest is to be calculated by increasing that average interest rate by ten percentage points.

### **Facts, procedure and the question referred**

6. In February and May 2008 Nidera B.V., a company incorporated under Netherlands law (‘Nidera’), acquired a consignment of grain from Lithuanian producers and paid VAT on those supplies in the amount of LTL 11 743 259 (approximately EUR 3 400 000). Nidera then exported that grain to third countries, applying a 0% VAT rate.

7. On 12 August 2008 Nidera was registered as a taxable person for the purposes of VAT in Lithuania and requested, in a VAT declaration for the period from 12 to 31 August 2008, a refund of the VAT paid on the transactions concluded in February and May 2008. However, by decision of 19 March 2009 the Lithuanian tax authorities refused to grant Nidera a refund, stating that, since that company was not registered as a taxable person for the purposes of VAT on the day on which the transactions were effected, it was not entitled to deduct the input tax.

8. Nidera instituted proceedings in that case which led to a ruling by the Court on a preliminary reference. (3) As a result of that ruling Nidera received, on 22 December 2010, a VAT refund in the amount of LTL 11 743 259, that is to say, an amount corresponding to the amount of tax paid. Nidera then requested payment of default interest on the VAT refund. The tax authorities paid it an amount of LTL 214 902.27 (approximately EUR 60 000) by way of interest for the period from the date of the ruling by the Court to the date on which the tax was refunded. The appeal against that decision which Nidera lodged with the immediately superior tax authority was dismissed.

9. Nidera then brought an action before the Vilniaus apygardos administracinis teismas (Regional Administrative Court, Vilnius, Lithuania), claiming that the abovementioned decision should be annulled and that the administrative authorities should be ordered to pay LTL 3 864 706.66 (approximately EUR 1 100 000) by way of interest for the period from 21 November 2008,

that is to say, the date on which the tax inspection was initiated, to the date on which the VAT was refunded. That court upheld the action brought by Nidera in part, ordering that interest be paid for the period from 17 February 2009. The tax authority lodged an appeal against that judgment with the Lietuvos vyriausioji administracinis teismas (Supreme Administrative Court, Lithuania), which is the referring court in the present case.

10. The referring court has doubts as to whether it has the power to limit the amount of default interest for the late refunding of unduly paid VAT on account of the substantial amount of interest in relation to the principal sum and the loss actually incurred by the taxable person. In those circumstances, the Lietuvos vyriausioji administracinis teismas (Supreme Administrative Court) has decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Should Article 183 of [Directive 2006/112], 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?’

11. The request for a preliminary ruling was received at the Court on 12 July 2016. Written observations were submitted by Nidera, the Lithuanian and Czech Governments, and the European Commission. Nidera, the Lithuanian Government and the Commission were represented at the hearing on 8 June 2017.

## **Analysis**

12. By the question referred in the present case the national court asks, in essence, whether Article 183 of Directive 2006/112, read in conjunction with the principle of fiscal neutrality, should be interpreted as permitting a reduction in the amount of interest due to a taxable person by way of default interest for the late refunding of overpaid VAT in relation to the amount of interest to which he would have been entitled under the normal rules, for reasons unconnected with the actions of that taxable person, but arising from the substantial amount of that interest in relation to the principal sum and the losses actually incurred by the taxable person.

## **Obligation to refund overpaid tax**

13. At the outset, it should be recalled that the obligation under Article 183 of Directive 2006/112, read in conjunction with the principle of fiscal neutrality, to refund overpaid VAT — together with interest where that refund has not been made within a reasonable period — arises from settled case-law. (4) As a rule, the date on which the refund should have been made should be taken as the starting point for calculating the amount of interest in this respect. (5) The period for the refund may be postponed owing to the need to conduct an investigation to establish the right to a refund of tax, but where the length of that investigation exceeds the time necessary to carry it out the taxable person is also entitled to interest. (6)

14. Similar rules, that is to say, an obligation to refund with interest, apply in relation to tax levied in breach of EU law. (7) It must be held that that is also true of tax which, as in the present case, was indeed levied in accordance with EU law, but the refund of which was refused, in breach of that law.

15. I therefore consider it beyond dispute that, under Article 183 of Directive 2006/112, read in

conjunction with the principle of fiscal neutrality, Nidera was entitled to a refund of the VAT at issue in the main proceedings, together with interest calculated from the time limit for refunding that tax, fixed pursuant to Lithuanian law, once the tax inspection was completed. (8) However, on 19 March 2009 the Lithuanian tax authorities, incorrectly and in breach of EU law, issued a decision refusing to refund the tax.

16. Although it does not challenge that right in principle, the referring court does ask whether, in the particular circumstances of the main proceedings, in which the long period of delay in refunding the tax has given rise to a right on the part of the taxable person to a very large amount of interest in relation to the principal sum, which potentially exceeds the amount of the losses actually incurred by that taxable person as a result of the failure to refund the tax, it is possible to restrict the amount of that interest by means of a judicial decision.

### **Principles of equivalence and effectiveness**

17. It is the legislation of the Member States which, in accordance with the principle of procedural autonomy, lays down the rules on the refunding of overpaid or improperly levied taxes, including the amount of any interest. However, those rules must be reconciled with the principles of equivalence and effectiveness. (9)

#### *Principle of equivalence*

18. The principle of equivalence requires that the rules concerning the refunds to which a taxable person acquires the right under EU law be no less favourable than the rules relating to similar rights arising under national law.

19. In my view, the provisions of Lithuanian law cited in the request for a preliminary ruling do not give courts an unequivocal power to reduce the amount of interest paid to taxable persons on account of the late refunding of tax in relation to the amount of that interest arising under law. In addition, the decision of the referring court contains no information on the practice of the Lithuanian courts in this regard. Therefore, it is difficult to assess whether a reduction in interest in the event of a refund of tax under EU law would constitute less favourable treatment than the refunding of taxes carried out on the basis of national law.

20. Therefore, it will ultimately be for the referring court to assess whether the principle of equivalence has been observed. However, I consider that, if Lithuanian law does not contain unequivocal rules empowering the courts to reduce interest and if there is no established judicial practice which permits such action by the courts in relation to the refunding of taxes carried out on the basis of national law, a reduction in the interest due by way of a refund of tax under EU law, in particular were it to set a precedent, would be contrary to the principle of equivalence. If the referring court were to find that that is essentially the case, that alone would, in my view, be sufficient for the question referred to be answered in the affirmative.

#### *Principle of effectiveness*

21. The principle of effectiveness requires that the rules on redress laid down in national law not render impossible in practice or excessively difficult the exercise of rights arising under EU law. The answer to the question as to whether it is possible to reduce the interest due to a taxable person for the late refunding of overpaid tax in the light of the principle of effectiveness requires a more extensive analysis.

22. As is apparent from the case-law cited above, a taxable person for the purposes of VAT has the right, under Article 183 of Directive 2006/112, to a refund of tax paid where the amount of

that tax exceeds the amount which he is entitled to deduct. This follows from the general scheme of VAT, the burden of which is to be borne by the consumption of goods or services and which must be imperceptible for economic operators. The principle of VAT neutrality for taxable persons derives from that scheme.

23. The refund of tax must be made within a reasonable period as laid down in the internal rules of the Member States. Failure to do so within a reasonable period should entail compensation for the consequent harm suffered by the taxable person, so that he does not bear any associated financial risk. (10)

24. The losses which a taxable person may incur as a result of the late refunding of tax can vary. They arise primarily from the unavailability of the sums of money which, in normal circumstances, that is to say, if the refund had been received on time, would have been available to him but which remain 'frozen' in the tax authority's account.

25. Losses of this kind are not easy to calculate precisely because they consist mainly of the loss of the profit (*lucrum cessans*) which the taxable person could have made by investing sums of money either in his own business or in financial instruments. Thus, the typical difficulties in calculating future income, which is by nature uncertain and not unconditional, arise in this case.

26. Consequently, the generally recognised form of compensation for losses of this kind is the payment of interest, which is a form of flat-rate compensation. Such a form of compensation allows the creditor (in this case the taxable person) to obtain equitable compensation without having to produce very difficult-to-furnish evidence of the actual loss and, on the other hand, does not expose the debtor to having to pay unpredictable and potentially significant amounts.

27. Default interest also plays an additional role in that it constitutes a penalty which is intended to induce the debtor to pay the amount due to the creditor on time, as otherwise that amount will be increased by interest. However, I consider that, where the debtor is the State and the creditor is a taxable person, the disproportionate nature of the financial potential of the two sides means that it is the compensatory function of the interest which plays the predominant role. Whereas for the State budget a single amount due from a specific taxable person is insignificant, in the taxable person's budget it will normally constitute a substantial item and may even, on occasion, determine his liquidity.

28. Default interest is normally determined on the basis of the average costs of obtaining the sums of money on the banking market. Therefore, compensation in the form of interest has the added advantage that it allows the creditor to obtain the sums of money he requires in the form of a bank loan, with the guarantee that he will recover, in the form of default interest, an amount corresponding roughly to the costs of obtaining that loan.

29. The amount of default interest is normally laid down in the national legislation of the Member States. From the point of view of EU law, provided that that amount is not set at an abnormally low level, which would be contrary to the principle of effectiveness, the Member States are free, in the exercise of their procedural autonomy, to lay down in their national law the amount of interest in force. The amount of interest thus laid down allows creditors and debtors to predict precisely the extent of their future financial rights or, where appropriate, obligations, thereby constituting a guarantee of legal certainty.

30. Thus, if, under Article 183 of Directive 2006/112, read in conjunction with the principle of fiscal neutrality, a taxable person has a right to receive a refund of overpaid tax within a reasonable period, and, where such tax is not refunded within that reasonable period, a right to compensation for losses incurred owing to the late refunding of tax, that means, in my view, that

there is a right to receive interest for the late refunding of tax in the full amount laid down in the national law of the Member State concerned. Therefore, a restriction of the right to receive interest must be regarded as contrary to the principle of effectiveness since it means that the exercise of the right arising under EU law — and consisting of the right to compensation for a loss incurred as a result of the late refunding of tax — will become impossible or at least excessively difficult. In addition, such a restriction will also be contrary to the principle of legal certainty and the protection of legitimate expectations, as a taxable person who is in that position as a creditor of the tax authorities has the right to expect to receive interest in the full amount laid down by law. A restriction on the right to receive interest in the full amount would be possible only in particular situations where the delay in refunding the tax occurred for reasons attributable to the taxable person. However, that is not the position in the present case.

31. The possibility of reduction, by a court or tribunal, of the amount of interest due to a taxable person where a significant delay, not attributable to that person, in the refunding of tax has given rise to a right on the part of that person to receive a particularly large amount of interest in relation to the principal sum, which potentially exceeds the amount of the losses actually incurred by that person owing to the delay in refunding that tax, must, in my view, be regarded as contrary to the principle of effectiveness.

32. Such a reduction in the amount of interest due would inevitably involve the taxable person having to prove the amount of that actual loss. (11) As I have stated above, such proof is particularly difficult to furnish, because the losses concerned are in the form of non-received income which is therefore by nature difficult to calculate and prove. The need to produce such proof would therefore render it excessively difficult, and in many cases probably even impossible, for taxable persons to exercise the right to receive a refund of tax together with compensation for any delay in making that refund. The difficulties involved in such a process for claiming compensation for that delay are particularly evident when compared with the very simple mechanism for the payment of default interest in a pre-determined amount.

33. In actual fact, as the referring court observes, in some cases the amount of interest may exceed the actual loss incurred by the taxable person. However, this is a normal phenomenon associated with applying compensation at a flat rate, which by its very nature reflects the approximate and statistically probable loss which the taxable person might 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, but in my view that does not justify not applying it at all.

34. In particular cases, for example where a delay in paying a debt results in a creditor becoming bankrupt, it (or its successors in law) can claim compensation which is greater than the amount of default interest. This is also true of relations between the State and taxable persons. However, such a decision depends exclusively on the will of the creditor. Nonetheless, the possibility of claiming compensation exceeding the amount of interest does not deprive the creditor of the guarantee which interest provides.

35. The position is similar as regards the relationship between the amount of interest and the principal sum. The amount of interest is determined by the amount of the principal sum and the length of the delay in refunding the tax. Where that delay has been particularly long, the amount of interest may be close to, or even exceed, the principal sum. However, this merely illustrates the length of the delay. Underlying the instrument of default interest is the assumption that if the creditor had at his disposal the sums of money due to him for the duration of the delay in payment he could have obtained income from them: the cumulative amount thereof would depend on the time elapsed, and could also equal or exceed the amount originally invested. Therefore, his obtaining a similar amount by way of interest does not constitute unjust enrichment, but is merely

compensation for his inability to obtain income as a result of the delay in refunding the principal sum.

36. Lastly, it should be borne in mind that it is the Member States which, in the exercise of their procedural autonomy, lay down the amount of default interest, including for a delay in refunding overpaid tax. Therefore, where a State recognises that the amount of interest laid down in national law exceeds equitable compensation for the harm caused by that delay, it has the possibility of reducing it by way of legislation. However, until such statutory reduction is effected, taxable persons deriving their right to a refund of tax from EU law have the right to receive interest in the full amount arising from the provisions in force.

### **Remarks on the arguments put forward by the Lithuanian Government**

37. In its observations in the present case the Lithuanian Government also relies on the argument that the default interest for the late refunding of overpaid tax provided for in Lithuanian law does not constitute compensation for the harm suffered by the taxable person as a result of the delay in refunding that tax, but is merely a penalty and serves to induce the tax authorities to fulfil their obligation to refund the tax as quickly as possible. The Lithuanian Government relies on the fact that that interest is set on the same basis as the penalty interest due from taxable persons for delays in paying tax, which is twice the rate of default interest in private-law relationships. Consequently, the Lithuanian Government considers that the rate of compensatory interest must only be set by the referring court in the main proceedings.

38. I find that argument unconvincing for several reasons.

39. First, none of the information contained in the request for a preliminary ruling or the parties' observations indicates that there is any such judicial practice of setting a rate of compensatory interest in lieu of the rate of interest laid down in Lithuanian law in the event of a delay in the refunding of tax. Moreover, the agent for the Lithuanian Government stated at the hearing that, as far as he is aware, the present case is setting a precedent. This must be taken to mean that, in other cases, including where tax is refunded solely on the basis of national law, taxable persons receive interest in the amount laid down in law. Therefore, the application in the present case of the theory put forward by the Lithuanian Government would mean less favourable treatment of a claim based on EU law, which would be contrary to the principle of equivalence and should be ruled out on that ground alone. (12)

40. Second, as I have already mentioned, (13) although default interest normally has both a compensatory and a punitive function, the relevance of those two functions is different in the State's relations with taxable persons. In actual fact, where the taxable person acts as the debtor, the punitive function of interest has more relevance, as the losses to the State budget as a result of an individual taxable person not paying tax are relatively minor. However, it is otherwise in the reverse situation where the State is the debtor vis-à-vis the taxable person by virtue of its obligation to refund tax. In that case, the effectiveness of the interest's punitive function is generally rather limited, and its compensatory function is paramount, since the losses incurred by the taxable person as a result of the delay in refunding the tax may potentially be highly significant in relation to his overall funds. Therefore, I am unable to concur with the Lithuanian Government's assertion that the default interest due from the State to a taxable person for a delay in refunding overpaid tax performs the same exclusively or mainly punitive function as the default interest for late payment by a taxable person. The fact that that interest has been set at the same level is a technical choice that has been made by the Lithuanian legislature.

41. Third, the argument put forward by the Lithuanian Government would mean that Lithuanian law essentially does not generally set the rate of interest due to taxable persons for a delay in the

refunding of tax. However, in situations where that refund has been made pursuant to EU law, this would be contrary to the case-law cited above (14) and the principle of effectiveness. The right to a refund of tax together with default interest does not mean merely the right to expect to receive interest in the amount which a court wishes to set in the course of proceedings, but the right to receive interest in an amount known in advance, laid down a priori in law. However, the Lithuanian Government appears to overestimate the scope of the freedom that the Member States enjoy when laying down the rules on refunding overpaid VAT. Whilst the first paragraph of Article 183 of Directive 2006/112 provides that the Member States are to determine the conditions under which they are to refund overpaid VAT, the manner in which those conditions are determined must satisfy the minimum criteria of predictability and legal certainty. The same is true as regards determining the amount of interest to which the taxable person is entitled in the event of a delay in the refunding of tax, since the right to receive interest in the event of delay is an element of the right to a refund of overpaid tax. Therefore, the refund conditions, including the amount of interest, cannot be laid down, as the Lithuanian Government would like, on an ad hoc basis by judicial decisions in individual cases concerning specific taxable persons. In my view, such a mechanism would be contrary to the principle of effectiveness, since an essential element of the effective assertion of the rights arising under EU law is certainty as to the scope of those rights and the protection of legitimate expectations in that regard.

42. Lastly, the Lithuanian Government suggests that the default interest for the late refunding of tax provided for in Lithuanian law could be reduced by restricting it to one component of the rate of that interest, that is to say, the average interest rate for government bonds.

43. However, leaving aside the problem of the likely incompatibility of that approach with the principle of equivalence, government bonds, as financial instruments regarded as particularly safe, normally have a very low rate of interest, significantly lower than the average loan interest rate on the banking market. Therefore, in my view, default interest for the late refunding of tax in an amount restricted to the level of interest for government bonds would not perform a compensatory function, since it would not even enable the cost of raising the missing funds on the banking market to be met. Thus, that interest would not perform the role of providing compensation for the harm suffered by the taxable person as a result of the delay in refunding the tax and would partially shift onto him the financial risk associated with that delay. The setting of interest at such a low rate would therefore be contrary to the principle of effectiveness.

## **Summary**

44. In short, my view is that Article 183 of Directive 2006/112, read in conjunction with the principle of fiscal neutrality and in the light of the principles of equivalence and effectiveness, requires that, where the tax authorities fail to refund overpaid VAT within a reasonable period as laid down in national law, the taxable person is to receive a refund of that tax together with interest in the full amount provided for in the national law in force, where the delay in refunding the tax was not caused by the taxable person's actions.

## **Conclusion**

45. In the light of all of the foregoing, I propose that the Court answer the question referred by the Lietuvos vyriausioji administracinis teismas (Supreme Administrative Court, Lithuania) as follows:

Article 183 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, read in conjunction with the principle of fiscal neutrality, must be interpreted as not permitting a reduction in the amount of interest due to a taxable person by way of default interest for the late refunding of overpaid VAT in relation to the amount of interest to which he



would have been entitled under the normal rules, for reasons unconnected with the actions of that taxable person.

1 Original language: Polish.

2 OJ 2006 L 347, p. 1.

3 Judgment of 21 October 2010, *Nidera Handelscompagnie* (C?385/09, EU:C:2010:627).

4 See, most recently, judgment of 6 July 2017, *Glencore Agriculture Hungary* (C?254/16, EU:C:2017:522, paragraphs 18 to 22 and the case-law cited).

5 Ibid., paragraph 23.

6 Ibid., paragraph 24.

7 See, most recently, judgment of 30 June 2016, *Toma and Biroul Executorului Judec?toresc Hora?iu-Vasile Cruduleci* (C?205/15, EU:C:2016:499, paragraph 32 and the case-law cited).

8 The issue of the date from which the interest at issue in the main proceedings is to be calculated is not the subject matter of the question referred. I merely recall that the court of first instance in the main proceedings ruled that interest should be calculated from 17 February 2009. However, it should be noted that, contrary to the Lithuanian tax authorities' assertions, the failure to refund the tax at issue was in breach of EU law from the outset and not just from the date (21 October 2010) on which the Court delivered its judgment in *Nidera Handelscompagnie* (C?385/09, EU:C:2010:627). Preliminary rulings of the Court of Justice are declaratory in nature and determine the interpretation of EU law as it must be applied from the time of its coming into force (see, in particular, judgments of 27 March 1980, *Denkavit italiana*, 61/79, EU:C:1980:100, paragraph 16; of 19 October 1995, *Richardson*, C?137/94, EU:C:1995:342, paragraph 33; and of 14 April 2015, *Manea*, C?76/14, EU:C:2015:216, paragraph 53). In exceptional circumstances it is possible to limit the temporal effects of a judgment (see judgment of 14 April 2015, *Manea*, C?76/14, EU:C:2015:216, paragraph 54); however the Court did not do so in relation to the judgment of 21 October 2010, *Nidera Handelscompagnie* (C?385/09, EU:C:2010:627).

9 See, most recently, judgment of 30 June 2016, *Toma and Biroul Executorului Judec?toresc Hora?iu-Vasile Cruduleci* (C?205/15, EU:C:2016:499, paragraph 34 and the case-law cited).

10 See judgment of 6 July 2017, *Glencore Agriculture Hungary* (C?254/16, EU:C:2017:522, paragraphs 20 and 22 and the case-law cited).

11 I would point out that in Lithuanian law there are no specific provisions laying down the rules governing such reduction of interest by a court or tribunal and it is hard to imagine that either would reduce it in an entirely arbitrary manner, without taking account of the actual loss incurred by the taxable person.

12 See point 20 above.

13 See point 27 above.

14 See points 13 and 14 above.