Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 19 December 2019[1]

Case C-446/18

AGROBET CZ, s.r.o.
Other party:
Finanční úřad pro Středočeský kraj

(Request for a preliminary ruling from the Nejvyšší správní soud
(Supreme Administrative Court, Czech Republic))

(Reference for a preliminary ruling — Taxation — Value added tax (VAT) — Article 179 and Article 183 of Directive 2006/112/EC — Deduction of input tax — Excess VAT — Retention of the total amount of excess VAT upon a tax inspection in respect of part of the transactions — Partial refund of excess VAT claimed — Principle of neutrality — Principle of proportionality)

I. Introduction

1. Are tax authorities able to defer the refund of the total amount of excess VAT even though only a small part is still the subject of an ongoing tax inspection? The tax authorities and the Commission believe so, arguing that the deduction under Article 179 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax[2] ('the VAT Directive') is to be made only from the *total* amount.

2. This question is particularly sensitive because the part of the claimed deduction still to be investigated might be connected with a third party's fraudulent transactions, about which the taxable person possibly should have known. According to the Court's case-law,[3] this would permit (or require) the tax authorities to refuse the deduction in this regard.

3. But does this also mean that the deduction in respect of other indisputably 'legitimate' transactions can be deferred for several years?

1 Original language: German.

2 OJ 2006 L 347, p. 1.

3 Judgments of 16 October 2019, *Glencore Agriculture Hungary* (C-189/18, EU:C:2019:861, paragraph 35); of 3 October 2019, *Altic* (C-329/18, EU:C:2019:831, paragraph 30); and of 22 October 2015, *PPUH Stehcemp* (C-277/14, EU:C:2015:719, paragraph 48). See also, to that effect, judgments of 13 February 2014, *Maks Pen* (C-18/13, EU:C:2014:69, paragraphs 27 and 28), and of 6 December 2012, *Bonik* (C-285/11, EU:C:2012:774, paragraphs 39 to 40).

II. Legal framework

A. EU law

4. Article 168(a) of the VAT Directive provides:

'In so far as the goods and services are used for the purposes of the taxed transactions of a taxable person, the taxable person shall be entitled, in the Member State in which he carries out these transactions, to deduct the following from the VAT which he is liable to pay:

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

5. Article 179(1) of the VAT Directive concerns the application of the deduction by the taxable person:

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

6. Article 183(1) of the VAT Directive concerns the treatment of excess VAT by the Member State:

'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. …'

7. Article 273 of the VAT Directive provides for options for the Member States inter alia to combat evasion:

'Member States may impose other obligations which they deem necessary to ensure the correct collection of VAT and to prevent evasion, subject to the requirement of equal treatment as between domestic transactions and transactions carried out between Member States by taxable persons and provided that such obligations do not, in trade between Member States, give rise to formalities connected with the crossing of frontiers.

The option under the first paragraph may not be relied upon in order to impose additional invoicing obligations over and above those laid down in Chapter 3.'

B. Czech law

8. Under Paragraph 105(1) of Zákon č. 235/2004 Sb., o dani z přidané hodnoty (Law No 235/2004 on value added tax), 'when, following an assessment of excess VAT, the refundable overpayment is more than 100 Czech crowns (CZK), it shall be refunded automatically to the taxable person within 30 days of the assessment'.

9. Under Paragraphs 89 and 90 of Zákon č. 280/2009 Sb., daňový řád (Law No 280/2009 Coll., Tax Code), in the version in force until 31 December 2016 ('the Tax Code'), in a situation where it appears from a proper tax claim submitted that a tax deduction is due to the taxable person, the tax authority must, where there is doubt, issue a request for information to eliminate any doubts; if those doubts are not then eliminated and the amount of tax is not established with sufficient credibility, the tax authority may initiate a tax inspection.

10. According to the referring court, the Tax Code does not lay down any maximum period of time for a tax inspection or for the assessment procedure within which the tax inspection is carried out, apart from a time limit for calculating the tax. Under Paragraph 148 of the Tax Code, where a tax inspection is initiated before expiry of the time limit laid down for calculating tax, the tax must be calculated within three years of the start of the inspection; inter alia, the period of time allowed for calculating tax is to be suspended during ongoing international cooperation in tax administration, but may in any event be no longer than 10 years.

11. Paragraph 254a of the Tax Code provides that if a procedure to eliminate doubt relating to a proper tax claim from which it appears that a tax deduction is due to the taxable person continues for more than five months, the taxable person is to be entitled to interest on the tax deduction determined by the tax authority.

12. It is evident from the statements made by the referring court that a partial or provisional tax assessment of the undisputed part of a tax claim is clearly not possible under national law before the tax inspection has been completed.

III. Main proceedings

13. AGROBET CZ, s. r. o. ('AGROBET') is an undertaking engaged in the import and export of agricultural products and feed in particular.

14. In February 2016 it submitted a VAT return for December 2015 and January 2016 and reported excess VAT of CZK 2 958 167 (equivalent to around EUR 109 476) and CZK 1 559 241 (equivalent to around EUR 57 649). That excess VAT also included amounts to be deducted in respect of the purchase of rapeseed oil which AGROBET had sold on to a Polish undertaking free of tax.

15. The tax authorities initiated a tax inspection for the two tax periods because it had doubts as to the correct taxation of the rapeseed oil transactions. The doubts related both to the tax rate applied and to the existence of fictitious transactions in the light of the fact that the rapeseed oil originated from Poland, was traded on without further processing in the Czech Republic and was then sold on again by AGROBET to a consignee in Poland.

16. Given those doubts, assessment of VAT in respect of the periods December 2015 and January 2016 and refund of the calculated excess VAT were precluded. AGROBET thereupon offered to secure the disputed part of the VAT so that the undisputed part could be assessed and the remaining excess VAT paid. The tax authorities declined that offer on the ground that the excess VAT was indivisible and related to the tax period as a whole, not only the part for which the transactions were reported.

17. Following a request for information by way of international administrative assistance, in June 2016 the Polish tax authorities described the consignee of the rapeseed oil from AGROBET as uncontactable and thus as a 'missing trader'. The investigation of the rapeseed oil transactions at issue had not yet been finally concluded at the time of the hearing before the Court on 11 September 2019.

18. On 30 January 2017, the applicant submitted two applications against the defendant's inaction, requesting the court to require the defendant to issue a decision showing the tax calculation for the applicant's VAT for the December 2015 and January 2016 tax periods, in so far as such tax was not within the scope of the ongoing tax inspection. AGROBET brought an appeal on a point of law at the referring court against the judgment of 13 June 2017 dismissing those applications.

IV. Request for a preliminary ruling and procedure before the Court

19. By order of 31 May 2018, the Nejvyšší správní soud (Supreme Administrative Court, Czech Republic) referred the following question to the Court for a preliminary ruling pursuant to Article 267 TFEU:

'Is it consistent with European Union law and in particular with the principle of VAT neutrality for a Member State to adopt a measure which makes the assessment and payment of part of a VAT deduction claimed conditional on the completion of a procedure applying to all taxable transactions in a given tax period?'

20. In the proceedings before the Court, AGROBET, the Czech Republic, the Kingdom of Spain and the Commission submitted written observations and attended the hearing on 11 September 2019.

V. Legal assessment

A. Background to the problem at issue and interpretation of the question referred

21. The disputed excess VAT in respect of AGROBET results from the VAT treatment of cross-border trade in goods. An intra-Community supply (cross-border sale of goods) is in principle exempt in the country of origin (Article 138 of the VAT Directive). It is nevertheless possible to make a deduction in respect of the purchase (Article 169(b) of the VAT Directive). This system serves to put into effect the destination principle. Goods are exempted from domestic VAT in relation to the exporter and subject to VAT in the country of destination in relation to the importer (taxation of the intra-Community acquisition; see Article 2(1)(b), Articles 20, 40 and 68 of the VAT Directive). In such a business model, excess VAT therefore inevitably arises for the exporter.

22. In the case of domestic transactions, on the other hand, the method of compulsory set-off of the VAT due and entitlement to an input tax refund under Article 179 of the VAT Directive generally avoids such an excess because the taxable output transactions normally exceed the input transactions. However, undertakings engaged primarily in cross-border trade in goods are particularly reliant on a prompt refund of excess VAT.

23. Nevertheless, for this reason, cross-border trade is also very susceptible to fraud. All that is needed is for the consignee of the goods not to pay the VAT from the resale in the country of destination (here Poland) and then to disappear ('missing trader').

24. It would seem uncertain in the present case whether AGROBET should have known, with respect to the sale of rapeseed oil to its Polish purchaser, that the purchaser is such a VAT fraudster. In that regard, the Czech tax authorities wish to refuse AGROBET either the deduction from the purchase or the exemption from the sale. I consider it unlikely that the tax authorities wish to refuse AGROBET both the deduction from the purchase and the exemption from the sale (cumulatively), as that would be a double 'punishment' for the same 'offence'. It is not sufficiently clear from the order for reference, however, what specifically the tax authorities are investigating.

25. In any case, AGROBET had further transactions with other goods and other recipients in other Member States which, according to the referring court, are not problematic. Both the exemption and the right to deduction in respect of those transactions are established. In the main proceedings AGROBET is claiming only the resulting deduction, which is refused by the tax authorities as long as a tax inspection into the (possibly fraudulent) rapeseed oil transactions at issue is ongoing.

26. Such inspections can last for years, already more than three years in this case. Theoretically, the inspection of a single transaction to the value of one euro could therefore defer the tax assessment for all other transactions for several years. The absolute limit in national law seems to be 10 years. Such a deferral has a detrimental effect on an undertaking's cash flow and makes the VAT for that period a substantial cost factor even though, as a general tax on consumption, it is intended to fall only on the final consumer[4] and to be neutral as regards undertakings.

27. Consequently, for the referring court it is a question of whether the Czech Republic may refuse the satisfaction of an entitlement to deduction (or to refund of the resulting excess VAT) under Article 168 of the VAT Directive, which indisputably exists, in the course of the inspection of other transactions for the same tax period as well as the deduction for the transactions being investigated.

28. The essential question is therefore whether it is compatible with Articles 167 and 168 of the VAT Directive in conjunction with the principle of neutrality to defer the assessment and payment of *undisputed* excess VAT until all transactions for a given tax period have been adequately inspected, even if it is clear that a large part of the declared tax liabilities and the declared deduction is legitimate.

29. That would be the case if the deduction could not be granted in part, but only for the total amount (in its entirety) (see under B) or there could be no undisputed excess VAT, as is asserted by the Czech and Spanish Governments in particular (see under C). If that were not the case, however, the principle of neutrality in VAT law could even require a prompt partial assessment and payment of the undisputed excess VAT, which may be limited, if necessary, on grounds of effective fraud prevention (see under D).

B. Deferred payment of excess VAT because the deduction is indivisible?

30. The Czech Republic, the Kingdom of Spain and the Commission take the view, in essence, that the deduction for a given tax period can be granted only as an indivisible whole. They essentially rely on Article 179 and Article 183 of the VAT Directive.

31. Article 179 of the VAT Directive explains how the taxable person makes the deduction, namely by arranging a compulsory set-off with the total amount of VAT due for the given tax period. If the amount of VAT due exceeds the deduction, a lower amount of tax is still payable.

32. If, on the other hand, the amount of VAT due is less than the deduction, excess VAT remains. Article 183 of the VAT Directive contains detailed provisions governing the refund of that excess VAT. In both cases it is the same deduction by the taxable person, however.

1. Does Article 179 of the VAT Directive permit only an assessment of the total amount of excess VAT?

33. Article 179 of the VAT Directive provides that the taxable person is to make the deduction by subtracting from the *total* amount of VAT due for a given tax period the total amount of VAT in respect of which the right of deduction has arisen. Contrary to the claim made by the Commission and the Czech and Spanish Governments, Article 179 of the VAT Directive does not, however, indicate whether payment of the undisputed parts of the excess VAT may be deferred until a tax inspection in respect of other parts has been completed.

4 The aim of VAT as a general tax on consumption is to impose a tax on consumer capacity, which is demonstrated by consumers' expenditure of assets to procure a consumable benefit (supply of goods or services); see, for example, judgments of 11 October 2007, *KÖGÁZ and Others* (C-283/06 and C-312/06, EU:C:2007:598, paragraph 37 – 'it is proportional to the price charged by the taxable person in return for the goods and services which he has supplied') – and of 18 December 1997, *Landboden-Agrardienste* (C-384/95, EU:C:1997:627, paragraphs 20 and 23).

34. Article 179 of the VAT Directive does not regulate the options for Member States to limit the deduction in time, but only the taxable person's obligation to make the deduction from the total amount. It thus covers only a method of calculation by the taxable person. The taxable person cannot declare a deduction and claim its payment for each transaction in isolation. He can make the deduction only from the total amount for the given tax period by setting it off with the amount of VAT due (compulsory set-off).

35. Article 179 of the VAT Directive thus concerns only a procedural aspect of the exercise of the right of deduction. The substantive right of deduction under Article 167 of the VAT Directive, on the other hand, arises at the time the deductible tax becomes chargeable.

36. The basic requirement under VAT law set out in Article 2(1)(a) of the VAT Directive refers to transactions such as the supply of goods subject to VAT. Following on from this, Article 168(a) of the VAT Directive stipulates that the taxable person may deduct the VAT due in respect of supplies to him of goods or services carried out by another taxable person. The right of deduction is therefore to be understood not in relation to the total amount, but in relation to a transaction. The same conclusion follows from Article 178 of the VAT Directive, which requires an invoice within the meaning of Article 226 of the VAT Directive for the exercise of the right to deduction. This does not mean an invoice for the total amount, but an invoice for a transaction.

37. Thus, the Court also considers perfectly correctly, as a matter of course, that those entitlements are divisible when, in *Molenheide*, it speaks of 'lifting in whole or in part the retention of the refundable VAT balance'.[5] The situation in *Commission* v *Hungary* also quite naturally concerned the carrying forward of excess VAT or a part of it to another period.[6] The same holds for the deferral of part of the excess VAT in *Mednis*.[7] For that reason, the argument concerning the indivisibility of the deduction or excess VAT must be rejected.

38. Consequently, it also cannot be inferred from Article 179 of the VAT Directive and the words 'from the total amount' that the right of deduction is an indivisible right which the Member State could grant only in full or not at all.

2. Can national law preclude a partial refund pursuant to Article 183 of the VAT Directive?

39. Nevertheless, under Article 183 of the VAT Directive, the Member States may, in accordance with conditions which they are to determine, either make a refund of excess VAT or carry the excess forward to the following period, which the Czech Republic has not done. In this regard national law precludes a refund of excess VAT until the tax inspection for the given tax period has been completed.

40. As the Court has already ruled, however, Article 183 of the VAT Directive cannot be interpreted as meaning that no control may be exercised under EU law over the procedures established by Member States for the refund of excess VAT.[8]

5 Judgment of 18 December 1997 (C-286/94, C-340/95, C-401/95 and C-47/96, EU:C:1997:623, paragraph 56).

6 Judgment of 28 July 2011 (C-274/10, EU:C:2011:530, paragraph 56).

7 Judgment of 18 October 2012 (C-525/11, EU:C:2012:652, paragraph 38).

8 Judgments of 16 March 2017, *Bimotor* (C-211/16, not published, EU:C:2017:221, paragraph 20); of 18 October 2012, *Mednis* (C-525/11, EU:C:2012:652, paragraph 23); of 28 July 2011, *Commission* v *Hungary* (C-274/10, EU:C:2011:530, paragraph 40); and of 12 May 2011, *Enel Maritsa Iztok 3* (C-107/10, EU:C:2011:298, paragraph 28), citing the judgment of 21 January 2010, *Alstom Power Hydro* (C-472/08, EU:C:2010:32, paragraph 15).

41. It should first be pointed out that, according to settled case-law, the right of taxable persons to deduct the VAT due or already paid on goods purchased and services received as inputs from the VAT which they are liable to pay is a fundamental principle of the common system of VAT established by EU law. [9]

42. As the Court has consistently held, that right to deduct is an integral part of the VAT scheme and as a general rule may not be limited. In particular, that right is exercisable *immediately* in respect of all the taxes charged on transactions relating to inputs. [10]

43. Second, it must be observed that the existence of the right to deduct is covered by Articles 167 to 172 of the VAT Directive in the Chapter headed 'Origin and scope of right of deduction', whereas Articles 178 to 183 of the directive relate only to the conditions for the exercise of that right. [11]

44. The Court has made it clear that the conditions determined by the Member States cannot undermine the principle of neutrality of the VAT tax system by making the taxable person bear the burden of the VAT in whole or in part. [12]

45. In particular, such conditions must enable the taxable person, in appropriate circumstances, to recover the entirety of the credit arising from that excess VAT, which implies that the refund must be made within a reasonable period of time by a payment in liquid funds or equivalent means and that, in any event, the method of refund adopted must not entail any financial risk for the taxable person. [13]

46. This would be the case if payment of excess VAT claimed were deferred merely because a small partial amount is disputed and subject to a closer inspection. One thinks, for example, of an excess of EUR 100 000 and a disputed partial amount of a few hundred euro. This is not altered by the fact that national law provides for payment of interest after five months, as it does not eliminate the financial risk over the first five months and the payment of interest does not compensate for the cash-flow disadvantage.

47. Article 183 of the VAT Directive does not therefore allow the undisputed part of the claimed deduction not to be refunded solely because another part is still disputed.

3. Limitation based on Article 273 of the VAT Directive?

48. Nor is it possible to infer from Article 273 of the VAT Directive any right of the Member States to limit the deduction in time in this way. Under that provision, Member States may impose other obligations on taxable persons to ensure the correct collection of VAT and to prevent evasion. The part of the excess VAT at issue in this case is not, however, related to tax evasion. Therefore, Article 273 of the VAT Directive also cannot be relied on to justify why that part is assessed and paid only years later.

9 Judgments of 28 July 2011, *Commission* v *Hungary* (C-274/10, EU:C:2011:530, paragraph 42); of 12 May 2011, *Enel Maritsa Iztok 3* (C-107/10, EU:C:2011:298, paragraph 31); and of 10 July 2008, *Sosnowska* (C-25/07, EU:C:2008:395, paragraph 14). The Court made similar statements in the judgment of 18 December 1997, *Molenheide and Others* (C-286/94, C-340/95, C-401/95 and C-47/96, EU:C:1997:623, paragraph 47).

10 Judgments of 28 July 2011, *Commission* v *Hungary* (C-274/10, EU:C:2011:530, paragraph 43); of 12 May 2011, *Enel Maritsa Iztok 3* (C-107/10, EU:C:2011:298, paragraph 32); of 30 September 2010, *Uszodaépítő* (C-392/09, EU:C:2010:569, paragraph 34); and of 15 July 2010, *Pannon Gép Centrum* (C-368/09, EU:C:2010:441, paragraph 37 and the case-law cited).

11 Judgment of 28 July 2011, *Commission* v *Hungary* (C-274/10, EU:C:2011:530, paragraph 44). See, to that effect, judgments of 29 April 2004, *Terra Baubedarf-Handel* (C-152/02, EU:C:2004:268, paragraph 30), and of 8 November 2001, *Commission* v *Netherlands* (C-338/98, EU:C:2001:596, paragraph 71).

12 As is expressly stated in the judgment of 28 July 2011, *Commission* v *Hungary* (C-274/10, EU:C:2011:530, paragraph 45).

13 Judgments of 16 March 2017, *Bimotor* (C-211/16, not published, EU:C:2017:221, paragraph 33); of 18 October 2012, *Mednis* (C-525/11, EU:C:2012:652, paragraph 24); of 28 July 2011, *Commission* v *Hungary* (C-274/10, EU:C:2011:530, paragraph 45); of 12 May 2011, *Enel Maritsa Iztok 3* (C-107/10, EU:C:2011:298, paragraphs 33 and 64); and of 10 July 2008, *Sosnowska* (C-25/07, EU:C:2008:395, paragraph 17).

4. Interim conclusion

49. It can be stated, as an interim conclusion, that Articles 179, 183 and 273 of the VAT Directive do not include a right for the Member States to limit in time the total amount of excess VAT if only part of it is disputed, while the other part is undisputed.

C. Existence of an undisputed part of the excess VAT claimed

50. The Czech and Spanish Governments nevertheless take the view that there cannot be an undisputed part of the excess VAT since, as a balance, it is always dependent on the actual amount of VAT due.

51. As the Commission and the Czech and Spanish Governments correctly assert, the dependence of the excess VAT on the amount of VAT due is the corollary of the compulsory set-off provided for in Article 179 of the VAT Directive. It must therefore be possible for the tax authorities, where there is doubt over the amount of tax declared, to investigate it within a reasonable period of time and, if necessary, to calculate a higher amount of tax such that excess VAT might no longer remain.

52. On the one hand, it is settled case-law that the right to deduct is exercisable *immediately*.[14] On the other hand, the tax authorities must be allowed to inspect tax claims submitted by the taxable person. This applies in particular if, as is provided for in Article 179 of the VAT Directive, the taxable person himself deducts the sum from the amount of VAT due and thus himself calculates the amount of VAT still to be paid or the amount of excess VAT. The inspection concerns both the amount of the deduction and the amount of VAT due, which are both important for the amount of excess VAT.

53. Accordingly, in a case where the tax authorities had refunded only part of the excess VAT and the taxable person brought proceedings to obtain the remainder of the excess VAT, the Court ruled that the period of time for the refund of excess VAT may be extended in order to carry out a tax investigation, provided that the extension does not go beyond what is necessary for the successful completion of the investigation.[15] This related only to the *disputed* part of the excess VAT, however.

54. There is no need for the Court to determine here how long a reasonable period of time for such an inspection of the disputed part is and whether or not it is exceeded after nearly three years. AGROBET is not seeking the payment of the doubtful excess VAT to be inspected, but the assessment and refund of the undisputed part of the excess VAT, which requires no further inspection. On the basis of the facts presented by the referring court, there would still appear to be excess VAT, even in the light of all the tax authorities' doubts, here over the rapeseed oil transactions. AGROBET is therefore correct in asserting that there is undisputed excess VAT.

55. I would nevertheless like to state that this undisputed part of the *excess* VAT does not have to be identical to the undisputed part of the *deduction* which is evidently being claimed by AGROBET, but is dependent on whether there are also doubts over the amount of VAT payable by AGROBET. If the tax authorities have objective evidence that a higher amount of VAT is due, this would reduce the undisputed part of the excess VAT notwithstanding an undisputed deduction. Theoretically, there might also be a residual amount of VAT still to be paid. This must be clarified by the referring court, however.

14 Judgments of 28 July 2011, *Commission* v *Hungary* (C-274/10, EU:C:2011:530, paragraph 43); of 30 September 2010, *Uszodaépítő* (C-392/09, EU:C:2010:569, paragraph 34); and of 15 July 2010, *Pannon Gép Centrum* (C-368/09, EU:C:2010:441, paragraph 37 and the case-law cited).

15 Judgments of 6 July 2017, *Glencore Agriculture Hungary* (C-254/16, EU:C:2017:522, paragraph 21), and of 12 May 2011, *Enel Maritsa Iztok 3* (C-107/10, EU:C:2011:298, paragraph 53); similarly, judgment of 10 July 2008, *Sosnowska* (C-25/07, EU:C:2008:395, paragraph 27).

D. Prompt payment of the undisputed part of the excess VAT

56. That excess VAT, which is undisputed and requires no further inspection, must be paid promptly. This follows from the principle of neutrality (see points 57 et seq.), the function of the taxable trader as a mere tax collector for the State (see points 63 and 64) and the fundamental rights of the taxable person (see points 65 and 66). In addition, effective fraud prevention does not, in the present case, justify a deferral of the refund of the undisputed part of the excess VAT for an unlimited period of time (see points 67 et seq.).

1. The principle of neutrality

57. The principle of neutrality comprises two main elements. First, it precludes economic operators who effect the same transactions being treated differently in respect of the levying of VAT.[16] Secondly, the principle of neutrality also provides that the trader, as tax collector on behalf of the State, is in principle to be relieved of the final VAT burden,[17] inasmuch as the purpose of the economic activity itself is to achieve sales revenue that is (in principle[18]) subject to tax.[19]

58. Both characteristics are relevant here. First, a taxable person who primarily makes cross-border (exempt) supplies is treated less favourably by the rules and practice in the Czech Republic than a taxable person who carries out the same transactions domestically. Where there are doubts over a right to deduct in respect of individual domestic transactions, no cash-flow problem would arise before the completion of the tax inspection because the deduction can be realised through a set-off with higher amounts of tax due from other domestic transactions.

59. In order to refuse a possible unauthorised deduction of this kind, the tax authorities would have duly to issue a tax assessment, which could then also be subject to prompt judicial review (if necessary by way of an interim measure). Such a dispute would relate only to the disputed part, while the undisputed deduction would not be affected.

60. If, however, the taxable person carries out the same transactions in cross-border trade in goods, then under Czech law mere doubts on the part of the tax authorities over individual transactions are intended to be sufficient for the undisputed excess VAT too not to be paid. Such a difference in treatment between undertakings is incompatible with the principle of neutrality.

61. Furthermore, during the investigation, the exporting undertaking is required to pre-finance the VAT at its own expense, even though VAT is not intended to be a burden on the undertaking. The second aspect of the principle of neutrality is thus also applicable.

62. Such disadvantaging of cross-border trade gives rise to serious concerns from the point of view of EU law.

16 Judgments of 16 October 2008, *Canterbury Hockey Club and Canterbury Ladies Hockey Club* (C-253/07, EU:C:2008:571, paragraph 30); of 7 September 1999, *Gregg* (C-216/97, EU:C:1999:390, paragraph 20); and of 11 June 1998, *Fischer* (C-283/95, EU:C:1998:276, paragraph 22).

17 Judgments of 13 March 2008, *Securenta* (C-437/06, EU:C:2008:166, paragraph 25), and of 1 April 2004, *Bockemühl* (C-90/02, EU:C:2004:206, paragraph 39).

18 The exempt cross-border supplies at issue in this case, which give rise to a right to deduct under Article 169(b) of the VAT Directive, constitute an exception.

19 Judgments of 13 March 2014, *Malburg* (C-204/13, EU:C:2014:147, paragraph 41); of 15 December 2005, *Centralan Property* (C-63/04, EU:C:2005:773, paragraph 51); of 21 April 2005, *HE* (C-25/03, EU:C:2005:241, paragraph 57); and my Opinion in *Centralan Property* (C-63/04, EU:C:2005:185, point 25).

2. The trader as tax collector for the State

63. Second, the trader's function as tax collector for the State and in the interest of the public exchequer [20] is also affected. If the objective of VAT is to burden the final consumer and, in order for that objective to be achieved, the trader is merely obliged to collect VAT from its contracting partner and pay it to the tax creditor, the occurrence of excess VAT in accordance with Article 183 of the VAT Directive is actually an exception.

64. In such a case, the trader does not simply collect VAT and then pay it to the State, but he finances it himself initially. The pre-financing of a tax which is not actually intended to burden the trader must, however, be kept as low as possible in the light of the principle of neutrality. That is not the case if doubts over individual transactions are sufficient to allow pre-financing of undisputed transactions to continue for years or indefinitely.

3. The tax creditor's obligations to comply with fundamental rights

65. Lastly, the fundamental rights require prompt payment of the undisputed part of the excess VAT. Even though it collects VAT for the State, a trader continues to enjoy fundamental rights. VAT assessment measures constitute the application of EU law in accordance with Article 51 of the Charter. Member States must therefore comply with EU fundamental rights in the context of the application and interpretation of the VAT Directive.

66. There is no need to decide whether to regard the right of deduction, like the ECtHR, [21] as property (here Article 17 of the Charter) or whether the blocking of excess VAT for a time relates more to pursuing an occupation (Article 15 of the Charter) or freedom to conduct a business (Article 16 of the Charter). There is in any event an encroachment on the trader's fundamental rights if he is compelled to pre-finance a materially extrinsic tax for several years. Such encroachment may be justified, but only if it is proportionate.

4. Proportionality in the context of effective fraud prevention

67. That is not the case here. The Member States have a legitimate interest in taking appropriate steps to protect their financial interests. The prevention of possible tax evasion, avoidance and abuse is also an objective recognised and encouraged by the VAT Directive. [22]

68. Member States must, however, employ means which are the least detrimental to the objectives and principles laid down by the relevant Community legislation, which include the fundamental principle of the right to deduct VAT. [23] Those means may not therefore be used in such a way as to have the effect of systematically undermining the right to deduct VAT and thus undermining the neutrality of VAT. [24]

20 As is expressly stated in the judgments of 21 February 2008, *Netto Supermarkt* (C-271/06, EU:C:2008:105, paragraph 21), and of 20 October 1993, *Balocchi* (C-10/92, EU:C:1993:846, paragraph 25).

21 ECtHR, judgments of 7 July 2011 — 39766/05, paragraph 32 et seq. — *Serkov v. Ukraine*, and of 22 January 2009 — 3991/03, paragraph 57 — *Bulves v. Bulgaria*.

22 Judgment of 10 July 2008, *Sosnowska* (C-25/07, EU:C:2008:395, paragraph 22); see, to that effect, judgments of 6 July 2006, *Kittel and Recolta Recycling* (C-439/04 and C-440/04, EU:C:2006:446, paragraph 54); of 21 February 2006, *Halifax and Others* (C-255/02, EU:C:2006:121, paragraph 71); and of 18 December 1997, *Molenheide and Others* (C-286/94, C-340/95, C-401/95 and C-47/96, EU:C:1997:623, paragraph 47).

23 Judgments of 10 July 2008, *Sosnowska* (C-25/07, EU:C:2008:395, paragraph 23); of 27 September 2007, *Teleos and Others* (C-409/04, EU:C:2007:548, paragraphs 52 and 53); and of 18 December 1997, *Molenheide and Others* (C-286/94, C-340/95, C-401/95 and C-47/96, EU:C:1997:623, paragraphs 46 and 47).
Expressly with regard to proportionality in respect of VAT fraud prevention, judgment of 21 February 2008, *Netto Supermarkt* (C-271/06, EU:C:2008:105, paragraphs 19 and 20).

24 See, to that effect, judgments of 21 October 2010, *Nidera Handelscompagnie* (C-385/09, EU:C:2010:627, paragraph 49); of 27 September 2007, *Collée* (C-146/05, EU:C:2007:549, paragraph 26); of 21 February 2006, *Halifax and Others* (C-255/02, EU:C:2006:121, paragraph 92); and of 21 March 2000, *Gabalfrisa and Others* (C-110/98 to C-147/98, EU:C:2000:145, paragraph 52).

69. I wish to point out that the Court has already held that the general need to inspect a taxable person — in particular a new taxable person — cannot result in excess VAT not being refunded until six months later if the taxable person does not have the opportunity to dispel suspicion of tax evasion.[25] The Court made a similar ruling with regard to the general deferral of part of the excess VAT claimed from one month to one year.[26]

70. This must also apply if the only question is whether the taxable person should have known that a third party with whom he has done business is involved in tax evasion, but that suspicion relates to only part of the transactions and part of the deduction, as the blocking of the total excess VAT claimed for an indefinite period of time is disproportionate if only part of the declared transactions and part of the declared deduction are subject to doubts and thus to an inspection.

71. This can be seen very clearly where the doubts relate only to a small area of a taxable person's economic activities (for example, one of a thousand transactions were carried out with a recipient who was a tax evader), whilst it is not disputed that the vast majority of the activities were declared correctly.

72. An equally appropriate but less onerous means to prevent loss of tax revenue through possible participation in tax evasion by a third party in Poland is a tax assessment which takes into consideration that participation and otherwise duly assesses the undisputed transactions and the undisputed deduction. A further less onerous, equally appropriate means would be a provisional assessment with the lodging of a security (such as a bank guarantee) to cover the feared risk of loss of tax revenue that is to be investigated (which could result from a possible higher amount of VAT due), as has, moreover, been offered by AGROBET.

VI. Conclusion

73. I therefore propose that the Court answer the question asked by the Nejvyšší správní soud (Supreme Administrative Court, Czech Republic) as follows:

It is not consistent with Articles 167 and 168 of Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, in the light of the principle of neutrality, to defer the assessment and payment of the undisputed part of the excess VAT claimed for an indefinite period of time until the disputed part of the excess VAT claimed has been adequately inspected.

25 Judgment of 10 July 2008, *Sosnowska* (C-25/07, EU:C:2008:395, paragraph 24).

26 Judgment of 18 October 2012, *Mednis* (C-525/11, EU:C:2012:652, paragraph 33 et seq.).