Provisional text

OPINION OF ADVOCATE GENERAL

BOBEK

delivered on 5 September 2018(1)

Case C?422/17

Szef Krajowej Administracji Skarbowej

v

Skarpa Travel sp. z o.o. w Krakowie

(Request for a preliminary ruling from the Naczelny S?d Administracyjny (Supreme Administrative Court, Poland))

(Reference for a preliminary ruling — Value added tax (VAT) — Payments on account — Chargeable event — Special scheme for travel agents — Determination of the margin — Actual cost to the travel agent)

I. Introduction

1. Skarpa Travel sp. z o.o. w Krakowie (‘Skarpa’) is a travel agent. Skarpa receives payments on account from its customers which may cover up to 100% of the price that they are required to pay. According to the general provisions of EU rules on value added tax (VAT), when payments on account are made before services are actually supplied, VAT becomes chargeable upon such payment, and on the amount received.

2. At the same time, Skarpa’s services are subject to VAT rules provided for under the special scheme for travel agents. Under this scheme, Skarpa charges VAT on its margin. However, Skarpa’s final margin is still unknown when payments on account are received: the exact amounts to be paid by Skarpa to its suppliers may not yet be fixed or may be subject to change.

3. Skarpa and the national tax authority disagree as to the exact moment VAT for travel services becomes chargeable. Skarpa takes the view that VAT becomes chargeable when the margin becomes definitely known. The Minister Finansów (Minister for Finance, Poland) considers that VAT is already chargeable when payment on account is made.

4. It is in this context that the Naczelny S?d Administracyjny (Supreme Administrative Court, Poland) asks, in essence, whether the *general* rule on chargeability for payments on account applies to services that fall under the *special* marginscheme for travel agencies. If so, that referring

court wishes to know the amount on which VAT should be charged given that the final margin can be only determined after the payments on account are made.

II. **Legal framework**

A. **EU law**

5. Article 63 of Directive 2006/112/EC (2) (‘the VAT Directive’) provides that ‘the chargeable event shall occur and VAT shall become chargeable when the goods or the services are supplied’.

6. Article 65 of the same directive specifies that ‘where a payment is to be made on account before the goods or services are supplied, VAT shall become chargeable on receipt of the payment and on the amount received’.

7. Furthermore, by way of derogation from Articles 63, 64 and 65, Article 66 of the VAT Directive allows Member States to provide that VAT is to become chargeable at one of three different times.

8. Articles 306 to 310 of the VAT Directive contain rules on a special scheme for travel agents. Articles 306 to 308 read as follows:

‘Article 306

1. Member States shall apply a special VAT scheme, in accordance with this Chapter, to transactions carried out by travel agents who deal with customers in their own name and use supplies of goods or services provided by other taxable persons, in the provision of travel facilities.

This special scheme shall not apply to travel agents where they act solely as intermediaries and to whom point (c) of the first paragraph of Article 79 applies for the purposes of calculating the taxable amount.

2. For the purposes of this Chapter, tour operators shall be regarded as travel agents.

Article 307

Transactions made, in accordance with the conditions laid down in Article 306, by the travel agent in respect of a journey shall be regarded as a single service supplied by the travel agent to the traveller.

The single service shall be taxable in the Member State in which the travel agent has established his business or has a fixed establishment from which the travel agent has carried out the supply of services.

Article 308

The taxable amount and the price exclusive of VAT, within the meaning of point (8) of Article 226, in respect of the single service provided by the travel agent shall be the travel agent’s margin, that is to say, the difference between the total amount, exclusive of VAT, to be paid by the traveller and the actual cost to the travel agent of supplies of goods or services provided by other taxable persons, where those transactions are for the direct benefit of the traveller.’

B. **National law**

9. The Ustawa z dnia 11 marca 2004 r. o podatku od towarów i us?ug(Law of 11 March 2004 on the tax on goods and services) (Dz. U. 2011, No 177, heading 1054, as amended) (‘the Law on

VAT’) provides as follows:

‘Article 19a(8)

Where, before goods or services are supplied, all or part of the payment is received — in particular: prepayments, payments on account, deposits, instalments and construction or housing contributions prior to the establishment of a right in cooperative residential or other premises — tax shall become chargeable on receipt of the payment and on the amount received, without prejudice to paragraph 5(4).

…

Article 119

1. The taxable amount in respect of the provision of tourist services shall be the amount of the margin, reduced by the amount of tax due, without prejudice to paragraph 5.

2. The margin referred to in paragraph 1 shall mean the difference between the amount to be paid by the purchaser of the service and the actual cost incurred by the taxable person in purchasing goods and services from other taxable persons for the direct benefit of the traveller; services for the direct benefit of the traveller shall mean services forming part of the tourist services provided and, in particular, transport, accommodation, meals and insurance.’

10. According to the order for reference, Poland made use of Article 66 of the VAT Directive and applied a specific rule to the payments on account for tourist services. (3) It was confirmed by the Polish Government at the hearing that as of 1 January 2014, the act containing that rule was repealed without apparently being replaced by any other specific provisions for travel services. (4)

III. **Facts, procedure and the questions referred**

11. Skarpa is a travel agent. Its services fall under the special scheme for travel agents (‘the special scheme for travel agents’) provided for in Articles 306 to 310 of the VAT Directive and Article 119 of the Law on VAT. Finding it unclear as to when VAT becomes chargeable for the payments on account received by travel agents, Skarpa asked the Minister for Finance to issue an individual interpretation on this point.

12. Skarpa’s view was that VAT should become chargeable for its services only when Skarpa can determine the final margin. By contrast, the Minister for Finance took the position that VAT becomes chargeable when the payment on account occurs, provided that the payment is made for a specific, clearly defined service. To determine the margin/taxable amount at that time, Skarpa should take into account its projected costs and thereafter make relevant adjustments when necessary.

13. Skarpa challenged the Minister for Finance’s individual interpretation before the Wojewódzki S?d Administracyjny w Krakowie (Regional Administrative Court of Cracow, Poland). Finding that interpretation to be incorrect and annulling it, that court held that VAT becomes chargeable only when the final margin is known: any other solution would result in an unacceptable change to the statutory rules on the taxable amount, because it would not allow the ‘actual margin’ to be taken into account, and would be based on estimates — the use of which should be limited to strictly defined cases. The adjustment of tax returns should be carried out as an exception and not as the rule.

14. The Minister for Finance appealed against that judgment before the Naczelny S?d Administracyjny (Supreme Administrative Court, Poland), the referring court. That court is

uncertain whether the special rule on the taxable amount for travel agents' services affects the determination of when the VAT for those services becomes chargeable. Although the customer buys a specific, identifiable service, the costs that will be incurred by the travel agent will only be known later. For that reason, the referring court considers that the general rule under Article 65 of the VAT Directive does not apply. That court does however also admit that such a solution is not provided for in the VAT Directive and could only be inferred from its overall framework.

15. Should this Court decide that the VAT becomes chargeable when the payment on account is received, the referring court additionally asks whether the VAT should be calculated on the amount received (if the general rule in Article 65 of the VAT Directive is applied), or whether account should be taken of the specific method for the determination of the taxable amount under Article 308 of the VAT Directive. In this respect, the referring court considers that the taxable amount should be the margin (and not the amount received on account) and that the margin should be calculated based on the costs incurred until receipt of the payment on account. The referring court is unconvinced by the position of the Minister for Finance concerning the taking into account of projected costs. Such a position, albeit justified and dictated by practical considerations, is not supported by the wording of Article 65 and Article 308 of the VAT Directive. On the other hand, taxing the travel agent on the amount received would result in taxing an amount that would be significantly higher than the taxable amount to be finally established.

16. In those circumstances, the referring court decided to stay the proceedings and refer the following questions to this Court:

'(1) Must [Directive 2006/112] be interpreted as meaning that tax becomes chargeable on payments on account received by a taxable person supplying tourist services, which are taxed under the special scheme for travel agents provided for in Articles 306 to 310 of [Directive 2006/112], at the time defined in Article 65 of [Directive 2006/112]?

(2) If the answer to the first question is in the affirmative, must Article 65 of [Directive 2006/112] be interpreted as meaning that, for taxation purposes, a payment on account received by a taxable person supplying tourist services, taxed under the special scheme for travel agents provided for in Articles 306 to 310 of [Directive 2006/112], is reduced by the cost referred to in Article 308 of [Directive 2006/112] actually incurred by the taxable person up to the time when he receives the payment on account?'

17. Written observations were submitted by Skarpa, the Polish Government and by the European Commission. Skarpa, the Szef Krajowej Administracji Skarbowej (Head of the National Revenue Administration, Poland), the German and the Polish Governments, as well as the Commission made oral argument at a hearing that took place on 7 June 2018.

IV. **Assessment**

18. This Opinion is structured as follows. In Part A, I will suggest, in response to the referring court's first question, that the special rule contained in Article 308 of the VAT Directive relating to the taxable *amount* does not exclude the simultaneous application of the general rule contained in Article 65 of the VAT Directive concerning the *moment* at which tax becomes chargeable if payment on account is made. In Part B, in response to the second question, I will propose that VAT is to be calculated on the margin — established as the difference between the sum received as payment on account and the corresponding percentage of the overall projected cost for a given transaction.

A. First question: applicability of the general rule in Article 65 of the VAT Directive to services of travel agents

19. By its first question, the referring court wishes to know whether the general rule contained in Article 65 of the VAT Directive, that VAT is chargeable on receipt of the payment on account, applies to payments on account made for the services of a travel agent.

20. Skarpa explained at the hearing that usually, its customers first pay 30% of the reserved service, with the remainder being paid prior to departure. The costs are incurred approximately one month prior to the provision of the service but the exact amount of those costs is only known later. According to Skarpa, this is mainly due to the fact that: (i) the price is based on the expected number of travellers, the actual number of which often differs; (ii) fluctuating exchange rates; and, (iii) unexpected costs.

21. How, in those circumstances, can VAT become chargeable when it is not clear *what amount* should be used as the basis for its calculation?

22. According to Skarpa, it is simply impossible to apply the temporal rule contained in Article 65 of the VAT Directive and charge VAT when the payment on account is received. Skarpa argues that VAT does not become chargeable until the margin is determined, the determination of the margin being an essential part of the special scheme for travel agents. The rule contained in Article 308 of the VAT Directive thus modifies not only the question of *what* constitutes the taxable base (margin instead of amount received), but also postpones the moment *when* VAT becomes chargeable. In other words, the way in which the VAT is charged in this context must be adapted to the specificity of the travel services.

23. The Head of the National Revenue Administration, the German and Polish Governments as well as the Commission hold the view that Articles 65 and 308 of the VAT Directive can (and must) apply simultaneously. Both rules concern different aspects of VAT collection and the application of the general rule does not hamper application of the special rules. The costs are incurred at different moments prior to, in the course of, or even after, the relevant provision of the service. In their view, postponing the chargeability of VAT in the way Skarpa suggests would go beyond the objective sought by the special scheme for travel agents, and would lead to an unjustified advantage.

24. I share, in principle, the latter position. In my view, the application of the general rule in Article 65 of the VAT Directive (1) does not exclude application of the special rule contained in Article 308 (2), simply because in the context of the present case those two provisions are concerned with different issues. The first concerns *when* VAT is chargeable, while the other defines *what* constitutes the taxable amount. Those two provisions are thus not mutually exclusive (3).

1. General rule: when is VAT chargeable?

25. The VAT chargeability rules for supplies of goods and services are provided for in Articles 63 to 66 of the VAT Directive. Under Article 63, tax becomes chargeable when goods or services are supplied. (5) If payments on account are made, VAT becomes chargeable, under Article 65, ‘on receipt of the payment and on the amount received’.

26. The legislative history of Article 65 shows that it was considered essential for the harmonisation of VAT to define the chargeable event at EU level. (6) The rationale of the rule concerning chargeability of payments on account was described as follows: ‘when payments on

account are received prior to the chargeable event, receipt of these amounts gives rise to a charge to tax, since the parties to the transaction in this way demonstrate their intention that all the financial consequences of the chargeable event should arise in advance'. (7)

27. Article 65 of the VAT Directive is part of Title VI thereof entitled 'Chargeable event and chargeability of VAT'. It is Title VII, however, that concerns the taxable amount. Thus, the system and context of Article 65 also clearly confirm that that provision focuses primarily on the *temporal* aspect of VAT collection, and only secondarily and in a (logically) limited way on what the taxable amount (the account paid at the given moment) shall be.

2. **Special rule as to what constitutes the taxable amount for the travel agents' services**

28. All the parties and interested persons, with the exception of Skarpa, argued that the special scheme for travel agents is not an independent and exhaustive tax scheme that regulates all the aspects of the determination of VAT for travel agents' services. It is rather a set of rules allowing limited derogations — those necessary to achieve the specific objective pursued by that special VAT scheme, without however derogating from any other elements of the general VAT scheme. (8)

29. I agree with that position.

30. The objective of the special scheme for travel agents is twofold. First, this Court has repeatedly explained that the special scheme for travel agents seeks to avoid practical difficulties that would result from 'the application of the normal rules on place of taxation, taxable amount and deduction of input tax … by reason of the multiplicity of [travel agents'] services and the places in which they are provided'. (9)

31. Secondly, that scheme also aims at keeping collection of VAT for these services in the Member States where the services are carried out, while collecting the tax corresponding to the services provided by the travel agent in the Member State of its establishment. (10)

32. As a result, under the special scheme for travel agents, travel agents are not entitled to deduct input VAT charged on the services provided by their suppliers in different Member States. They effectively charge it to their clients as a cost component, (11) together with their own output VAT to be charged on their margin and paid in the Member State in which they are established. (12) In other words, the price of a travel package includes the price of services provided by the suppliers including the VAT charged by the suppliers, the margin of the travel agent (which at that stage is not yet final) and the VAT to be paid by the travel agents on that margin.

33. The above-described elements thus show that Articles 306 to 308 of the VAT Directive contain a twofold derogation: from the definition of the taxable amount (*what*) as well as the place of taxation (*where*). However, those provisions are silent as to the chargeable event and chargeability of tax.

3. **Applying Article 65 and Articles 306 to 308 of the VAT Directive simultaneously**

34. As is already apparent from the two previous sections, once one focuses on the exact nature of both provisions in question, the argument of 'incompatibility' between the general rule in Article 65 of the VAT Directive on one hand, and the specific rule in Articles 306 to 308 of the same directive on the other, becomes rather tenuous. In other words, the special rule contained in Articles 306 to 308 of the VAT Directive is concerned with the '*what*' and '*where*'. The first part of Article 65, and indeed the overall logic and purpose of Title VI, are concerned with '*when*'.

35. It ought to be further noted that, on the one hand, the general rule in Article 65 of the VAT

Directive applies independently of the sector concerned. It specifies *when* VAT becomes chargeable. It provides that that moment occurs when the payment on account is made. On the other hand, the rule contained in Article 308 of the VAT Directive applies only to travel agents and defines *what* constitutes the taxable amount for the services provided by them. That taxable amount is the margin, defined as the 'difference between the total amount, exclusive of VAT, to be paid by the traveller and the actual cost to the travel agent of supplies of goods or services provided by other taxable persons, where those transactions are for the direct benefit of the traveller'.

36. There are two counter-arguments to that understanding of the relationship between those two provisions: textual and purposive.

37. On the textual level, it is stated at the end of Article 65 that VAT shall become chargeable 'on the amount received'. (13) It could thus be argued that Article 65 also provides for the taxable basis that must always be, for payments on account, the amount received.

38. In view of the general points made in the previous sections, but also as a matter of simple logic, I find that reading problematic. What should be taxed, within any payment received, is the 'taxable amount' or rather the taxable part of the payment received. That does not naturally mean that any and all payments received will be automatically taxed. Yet again, for the purpose of determining the (taxable) amount received in the case of services provided by the travel agents, reference must be made to the special provision of Article 308 that indeed defines 'the taxable amount' for this purpose. (14)

39. On the purposive level, it ought to be recalled that Articles 306 to 308, or rather the entire Chapter 3, falls under Title XII of the VAT Directive entitled 'Special schemes' (for the respective sector or activity). It could thus be suggested that the EU legislature wished to establish a separate 'scheme', potentially derogating not only from those elements expressly provided for within the relevant chapter dedicated to each special scheme, but also from further, general provisions that could potentially pose problems in the operation of that special scheme.

40. I do understand the broader logic of that argument. It would appear nonetheless that such an approach is at odds with the established case-law, which insists on the strict and narrow interpretation of any departure from the general VAT regime, both generally, as well as specifically with regard to the special scheme for travel agencies.

41. In general, it is a well-established approach of this Court that any derogations provided for in the VAT Directive should be interpreted narrowly. That means that their scope should be limited strictly to the text and objective for which they have been designed, even though a broader derogation could be conceivable. Most recently, that principle was yet again underlined by the Court in the *Avon Cosmetics* judgment, (15) clearly rejecting the idea that a derogation provided with regard to the calculation of the taxable amount in a direct selling model could be interpreted as allowing also for deduction of costs of products bought for demonstration purposes at the level of input tax. Allowing for such a further derogation (certainly defendable in general) would effectively mean that a derogation provided with regard to one specific element would then be allowed to generate further 'ripple effects' throughout the entire VAT system, resulting in the generation of a number of parallel 'à la carte' regimes, extending clearly beyond the derogation's scope of application. (16)

42. As regards the specific scheme for travel agencies, the Court has repeatedly recalled that 'as an exception to the normal rules of the [VAT] Directive [the special scheme for travel agents] must be applied only to the extent necessary to achieve its objective'. (17) It has also acknowledged the simultaneous application of that scheme with relevant general provisions of the

VAT regime, the general rules being applied to the aspects of a transaction falling outside the derogation for travel agents. (18)

43. I fail to see how the objectives pursued by the special scheme for travel agents (19) could be affected by the application of the temporal rule of Article 65 of the VAT Directive. With VAT becoming chargeable upon reception of payments on account, the VAT would still be charged on travel services in the Member States in which they are carried out. That VAT would not be deducted in those States but carried forward to the customer by the travel agent and the latter would charge its output VAT on its margin and pay it in the Member State of its establishment.

44. That general finding does not appear to be altered by the arguments raised by Skarpa in the context of the present case.

45. First, Skarpa argues that the margin is an essential element of the margin scheme. Thus, when the exact margin is unknown, VAT does not become chargeable. This argument seems to be inspired by case-law of the Court showing that application of Article 65 of the VAT Directive requires that all the elements of the transaction should be determined. (20)

46. It is true that the case-law requires a degree of certainty so that VAT can be charged on supplies of goods or services. It follows from the judgment in *BUPA Hospitals* that that certainty is not in principle given when ‘lump sums are paid for goods referred to in general terms in a list which may be altered at any time by agreement between the buyer and the seller and from which the buyer may possibly select articles, on the basis of an agreement which he may unilaterally resile from at any time, thereupon recovering the unusedbalance of the prepayments’. (21)

47. I have difficulty applying that case-law to the present case. In contrast to the factual situations in those cases, the nature and the content of the service provided by travel agents tend to be very well-known and defined, often with a high degree of precision, including, as vividly described at the hearing, even going to the extent of ensuring that the room being booked faces in a certain direction. In those circumstances, it is difficult to conceive that the margin constitutes an essential element of the ‘chargeable event’. It strikes me as a rather technical aspect of the tax collection which is usually unknown to the customer, thus falling outside the set of elements of a transaction that have to be defined in advance.

48. Skarpa further argues that the taxation of payments on account, when the margin is still unknown, will cause serious and disproportionate difficulties in practice: VAT returns would have to be constantly adjusted. In Skarpa’s opinion, this would be contrary to the objectives of the margin scheme. What also emerged at the hearing was that there are in fact two propositions hidden in that statement: the issue of knowledge (known or unknown margin) and the practical difficulties of readjustment.

49. Second, as far as the issue of the unknown margin is concerned, it was confirmed by Skarpa at the hearing that in general, the price charged to the clients by a travel agent appears to be a compound of different amounts. The VAT to be subsequently calculated and paid by the travel agent is actually already included in that ‘catalogue price’. The final margin appears thus to be calculated ‘by exclusion’ in the sense that once the actual costs are deducted from the payment received, the remainder is divided between margin and the VAT. In this way, the travel agent does not send any corrected invoice to the client.

50. To provide an example: assuming that the price of the travel is EUR 1 000 and the costs are EUR 800, the difference of EUR 200 has to be divided between the margin and VAT. Imagine that the VAT rate is 21%. The sum of EUR 200 thus represents 121%, which will be divided into VAT corresponding to EUR 34.71, and the margin corresponding to EUR 165.29.

51. If that is indeed how the industry operates, which I understood to be confirmed by Skarpa at the hearing, together with the fact that the catalogue price is already inclusive of VAT and that the travel agencies would not charge any VAT separately later, then the only logical inference I can make from those statements is the following: a reasonably well-run travel agency must indeed prepare a rather detailed estimate of its projected costs and estimated margin, in order to be able to publish any such price in a catalogue.

52. Thus, although the exact margin may indeed not be known either at the moment when the payment on account is made, or at the moment that the service is actually provided, or even considerably later (until and unless all the payments to a certain supplier and/or for a certain season are settled), the fact remains that any travel agent not wishing to suffer losses is likely to have a rather detailed estimate of projected costs before it sets up and advertises certain travel.

53. Third, concerning the practical difficulties referred to by Skarpa, in particular the need for additional readjustments, I would simply suggest that such an argument can hardly, in and of itself, warrant the effective exclusion of the statutory VAT rules. (22)

54. In addition, contrary to what Skarpa argues, any such practical difficulties are not the ones that the margin scheme was designed to avoid. As explained above, (23) the special scheme for travel agents was designed to do away with the need for travel agents to claim VAT deductions all over the European Union. But it was hardly meant to liberate them of all the administrative responsibilities that any taxable person faces in similar circumstances. (24)

55. That conclusion seems to be all the more warranted given that the opposite would confer upon the travel agent a double financial advantage: it would be entitled to pay the VAT even after the provision of services, whenever the margin becomes known, while charging its customers in advance. I fail to see how such an interpretation would provide a reasonable balance between all the interests involved.

56. Lastly, the problem of the provisional nature of the margin when the payment on account is received does not seem to be limited to the payment on account. I understand from the description given at the hearing that as a matter of fact, the margin may still be unknown even *after the travel services are provided*, when adjustments are made by the travel agent’s suppliers.

57. This fact only underlines the overall problem of the Skarpa’s argument on this point. If taken to its full logical conclusion, then Skarpa is effectively asking not just for the derogation from Article 65 of the VAT Directive, as the same argument could be stretched to exclude the applicability of Article 63 too. (25) Moreover, since the exact margin may not be known when services are supplied, the point at which VAT will be chargeable would, in effect, become completely dependent on the self-declaration of the travel agent as to when it considers that it knows the exact amount of the margin. This is likely to occur not when the service in question is provided, but weeks or months later, or perhaps even at the end of each season, when there are likely to be full and complete breakdowns of all the actual costs provided for each individual component service. Needless to say, during all those periods, the respective resources would be unavailable to the State. (26)

58. In the light of the above, my interim conclusion is that the VAT Directive shall be interpreted

as meaning that tax becomes chargeable on payments on account received by a taxable person supplying travel services, which are taxed under the special scheme for travel agents provided for in Articles 306 to 310 of the VAT Directive, at the time defined in Article 65 of the VAT Directive, that is when the respective payment on account is received.

B. **Second question: how to determine the VAT when the taxable amount is unknown**

59. By its second question, the referring court wishes to ascertain how, if tax is indeed chargeable upon receipt of a payment on account, that tax is to be determined when the exact margin, that is the taxable amount, is not yet known.

60. The Head of the National Revenue Administration, the Polish and German Governments, as well as the Commission agree that VAT should not be charged on the *amount received* but on the *margin*. (27) However, suggestions as to how that margin should be established at the moment of receipt of the payment on account differ.

61. The Head of the National Revenue Administration maintains that the margin should be determined on receipt of the payment on account, based on the *projected* costs. The necessary adjustments are to be made subsequently — in the tax return for the respective accounting period during which the service was provided. Similarly, the Polish Government argues that to establish the margin when the payment of account has been received, Skarpa should embrace the 'functional approach' and use as a basis the *projected* costs.

62. At the hearing, the German Government presented a (in part) similar position. It argued that to determine the margin, the costs to be taken into account should be the incurred costs and the projected (foreseeable) costs. According to that government the phrase 'actual cost to the travel agent' in Article 308 of the VAT Directive should be understood in that way.

63. The Commission considers that the taking into account of projected costs for the purpose of establishing the margin upon the receipt of the payments on account would go against the wording of Article 308 of the VAT Directive. That provision refers to '*actual cost*' to the travel agent. (28) Thus, only the actual costs incurred until that paymentcan be relied on to determine the margin when payments on account are received. The Commission's position also corresponds to the suggestion made by the referring court.

64. As further discussed at the hearing, there are essentially five different options as to how, in theory, the calculation of the margin and the taking into account of costs in those circumstances can be approached.

(i) Article 65 of the VAT Directive does not apply. No VAT is to be charged when the payment on account is received and the margin is to be relied on for the calculation of the VAT when it is definitely known (Skarpa's position).

(ii) VAT is to be charged on the amount of the payment on account received (instead of on the margin). That would result from the literal application of Article 65 of the VAT Directive.

(iii) The VAT should be charged on the margin, calculated by subtracting a *proportion of the projected costs* for a given transaction from the amount received on account. That proportion would correspond to the proportion that the amount received represents out of the total price for the service (the position of the Head of the National Revenue Administration and of the Polish Government).

(iv) The VAT should be charged on the margin, but that margin should be established on

receipt of the payment on account, by subtracting the actual costs in the sense of the costs actually incurred by the travel agent up to the moment of receipt of the payment on account (the position of the Commission and also suggested by the referring court).

(v) The VAT would be charged on the margin, also established at the time of receipt of the payment on account, but relying on the costs incurred by the travel agent up to the time of the receipt of the payment on account *and* the projected costs, provided that all projected costs have not yet been incurred (the position of the German Government).

65. The mere listing of all those (at least theoretically conceivable) options clearly demonstrates that the answer to be given is far from clear. However, some options are more problematic than others.

66. For the reasons already discussed in detail in response to the first question, (29) the first position defended by Skarpa simply cannot be accepted without further distorting the entire system of VAT collection. In addition, if such an approach were to be embraced, why stop at Articles 65 and 63. There might potentially also be other (general) provisions of the VAT Directive that could 'ideally' be further adapted in order to provide for the (objectively, no doubt entirely justified) specific needs of a specific industry. But that is exactly the slippery slope that this Court has been trying to avoid.

67. For the reasons also already alluded to above, (30) the second option cannot be accepted either. It is true that Article 65 of the VAT Directive states that 'VAT shall become chargeable on receipt of the payment and *on the amount received*'. (31)However, embracing such a position would also by definition always lead to a (presumably provisionally) disproportionate result because such an initial taxable amount would by definition be higher than the taxable amount to be determined subsequently. Also for that reason, I consider that the reference made in Article 65 to 'the amount received', is to be understood as a reminder of the general rule according to which a tax is to be charged on 'everything which constitutes consideration obtained or to be obtained by the supplier …'. That follows from Article 73 of the VAT Directive. (32) More specifically in the present context, I am of the view that the term 'on the amount received' appearing in Article 65 of the VAT Directive should be understood as referring to the *taxable amount received*. That taxable amount is, under the specific rule in Article 308 of the VAT Directive, the margin. That special rule shall thus be inserted into the logic of Article 65 of the VAT Directive where the latter refers to the 'amount received'.

68. I readily acknowledge that the fourth and fifth options would follow more closely from the wording of Article 308 of the VAT Directive. However, I am afraid that they also simply cross the line from accounting and VAT declarations being a rather complex exercise, to making it 'mission impossible'. Indeed, under those options the *individual* breakdown of all the *actual* incurred costs would have to be made *repetitively* and *differently* for each payment on account received.

69. That appears, indeed, for a number of reasons, to be simply impossible. First, certain services are purchased in large numbers (accommodation and transport), whereas the individual services within them are sold separately. If that is indeed the case, then proportion of the overall costs in respect of each transaction (each service) is likely to be unknown when the payment on account is received, especially since the amount of individual services sold is likely to change considerably over time. Second, it is unclear to me how such actual costs for services ordered in large amounts would be paired up with the individual services provided. Third, all that becomes even more complex in cases in which the payments on account were not just 100% of the price, but indeed fractions of it, like 10%, 30%, or 50%.

70. Furthermore, in all these cases, before the final situation is known, the subtraction of all the

actual costs incurred at the moment at which either only part of the payments is made (only for some places on a larger package trip) and/or even just a percentage of that price (30% or 50%), will likely lead to a negative balance. In other words, at a specific moment of time, the actual cost, in the sense of cost that has been effectively incurred, may amount to 100% of all costs, while the payment on account may only correspond to 10% of the price of the service. It is not clear to me how precisely that should be adjusted later and whether such 'temporary losses' should for example be declared as such.

71. Thus, for all practical purposes, it would appear to me that, at the end of the day, in view of such complexity, realistically, what could be carried out would be, at best, another (informed) estimate as to where the level of actual costs could lie. The only difference would be that the travel agency would be asked to carry out such an assessment over and over again, with Sisyphean diligence, every time it receives any payment on account.

72. At the same time, as already explained above and confirmed at the hearing, it seems that an informed travel agent would have a fairly good idea of the costs to be incurred and the margin to be obtained in respect of a specific transaction.

73. All these considerations lead me to the conclusion that it is indeed the third option, suggested by the Head of the National Revenue Administration and by the Polish Government, that appears to be the most reasonable and the least burdensome. That position seems to me as striking a reasonable balance between the respective interests of the national tax authority and the taxable person, while remaining within the realm of the possible. That approach gives neither of those parties an excessive advantage over the other. This is because neither of them seems to have in their possession, at any relevant time, 'too much money' in comparison to what that party will finally be entitled to.

74. The example given at the hearing by the Head of the National Revenue Administration captures that logic well. If the price of the service is, for example, 1 000 Polish zloty (PLN), with the estimated margin to be made up of 20% of that price (PLN 200), and the client makes an advance payment of PLN 500, the margin to be taken into account at the time of receipt of the payment on account should be PLN 100. It is on that amount of PLN 100 that the VAT should be calculated, and it should be charged at that stage, with subsequent and final adjustments to be carried out once the final margin is known, if necessary.

75. In addition, this ensures a reasonable balance in terms of neither excessively overpaying nor withholding the tax due, and it also allows for the accounting process to be manageable, while complying with the Court's previous holding (in the judgments in *Commission* v *Spain* (33) and *Commission* v *Germany* (34)) that the margin must be determined in relation to each transaction and not 'globally' per given period. But the entire exercise with regard to the costs calculation for each individual transaction (in the sense of each service provided by the travel agent) would need to be carried out only twice. This would be first, when deciding the initial estimates and calculating the projected costs before pricing and advertising the service, and second, at the very end, when all the costs and the exact margin are known.

76. In the light of the foregoing, I therefore conclude that the VAT is to be calculated on the margin, established as the difference between the sum received as payment on account and the corresponding percentage of the overall projected costs for the given transaction.

77. A concluding remark is called for. I readily acknowledge that the solution that I have just suggested is not ideal. But, based on the outlined process of elimination of the extremes, it appears to be the one that is the least onerous and cumbersome for all the parties concerned, while remaining within the options that can still reasonably be said to pertain to the ambit of judicial

interpretation of the extant rules.

78. The determination of VAT-related obligations of travel agents encounters difficulties that stem from the temporal discrepancies between, on one hand, receipt of the amount of the price and, on the other hand, the engagement of costs. The calculation of the margin in those circumstances is a rather complex exercise, as the Member States' experience shows. Those difficulties have been addressed in some Member States by establishing a flat-rate margin for a given period. (35) Besides, a proposal aiming at the introduction of an overall rate for the calculation of the margin of travel agents was tabled in 2002. (36) It was, however, abandoned in 2014. Furthermore, in view of the Court's judgments in *Commission* v *Spain* (37) and in *Commission* v *Germany*, (38)that approach appears to be problematic.

79. In such an (already) complex environment, I agree with the general proposition made by the German Government that it is advisable to strive for a solution that poses less rather than more additional difficulties. It is also not without a certain dose of irony that, as almost all the parties and interested persons suggested at the hearing, the special schemes were put in place in order to simplify the operation of the system, while arriving at strikingly different opinions as to what such simplification should mean in the specific context of the special scheme for travel agents. Also in view of such notable *diversity in simplification*, I assume it would be advisable to leave further simplification steps in this regard to the EU legislature and/or, within the bounds set by the EU law, to the national legislatures.

V. **Conclusion**

80. In the light of the above, I suggest that the Court respond to the Naczelny S?d Administracyjny (Supreme Administrative Court, Poland) as follows:

(1) Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax shall be interpreted as meaning that tax becomes chargeable on payments on account received by a taxable person supplying travel services, which are taxed under the special scheme for travel agents provided for in Articles 306 to 310 of Directive 2006/112, at the time defined in Article 65 of the same directive, that is when the respective payment on account is received;

(2) At that moment, VAT is to be calculated on the margin, established as the difference between the sum received as payment on account and the corresponding percentage of the overall projected costs for the given transaction.

1 Original language: English.

2 Council Directive of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1).

3 That appears to follow from Article 3(1) of the Decree of the Minister for Finance relating to the implementation of certain provisions of the Law on VAT of 4 April 2011 (Dz. U. 2013, position 247).

4 At the hearing, the Polish Government explained that that change was in response to the judgment of 16 May 2013, TNT Express Worldwide (Poland) (C?169/12, EU:C:2013:314).

5 The Court recalled that ‘Article 63 of [the VAT] directive reflects that fundamental principle, providing that the chargeable event is to occur and VAT is to become chargeable on the date on which the goods or the services are supplied’. Judgment of 16 May 2013, TNT Express Worldwide (Poland) (C?169/12, EU:C:2013:314, paragraph 22).

6 See the Proposal for a Sixth Council Directive on the harmonisation of legislation of Member States concerning turnover taxes — Common system of value added tax: uniform basis of assessment (COM(73) 950 of 20 June 1973). See also the explanatory memorandum to the proposal for the Sixth Directive, *Bulletin of the European Communities*, supplement 11/73, p. 12.

7 The explanatory memorandum to the proposal for the Sixth Directive, *Bulletin of the European Communities*, supplement 11/73, p. 13.

8 Judgment of 12 November 1992, Van GinkelVan Ginkel (C?163/91, EU:C:1992:435, paragraph 15), or of 22 October 1998, Madgett and BaldwinMadgett and Baldwin (C?308/96 and C?94/97, EU:C:1998:496, paragraph 5). See also paragraph 34 of the same judgment and judgment of 25 October 2012, Kozak (C?557/11, EU:C:2012:672, paragraph 20).

9 See judgments of 19 June 2003, First Choice Holidays (C?149/01, EU:C:2003:358, paragraphs 24 and 22 and the case-law cited); of 9 December 2010, Minerva KulturreisenMinerva Kulturreisen (C?31/10, EU:C:2010:762, paragraphs 17 and 18 and the case-law cited); and of 25 October 2012, Kozak (C?557/11, EU:C:2012:672, paragraph 19).

10 See, for an illustration of this, the Council’s interinstitutional file 2002/0041 (CNS), on ‘VAT — Special scheme for travel agents’ [17567/09]: ‘2. The first objective of the scheme was to simplify the application of the VAT rules to these transactions, saving the operators from having to register in the various Member States where the services were provided. 3. A second objective was to ensure that VAT due on goods and services purchased by an agent is collected by the state in which those transactions are carried out, while the tax corresponding to the services supplied by the travel agent is collected in the state in which the agent is established.’

11 And this input VAT is recovered implicitly — see Opinion of Advocate General Tizzano in First Choice Holidays (C?149/01, EU:C:2002:485, point 25).

12 More specifically, the second paragraph of Article 307 of the VAT Directive states that ‘the single service [of the travel agent] shall be taxable in the Member State in which the travel agent has established his business or has a fixed establishment from which the travel agent has carried out the supply of services’.

13 ‘… VAT shall become chargeable on receipt of the payment and on the amount received.’

14 See further, point 67 of this Opinion.

15 Judgment of 14 December 2017 (C?305/16, EU:C:2017:970, paragraphs 36 to 40).

16 See also my Opinion in Avon Cosmetics (C?305/16, EU:C:2017:651, especially points 39 to 41 and 50, 58 to 60 and the case-law cited).

17 See, for instance, judgments of 22 October 1998, Madgett and BaldwinMadgett and Baldwin (C?308/96 and C?94/97, EU:C:1998:496, paragraphs 5 and 34); of 19 June 2003, First Choice Holidays (C?149/01, EU:C:2003:358, paragraph 22 and the case-law cited); of 9 December 2010, *Minerva Kulturreisen* (C?31/10, EU:C:2010:762, paragraph 16); and of 25 October 2012, Kozak (C?557/11, EU:C:2012:672, paragraph 20 and the case-law cited).

18 Concerning the determination of taxable amount concerning in-house and bought-in services, see judgment of 22 October 1998, Madgett and BaldwinMadgett and Baldwin (C?308/96 and C?94/97, EU:C:1998:496, paragraph 39 et seq.).

19 Identified and discussed above in points 30 to 33.

20 Judgments of 21 February 2006, BUPA Hospitals and Goldsborough Developments (C?419/02, EU:C:2006:122, paragraph 48); of 16 December 2010, Macdonald Resorts (C?270/09, EU:C:2010:780, paragraph 31); of 3 May 2012, Lebara(C?520/10, EU:C:2012:264, paragraph 26); of 19 December 2012*,* Orfey BalgariaOrfey BalgariaOrfey Balgaria (C?549/11, EU:C:2012:832, paragraph 28); and of 7 March 2013, Efir (C?19/12, not published, EU:C:2013:148, paragraph 32).

21 Judgment of 21 February 2006, *BUPA Hospitals and Goldsborough Developments* (C?419/02, EU:C:2006:122, paragraph 51).

22 See, iteratively, to show the Court's lack of acceptance of 'practical or technical difficulties' as a sufficient reason for departure from EU rules, judgment of 27 October 1992, Commission v GermanyCommission v GermanyCommission v Germany (C?74/91, EU:C:1992:409, paragraph 12); or judgment of 23 May 1996, Commission v GreeceCommission v GreeceCommission v Greece (C?331/94, EU:C:1996:211, paragraph 12).

23 In detail above, points 30 to 33.

24 See, in this sense, Opinion of Advocate General Léger in MyTravel(C?291/03, EU:C:2005:283, point 79): 'Moreover, although the purpose of Article 26 of the Sixth Directive is to adapt the rules applicable in respect of VAT to the specific nature of the work of a travel agent and thus reduce the practical difficulties which might hamper such work, the scheme established by that Article, unlike that set up for small undertakings and agricultural producers, is not intended to simplify the accounting requirements entailed by the general VAT scheme.' Also, see judgment of 19 June 2003, First Choice Holidays (C?149/01, EU:C:2003:358, paragraph 25).

25 In the absence of any national rules adopted based on Article 66 (a) to (c) of the VAT Directive.

26 The Court held that '…in the field of VAT, taxable persons act as tax collectors for the State' and has regarded as justified provisions of the Sixth Directive designed to prevent 'large sums of public money accumulating in their hands during a tax period'. Judgment of 20 October 1993, *Balocchi* (C?10/92, EU:C:1993:846, paragraph 25).

27 This is also the (alternative) position of Skarpa, with the clear caveat flowing from its proposed answer to the first question that Article 65 of the VAT Directive cannot apply and that the VAT becomes chargeable only when the margin is known.

28 In some of the other language versions captured as *coût effectif supporté par l'agence de voyages* (French); *tatsächliche(n) Kosten die dem Reisebüro entstehen* (German); *faktyczne koszty poniesione przez biuro podró?y* (Polish); *skute?né náklady cestovní kancelá?e* (Czech); *coste efectivo soportado por la agencia de viaje* (Spanish).

29 See above points 39 to 57 of this Opinion.

30 Above, points 37 to 38.

31 Emphasis added.

32 'In respect of the supply of goods or services, other than as referred to in Articles 74 to 77, the taxable amount shall include everything which constitutes consideration obtained or to be obtained by the supplier, in return for the supply, from the customer or a third party, including subsidies directly linked to the price of the supply'. According to settled case-law, the definitive taxable amount under the general rules is the consideration actually received, see, for example (as regards supplies of goods), judgment of 29 May 2001, Freemans (C?86/99, EU:C:2001:291, paragraph 27 and the case-law cited).

33 See judgment of 26 September 2013 (C?189/11, EU:C:2013:587, paragraphs 101 to 104).

34 Judgment of 8 February 2018 (C?380/16, not published, EU:C:2018:76, paragraphs 87 to 92).

35 The various national solutions were described, as Skarpa pertinently pointed out at the hearing, in the report drafted for the Commission, entitled *Study on the review of the VAT Special Scheme for travel agents and options for reform*, Final Report TAXUD/2016/AO-05, December 2017 (accessible online at the website of the European Commission). That report mentions that around 14 Member States provide for such an alternative.

36 Proposal for a Council Directive of 8 February 2002 amending Directive 77/388/EEC as regards the special scheme for travel agencies, COM(2002) 64 final (OJ 2002 C 126E, p. 390). Similarly, the VAT Committee considered that it was acceptable to use an overall calculation: 'The Committee also held that the principle applied to travel agents of taxing the margin does not preclude determination of the margin for all transactions on the basis of the same formula during a specific period.' (Guidelines resulting from the 17th meeting of 4 to 5 July 1984, XV/243/84). See Guidelines resulting from meetings of the VAT Committee (Up until 2 July 2018), available at https://ec.europa.eu/taxation_customs/business/vat/vat-committee_en.

37 See judgment of 26 September 2013 (C?189/11, EU:C:2013:587, paragraphs 101 to 104).

38 Judgment of 8 February 2018 (C?380/16, not published, EU:C:2018:76, paragraphs 87 to 92).