Reports of Cases

OPINION OF ADVOCATE GENERAL
BOBEK
delivered on 26 March 2020[1]

Case C-835/18

SC Terracult SRL
v
Direcția Generală Regională a Finanțelor Publice Timișoara –Administrația Județeană a Finanțelor Publice Arad — Serviciul Inspecție Fiscală Persoane Juridice 5, Agenția Națională de Administrare Fiscală — Direcția Generală Regională a Finanțelor Publice Timișoara — Serviciul de Soluționare a Contestațiilor

(Request for a preliminary ruling from the Curtea de Apel Timişoara (Court of Appeal, Timişoara, Romania))

(Reference for a preliminary ruling — Taxation — Directive 2006/112/EC — Common system of value added tax (VAT) — Reverse charge mechanism — Adjustment of tax improperly invoiced — Refund of tax unduly paid — Transactions relating to a tax period that has already been the subject of a tax inspection — Principle of effectiveness — Fiscal neutrality — Good faith — Abuse of rights — Tax fraud — Legal certainty)

I. Introduction

1. A taxable person was the subject of an inspection by the tax authorities. Having identified errors with regard to a given transaction in which that taxable person acted as supplier, the tax authorities issued a tax assessment requesting the taxable person to pay additional value added tax (VAT). The taxable person complied with the tax assessment and paid the additional VAT requested.

2. Subsequently, however, new facts came to light which triggered a different tax regime (the reverse charge mechanism) with regard to the transaction at issue. In those circumstances, can the national tax authorities refuse to allow the taxable person to correct the relevant invoices, and thus, in effect, deny the taxable person the right to a tax adjustment, because the invoices relate to transactions carried out during a period which was the subject of a tax inspection, and the resulting tax assessment was not challenged by the taxable person at that time?

1 Original language: English.

II. Legal framework

A. EU law

3. Article 193 of Directive 2006/112/EC on the common system of value added tax,[2] as applicable at the material time,[3] provided:

'VAT shall be payable by any taxable person carrying out a taxable supply of goods or services, except where it is payable by another person in the cases referred to in Articles 194 to 199b and Article 202.'

4. Article 199a of the VAT Directive provided:

'1. Member States may, until 31 December 2018 and for a minimum period of two years, provide that the person liable for payment of VAT is the taxable person to whom any of the following supplies are made:

…

(i) supplies of cereals and industrial crops including oil seeds and sugar beet, that are not normally used in the unaltered state for final consumption;

…'

5. Pursuant to Implementing Decision 2011/363/EU, Romania was authorised to apply the reverse charge mechanism to some cereals, including rapeseed.[4] On 20 February 2014, Romania informed the Commission that, in conformity with Directive 2013/43, it would continue to apply that mechanism with regard to certain cereals until 18 December 2018.

B. National law

6. According to Article 7(2) of Ordonanța Guvernului nr. 92/2003 privind Codul de procedură fiscală, republicată (Government Order No 92/2003 on the Code of Tax Procedure), the tax authority is entitled to examine the factual situation of its own motion and to obtain and use all the information and documents required to establish correctly the tax position of the taxpayer, and is to identify and take into account all the circumstances relevant to each case.

7. Pursuant to Article 205(1) and Article 207(1) of the Code of Tax Procedure, a complaint may be lodged against any administrative act relating to taxation within 30 days of notification of that act, if it is not to be out of time. The complaint procedure does not deprive the taxable person of the right to a judicial remedy under the conditions laid down by law.

8. Article 213(1) of the Code of Tax Procedure, provides:

'The competent authority, ruling on the complaint, shall review the factual and legal grounds on which the administrative act relating to taxation is based. The analysis of the complaint shall take into account the arguments of the parties, the legal provisions invoked by them and the documents in the case file. The complaint is to be dealt with within the limits of the referral.'

2 Council Directive of 28 November 2006 (OJ 2006 L 347, p. 1) ('the VAT Directive').

3 Resulting from the amendments introduced by Council Directive 2013/43/EU of 22 July 2013 amending Directive 2006/112(OJ 2013 L 201, p. 4).

4 Council Implementing Decision of 20 June 2011 authorising Romania to introduce a special measure derogating from Article 193 of Directive 2006/112 (OJ 2011 L 163, p. 26).

9. Article 159 of Legea nr. 571/2003 privind Codul fiscal (Law No 571/2003 establishing the Tax Code), as amended and supplemented by Legea nr. 343/2006 (Law No 343/2006), which, in Title VI, transposed into national law, inter alia, the VAT Directive, provides:

'(1) Correction of the information entered in the invoice or in other documents used in its place shall be carried out as follows:

…

(b) where the document has been sent to the recipient, either a new document, which must contain, first, the information from the initial document, the number and date of the corrected document, and the values with a minus sign and, second, the correct information and values, shall be issued, or a new document containing the correct information and values shall be issued at the same time as a document with the values with a minus sign in which the number and date of the corrected document are entered.

…

(3) Taxable persons who have been subject to a tax inspection and in respect of whom errors have been detected and established as regards the correct determination of the tax charged, and who are required to pay those amounts on the basis of the administrative act issued by the competent tax authority, may issue to the recipients corrected invoices within the meaning of paragraph (1)(b). The invoices issued shall state that they were issued following an inspection and be entered under a separate heading in the tax return. The recipients have the right to deduct the tax entered in those invoices within the limits and under the conditions laid down in Articles 145 to 147^2.'

III. Facts, procedure and the question referred

10. Donauland SRL, a company that was later incorporated into Terracult SRL ('Terracult'), was the subject of a tax inspection by the Romanian tax authorities, which was completed in March 2014. The inspection found that, in the period from 10 to 14 October 2013, Donauland had supplied rapeseed to Almos Alfons Mosel Handels GmbH (Germany) ('Almos'). On finding that Donauland was unable to provide the supporting documents verifying that the goods had left the territory of Romania, the tax authorities considered that the VAT exemption for intra-Community supplies of goods was not applicable to those supplies.

11. On 4 March 2014, the authorities issued a tax assessment ('the first tax assessment') and a tax inspection report, which set out certain additional liabilities of Donauland, including VAT in the amount of 440 241 Romanian lei (RON) for the supplies of rapeseed made to Almos in October 2013, which were regarded as national supplies, subject to the standard VAT rate of 24%.

12. Donauland did not contest the first tax assessment.

13. On 28 March 2014, Almos informed Donauland that it had noted that the invoices issued by Donauland contained Almos' tax identification code ('TIC') for Germany. Almos informed Donauland that the goods had not left the territory of Romania and requested corrected invoices bearing the identification details of Almos' tax representative in Romania.

14. On the basis of the documents produced by Almos, Donauland recorded 180 corrected invoices in its accounts, pursuant to Article 159(3) of Law No 571/2003 establishing the Tax Code. The corrected invoices were issued to Almos (addressed to both Almos in Germany and its tax representative in Romania), showing the following transactions: (1) the cancellation of the intra-Community supplies made and the reclassification of them as national supplies, applying the standard VAT rate of 24%,

and (2) the cancellation of those national supplies to which the standard VAT rate had been applied and the inclusion of those supplies in the category of supplies of goods to which the reverse charge mechanism applied, on the basis that incorrect purchaser identification had been detected as a result of the communication of 28 March 2014.

15. The corrected invoices issued by Donauland were included in the VAT return of March 2014. Donauland deducted the VAT relating to those invoices from the VAT owed for that period.

16. As a result of an application for a refund of VAT, a new tax inspection was carried out during the period from November 2016 to February 2017, at the end of which the tax assessment of 10 February 2017 ('the second tax assessment') was issued. That tax assessment established an obligation for Terracult to pay additional VAT in the amount of RON 440 241.

17. Terracult lodged an administrative complaint against the second tax assessment, which was rejected by the Direcția Generală Regională a Finanțelor Publice Timișoara (Regional Directorate-General for Public Finance, Timișoara, Romania) on 14 July 2017.

18. On 2 February 2018, Terracult brought judicial proceedings before the Tribunalul Arad (Regional Court, Arad, Romania) requesting, inter alia, the partial annulment of the second tax assessment and a refund of the amount paid by that company on the basis of the first tax assessment. That court dismissed the action.

19. On 29 June 2018, Terracult brought an appeal against that judgment before the Curtea de Apel Timișoara (Court of Appeal, Timișoara, Romania). That court, harbouring doubts as to the compatibility of the national legislation at issue with EU law, decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Do the VAT Directive and the principles of fiscal neutrality, effectiveness and proportionality preclude, in circumstances such as those in the main proceedings, an administrative practice and/or an interpretation of provisions of national legislation which prevents the correction of certain invoices and, consequently, the entry of the corrected invoices in the VAT return for the period in which the correction was made, in respect of transactions carried out during a period which was the subject of a tax inspection, following which the tax authorities issued a tax assessment which has become final, when, after the issue of the tax assessment, additional data and information have been discovered which would entail the application of a different tax regime?'

20. Written observations have been submitted by Terracult, the Romanian Government and the European Commission. Those parties also presented oral argument at the hearing on 5 February 2020.

IV. Analysis

21. By its question, the referring court asks whether the provisions of the VAT Directive, and the principles of fiscal neutrality, effectiveness and proportionality, preclude a provision or practice of a Member State that does not allow the correction of invoices in respect of transactions carried out during a period which was the subject of a tax inspection, following which those authorities issued a tax assessment that has become final, where, after the issue of the tax assessment, additional information came to light which would give rise to the application of the reverse charge mechanism.

22. In my view, such a practice is incompatible with EU law. In order to explain that conclusion, it is necessary, first, to identify the taxable person liable for the payment of the VAT on the transaction at issue (A). Next, I will emphasise the importance of the right to make a tax adjustment and to obtain a refund of taxes unduly paid (B). Finally, I shall turn to the assessment of the grounds which the Romanian authorities have invoked to oppose the tax adjustment and refund of the tax unduly paid in the present case (C).

A. The taxable person liable for VAT

23. According to Article 193 of the VAT Directive, 'VAT shall be payable by any taxable person carrying out a taxable supply of goods or services, *except where it is payable by another person* in the cases referred to in Articles 194 to 199b and Article 202'. [5]

24. By Implementing Decision 2011/363, Romania was authorised — in the relevant period — to apply the reverse charge mechanism to the sale of rapeseed. In accordance with Article 199a(1) of the VAT Directive, in such a case, 'the person liable for the payment of VAT is the *taxable person to whom [the supplies] are made*'. [6]

25. In that connection, the Court has confirmed that, under the reverse charge regime, no VAT payment takes place between the supplier and the recipient of services, the recipient being liable, in respect of the transactions carried out, for the input VAT, while being able, in principle, to deduct that tax so that no amount is payable to the tax authorities. [7]

26. Since it is (now) common ground between the parties that, in respect of the transaction at issue, the reverse charge mechanism applies, the recipient was liable for the VAT and not the supplier. The fact that the supplier paid the VAT on the mistaken assumption that the reverse charge mechanism did not apply cannot authorise the tax authorities to derogate from the reverse charge mechanism, by holding that the person liable to pay the VAT is not the recipient but the supplier. [8]

27. Accordingly, the next issue to be examined is whether the supplier is, in principle, entitled to adjust the tax improperly invoiced and to obtain a refund of the tax unduly paid.

B. The right to adjust the tax improperly invoiced and to obtain a refund of the tax unduly paid

28. According to settled case-law, 'in order to ensure the neutrality of VAT, it is for the Member States to provide, in their domestic legal systems, for the *possibility of adjusting any tax improperly invoiced* where the person who issued the invoice shows that he acted in good faith'. [9]

29. It is also settled case-law that the *right to a refund of charges* levied in a Member State in breach of EU rules is the consequence and complement of the rights conferred on individuals by provisions of EU law as interpreted by the Court. Member States are therefore in principle required to repay charges levied in breach of EU law. [10]

5 Emphasis added.

6 Emphasis added.

7 See, to that effect, judgments of 13 June 2013, *Promociones y Construcciones BJ 200* (C-125/12, EU:C:2013:392, paragraph 23); of 26 April 2017, *Farkas* (C-564/15, EU:C:2017:302, paragraph 41); and of 11 April 2019, *PORR Építési Kft.* (C-691/17, EU:C:2019:327, paragraph 30).

8 See, by analogy, judgment of 23 April 2015, *GST — Sarviz Germania* (C-111/14, EU:C:2015:267, paragraph 29).

9 See judgment of 11 April 2013, *Rusedespred* (C-138/12, EU:C:2013:233, paragraph 26 and the case-law cited) (emphasis added).

10 See, among many, judgment of 16 May 2013, *Alakor Gabonatermelő és Forgalmazó* (C-191/12, EU:C:2013:315, paragraph 22 and the case-law cited).

30. In the absence of EU rules on the procedures for the adjustment by the issuer of the invoice of the VAT improperly invoiced,[11] and for the repayment of taxes,[12] the detailed procedural rules for those purposes are a matter for the domestic legal order of each Member State, in accordance with the principle of procedural autonomy. Those national rules must, however, observe the principles of equivalence and effectiveness: they must not be less favourable than those relating to similar claims founded on provisions of domestic law, or framed so as to render virtually impossible or excessively difficult the exercise of rights conferred by the EU legal order.

31. Therefore, a taxable person which has improperly invoiced VAT should be allowed to make an adjustment and, where appropriate, request a refund. The procedures by which the taxable person may proceed to a tax adjustment and request a refund are those set out in national law.

32. In the case at hand, it is not alleged that the national procedures do not comply with the principle of equivalence. Terracult argues, however, that those procedures breach, inter alia, the principle of effectiveness, since they make it impossible for it to make an adjustment and request a refund.

33. That position is contested by the Romanian Government. That government contends that, in the case at hand, the authorities could lawfully prevent the supplier from making an adjustment and claiming a refund. There are two reasons for this. First, the supplier did not challenge the first tax assessment within the prescribed period. Second, the Romanian Government appears to suggest that the supplier did not act in good faith or abused its rights. I shall assess those two arguments in turn.

C. Could the tax authorities oppose the adjustment and the refund?

1. Time limits

34. The Romanian Government argues that Terracult failed to challenge the first tax assessment within the prescribed time period. Therefore, it became final and could no longer be called into question.

35. In my view, the argument advanced by the Romanian Government conflates two situations. On the one hand, there is the scenario in which certain facts and/or the legal assessment of them have been made subject to an inspection by an administrative authority. Metaphorically speaking, a box containing certain elements was opened, inspected, and closed. On the other hand, there is the rather different scenario where new facts emerge later, which were not, as it were, in the box at the time of the inspection. In that circumstance, those specific elements could never have been reviewed for the simple reason that they were not present at the relevant time.

36. With regard to the first scenario, I would be inclined to agree that, had the tax assessment been erroneous at the time when it was issued, it would undoubtedly have been for Terracult to challenge it within the period laid down by national law. Failure to do so could have meant that the assessment became final and — regardless of its accuracy or lawfulness — no longer open to contestation by the taxpayer.

37. The Court has consistently stated that it is compatible with EU law to lay down reasonable time limits for bringing proceedings, in the interests of legal certainty, which protects both the taxpayer and the authorities concerned. Such periods are not by their nature liable to make it virtually impossible or excessively difficult to exercise the rights conferred by EU law, even if the expiry of those periods necessarily entails the dismissal, in whole or in part, of the action brought.[13]

11 See, inter alia, judgment of 19 September 2000, *Schmeink & Cofreth and Strobel* (C-454/98, EU:C:2000:469, paragraphs 48 and 49).

12 See, for example, judgment of 11 April 2019, *PORR Építési Kft.* (C-691/17, EU:C:2019:327, paragraph 39 and the case-law cited).

13 See, among others, judgment of 14 February 2019, *Nestrade* (C-562/17, EU:C:2019:115, paragraph 41 and the case-law cited).

38. In application of that principle, the Court has held, in connection with the reverse charge mechanism, that a limitation period, the expiry of which has the effect of penalising a taxable person who has not been sufficiently diligent, cannot be regarded as being incompatible with the regime established by the VAT Directive.[14] Indeed, the possibility of exercising the right to a refund of excess VAT without any temporal limit would be contrary to the principle of legal certainty, which requires the tax position of the taxable person, having regard to his rights and obligations vis-à-vis the tax authorities, not to be open to challenge indefinitely.[15]

39. However, the present case seems to be of a different nature. It appears to fall within the second scenario described above. In the case at hand, the tax assessment was, as far as can be ascertained from the case file, not wrong when it was issued by the tax authorities. The assessment reflected the data provided in the invoices and the results of the inspection carried out by the tax authorities. It was only later, following Almos' request to Donauland, that the input data changed.

40. Thus, the situation changed only *after* the tax assessment had been issued and Terracult had complied with it.[16] The recipient's request to use its Romanian VAT number triggered a change of legal regime. In those circumstances, Terracult can hardly be criticised for deciding to make use of the most obvious mechanism for adjusting VAT improperly invoiced, instead of challenging the legality of the tax assessment.

41. I understand that it would probably have been possible for Terracult to contest the first tax assessment under national law, despite it not being unlawful, on the basis of the new facts that arose after the assessment was issued.[17] Nevertheless, in the light of the EU and national rules, that would have been a somewhat unorthodox way for Terracult to have proceeded.

42. Indeed, a specific mechanism to rectify a situation such as that at issue in the main proceedings is expressly provided for in national law in Article 159 of Law No 571/2003 establishing the Tax Code. The existence of such a mechanism is — it may be worth emphasising — mandated by EU law. The Court has already made clear that the principle of fiscal neutrality and the principle of effectiveness *require* that the Member States provide for the instruments and the procedural rules necessary to guarantee that taxable persons have the possibility of adjusting any tax improperly invoiced, and are entitled to a refund of charges levied in breach of EU rules.[18]

43. The arguments put forward by the Romanian Government against the possibility for Terracult to take that course of action fail to convince. That government suggests that the case at hand gives rise to a potential clash between, on the one hand, the principle of legal certainty (deriving from the need to preserve the validity of acts not challenged within the prescribed period) and, on the other, the principle of fiscal neutrality (stemming from the need to ensure that a taxable person does not bear a tax for which it was not liable), and that it could legitimately favour the former over the latter.

14 See, to that effect, judgment of 12 July 2012, *EMS-Bulgaria Transport* (C-284/11, EU:C:2012:458, paragraph 49 and the case-law cited).

15 See judgment of 14 February 2019, *Nestrade* (C-562/17, EU:C:2019:115, paragraph 41 and the case-law cited).

16 Terracult can thus hardly be considered to have acted without diligence when, with a view to complying with the tax assessment, it paid the requested tax. Regardless of the underlying situation, it was required to do so under Article 203 of the VAT Directive, according to which 'VAT shall be payable by any person who enters the VAT on an invoice'.

17 The Romanian Government argued that that is indeed possible, and that view seems to be confirmed by the answers provided by the referring court to the questions posed by the Court. I note, however, that Terracult did not share that position, contending that the issue is not settled under national law.

18 See, to that effect, judgment of 11 April 2013, *Rusedespred* (C-138/12, EU:C:2013:233, paragraph 30 and the case-law cited).

44. That is not, in my view, an accurate way of portraying the present case. As already noted above in point 35 of this Opinion, I would stress once again that the case at hand does not concern an allegedly erroneous or unlawful tax assessment that was not challenged within the prescribed period. It concerns a transaction that, following the coming to light of new facts, was requalified after a tax assessment had been issued. Requiring the taxable person to challenge a (presumably legal and valid) tax assessment in those circumstances is not only counterintuitive, but it also raises a number of doubts from the perspective of fiscal neutrality, equality, and the right to an effective remedy.

45. First, interpreted in that way, national law would treat very differently taxable persons that are, in my view, in a similar situation. The length of the period in which a taxable person is permitted to correct information recorded in invoices and proceed to an adjustment would depend on whether or not the tax authorities had carried out an inspection and issued a tax assessment. Taxable persons that had been made subject to an inspection would have only 30 days to correct the invoices by challenging the legality of the tax inspection. Those who had not been inspected would have the normal period of five years. The issuance of a tax assessment would therefore mean that a 30-day period replaces the ordinary 5-year period.

46. That difference seems impossible to justify, since, with regard to new facts coming to light later, both taxable persons could be in exactly the same situation. In that respect, I would recall that, according to settled case-law, 'the principle of equal treatment, of which the principle of fiscal neutrality is the reflection in matters relating to VAT, requires similar situations not to be treated differently unless differentiation is objectively justified'. [19]

47. Second, obliging a taxable person to challenge a tax assessment within 30 days, even where the elements that may trigger an adjustment come to light after the issuance of that assessment, risks rendering the right to an effective remedy nugatory: depending on when those elements are discovered, the taxable person may have very little time to challenge the tax assessment, or may even be time-barred. For example, in the case at hand, Terracult would have had only a few days to challenge the first tax assessment (issued on 4 March 2014) after the new facts had come to light (28 March 2014). In the absence of an inspection and tax assessment, Terracult would have been able to correct the invoices and adjust the tax within the longer period of five years.

48. Third, and finally, those rather odd consequences underline the problematic starting point. I should stress that, in general, a national rule stating that what has already been reviewed (administratively or judicially) is not to be reopened is sound and proper. However, that principle can logically only be applied with regard to those matters, of law or fact, that were indeed the subject matter of a review. By contrast, the effect of being time-barred cannot extend to new elements that were not and could not have been subject to any such review, because they were not present at the relevant time. [20]

49. In the light of the above, I conclude that the provisions of the VAT Directive and the principles of fiscal neutrality, effectiveness and proportionality preclude a provision or practice of a Member State which does not allow the correction of invoices in respect of transactions carried out during a period which was the subject of a tax inspection, following which the tax authorities issued a tax assessment that has become final, where, after the issue of the tax assessment, additional information came to light which would give rise to the application of a different tax regime (the reverse charge mechanism).

19 See, for example, judgment of 13 March 2014, *Jetair and BTWE Travel4you* (C-599/12, EU:C:2014:144, paragraph 53).

20 A broader analogy can be made with the application of the same logic in the context of review by a court or tribunal. In that context, there is an even greater imperative for stability and immutability of legal relationships once they are created by a final decision of a court, which is certainly stronger than in the case of administrative or tax decisions. However, even in that context, the fact that a case was subject to an appeal or even a second appeal does not preclude reopening of the case, if new facts come to light later that justify such an extraordinary measure. They are simply different matters and different remedies. Thus, a similar logic must apply a fortiori to the system of VAT, which already provides for and accepts a much greater degree of *ex post* flexibility and possibility for readjustment in the name of fiscal neutrality.

2. Good faith, abuse of rights, and fraud

50. The Romanian Government also argues that the right to adjust and to claim a refund, normally provided for in national legislation, can be limited in circumstances such as those in the main proceedings because the supplier did not act in good faith or, at any rate, abused its rights. In that respect, the Romanian Government stresses that the correction of the invoices in fact nullified the results of the first tax assessment. Moreover, that government points out that the goods sold by Terracult to Almos have, after that sale, been the object of some suspicious transactions between Almos and a third party.

(a) Good faith

51. At the outset, it should be borne in mind that, although the right to adjust tax improperly invoiced must be granted when a taxable person acted in good faith, good faith is not a necessary condition of the right to an adjustment. Indeed, the Court has held that where the issuer of the invoice has, in sufficient time, wholly eliminated the risk of any loss of tax revenue, the principle of the neutrality of VAT requires that VAT which has been improperly invoiced can be corrected, without such adjustment being made conditional by the Member States upon the good faith of the issuer of the relevant invoice. The adjustment cannot be dependent upon the discretion of the tax authority.[21]

52. In that connection, I should point out that, in its response to the questions of the Court, the referring court states that it appears from the case file that the tax authorities never requested payment of the tax due from the recipient (Almos). It is unclear why the tax authorities did not make any attempt to verify whether the tax could be paid by the recipient, so that the amount unduly paid by the supplier (Terracult) could be refunded with no loss to the public purse. When asked the reason for that at the hearing, the Romanian Government was unable to provide any explanation.

53. Regardless of that aspect, and more importantly, I am unconvinced by the elements referred to by the Romanian Government in the context of the present proceedings to imply that Terracult did not act in good faith.

54. In particular, I fail to grasp the logic behind the argument according to which the fact that the effect of the correction of the invoices is to nullify the findings of the tax assessment resulting from the tax inspection is, in and of itself, an indication that the taxable person has not acted in good faith.

55. The very purpose of correcting the invoices is to alter a previous situation which, on the basis of elements that came to light subsequently, is considered to be incorrect. Consequently, the mere fact that the corrected invoices have nullified the effects of the first tax assessment is neither capable of proving nor sufficient to prove a lack of good faith on the part of the taxable person. Something more is required for that purpose. It should be recalled, in that regard, that the concept of 'good faith' entails the taxable person exhibiting all the due diligence of a circumspect trader.[22]

56. Therefore, the tax authorities can only invoke a lack of good faith if they expressly allege negligent behaviour on the part of the taxable person, explain the reasons in law and fact that support that view, and, where appropriate, submit evidence that corroborates those allegations.[23] Yet, in the present case, certainly as regards the facts and statements presented to this Court, there does not seem to be any clear and substantiated allegation in that respect.

21 See, to that effect, judgments of 19 September 2000, *Schmeink & Cofreth and Strobel* (C-454/98, EU:C:2000:469, paragraphs 58 and 68); of 18 June 2009, *Stadeco* (C-566/07, EU:C:2009:380, paragraphs 37 and 38); and of 11 April 2013, *Rusedespred* (C-138/12, EU:C:2013:233, paragraph 27).

22 Judgment of 21 December 2011, *Vlaamse Oliemaatschappij* (C-499/10, EU:C:2011:871, paragraph 26).

23 For more on this issue, see my Opinion in *Altic* (C-329/18, EU:C:2019:442, especially points 33 to 36).

57. It should be recalled that it is immaterial that the nullification, in effect, of the first tax assessment occurred after a tax inspection had taken place. Indeed, in *Zabrus Siret*[24]— a recent case which also concerned the national legislation at issue in the main proceedings — the Court unequivocally stated that '[the provisions of the VAT Directive], and the principles of effectiveness, fiscal neutrality and proportionality must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which, by way of derogation from the five-year limitation period imposed by national law for the correction of [VAT] returns, prevents, in circumstances such as those in the main proceedings, a taxable person from making such a correction in order to claim his right of deduction on the sole ground that that correction relates to a period that has already been the subject of a tax inspection'.[25]

58. The referring court, in fact, refers to this judgment in its request for a preliminary ruling, taking the view that the principles flowing from that judgment should be applicable to the situation at issue in the main proceedings.

59. I agree. In the light of the arguments put forward by the Romanian Government in its written and oral submissions, it would seem that the main problem in the case at hand is that the tax authorities had already checked the transaction at issue and, consequently, do not accept that the taxable person may subsequently undo the results of their assessment without going through the 'standard channels': administrative complaint followed, where appropriate, by judicial proceedings. However, in points 34 to 49 above, I have explained why, in the case at hand, that position is untenable.

(b) Abuse of rights

60. The same considerations apply with regard to the suggestions made by the Romanian Government that Terracult has abused its rights.

61. It may be recalled, in this context, that a finding of abuse requires two conditions to be satisfied. First, the transactions concerned, notwithstanding formal application of the conditions laid down by the relevant provisions of the VAT Directive and the national legislation transposing it, must result in the accrual of a tax advantage the grant of which would be contrary to the purpose of those provisions. Secondly, it must be apparent from a number of objective factors that the essential aim of the transaction concerned is to obtain a tax advantage.[26]

62. However, based on the elements in the case file, I cannot see that the tax authorities have established the existence of any abuse.

63. First, it is unclear what 'tax advantage the grant of which would be contrary to the purpose of [the VAT] provisions' Terracult could be seeking to obtain through its conduct. As mentioned in points 23 to 26 above, Terracult is not liable for the tax that it has paid. However, following the first tax inspection, it duly paid the tax. Subsequently, as Terracult observed at the hearing, it fell between two stools: on the one hand, it had paid VAT to the State that, although not due, cannot be refunded; on the other hand, the recipient refuses to reimburse that tax to Terracult since the transaction at issue is not subject to the ordinary tax regime but to the reserve charge mechanism. In essence, Terracult ends up having to bear tax for which it was not liable.

64. On that basis, it would appear to me that Terracult is not seeking to obtain an unjust advantage. It is merely trying to re-establish neutrality with regard to the transaction at issue.

24 Judgment of 26 April 2018 (C-81/17, EU:C:2018:283).

25 Ibid., paragraph 56 and the operative part.

26 See, to that effect, judgments of 21 February 2006, *Halifax and Others* (C-255/02, EU:C:2006:121, paragraphs 74 and 75), and of 22 March 2012, *Klub* (C-153/11, EU:C:2012:163, paragraph 49).

65. Second, it should be recalled that, to establish an abuse, the tax authorities must establish concrete elements that enable it to consider that the parties made use of an artificial construction in order to circumvent the application of the relevant VAT rules, in order to obtain an otherwise undue benefit. [27] Yet, there is nothing in the case file, and certainly nothing in the order for reference, that casts doubt on the genuine character of the corrections made to the invoices relating to the transaction at issue. The simple fact that the correction of the invoices had the effect of nullifying the results of the earlier tax assessment cannot, as already explained, constitute proof of a non-genuine transaction.

66. In the light of those considerations, what really matters, in a situation such as that at issue in the main proceedings, is whether the correction of the invoices is justified by the new elements invoked by Terracult or, conversely, whether it was made for fraudulent ends. That brings me to the next element referred to by the Romanian Government in that context.

(c) Fraud

67. In its submissions, the Romanian Government refers to the fact that the rapeseed sold by Terracult to Almos has been the object, after that sale, of some suspicious transactions between Almos and a third party.

68. In that regard, I would recall that, according to settled case-law, a taxable person loses the right of deduction where that person knew or should have known that, by his or her action, he or she was taking part in a transaction connected with VAT fraud. It is for the tax authorities, having found fraud or irregularities committed by a trader, to establish, in the light of objective factors and without requiring the other trader to carry out checks which are not that trader's responsibility, that the latter knew or should have known that the transaction relied on to establish the right of deduction was involved in VAT fraud. [28]

69. By contrast, where the material and formal conditions for the creation and exercise of a right of deduction are met, it is incompatible with the VAT Directive to impose a penalty in the form of refusing that right to a taxable person who did not know, and could not have known, that the transaction concerned was connected with a fraud committed by his or her business partner or by another trader acting upstream or downstream in the chain of supply. [29]

70. Against that backdrop, for the facts invoked by the Romanian Government to be relevant with regard to Terracult, the tax authorities should have established that Terracult was part of a fraudulent scheme, or at least that it was aware or should have been aware of it. Yet, at least in the context of the present procedure, the Romanian Government stopped short of claiming that there was a fraud or any other unlawful behaviour. Moreover, it did not bring forward any elements to corroborate the insinuation that Terracult was aware or should have been aware of the suspicious transactions carried out with the goods in question after the sale to Almos had taken place.

71. At the hearing, the Romanian Government was asked to explain more clearly why, in its view, Terracult had not acted with the necessary diligence in respect of those transactions, and which provisions of national or EU law could be the basis for requiring a higher degree of diligence of that company. However, the Romanian Government struggled to give a clear answer to that question. It only referred to Terracult's lack of responsiveness in searching documents which concerned the place of supply of the goods sold to Almos and, more generally, to (non-specified) failures in bookkeeping.

27 For more detail on this issue, see my Opinion in *Cussens and Others* (C-251/16, EU:C:2017:648, points 23 to 31, and 58 to 107).

28 See, to that effect, judgments of 22 October 2015, *PPUH Stehcemp* (C-277/14, EU:C:2015:719, paragraphs 48 and 50), and of 3 October 2019, *Altic* (C-329/18, EU:C:2019:831, paragraphs 30 and 31).

29 See, to that effect, judgments of 6 July 2006, *Kittel and Recolta Recycling* (C-439/04 and C-440/04, EU:C:2006:446, paragraphs 45 and 46), and of 22 October 2015, *PPUH Stehcemp* (C-277/14, EU:C:2015:719, paragraph 49).

72. I found that answer perplexing, especially since Terracult (and subsequently Almos) agreed with the findings of the tax inspectors with regard to the requalification of the sale as a national supply, and no allegation regarding failures in bookkeeping on the part of Terracult had been raised before the hearing. In any event, I am not convinced that any such failure — being, as the Commission rightly pointed out, arguably minor and purely formal — could justify a complete loss of the right to adjust and obtain a refund by Terracult.

73. According to settled case-law, Member States may adopt measures in order to ensure the correct levying and collection of VAT and for the prevention of fraud. However, those measures must not go further than is necessary to attain the objectives thereby pursued and may not, therefore, be used in such a way that they would have the effect of undermining the neutrality of VAT.[30] In particular, the Court has stated that a penalty consisting of an absolute refusal of the right to deduct is disproportionate where no evasion or detriment to the budget of the State is ascertained.[31] A similar principle must, no doubt, be valid in respect of an absolute refusal to allow a taxable person to adjust tax improperly invoiced and obtain a refund of tax unduly paid.

74. A Member State can therefore refuse the adjustment and the refund claimed by a taxable person only where the tax authorities can, based on objective factors, establish to the requisite legal standard that the correction of the invoices triggering the application of the reverse charge mechanism was made in bad faith, constituted an abuse of rights, or was connected to a tax fraud of which the supplier was aware or should have been aware.

75. It is obviously for the referring court to ascertain whether that is the case in the main proceedings.

V. Conclusion

76. I propose that the Court answer the question referred for a preliminary ruling by the Curtea de Apel Timișoara (Court of Appeal, Timișoara, Romania) as follows:

– Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, and the principles of fiscal neutrality, effectiveness and proportionality, preclude a provision or practice of a Member State which does not allow the correction of invoices in respect of transactions carried out during a period which was the subject of a tax inspection, following which the tax authorities issued a tax assessment that has become final, where, after the issue of the tax assessment, additional information came to light which would give rise to the application of the reverse charge mechanism.

– A Member State can refuse the tax adjustment and the refund of the tax unduly paid by the supplier only where the tax authorities can, based on objective factors, establish to the requisite legal standard that the correction of the invoices triggering the application of the reverse charge mechanism was made in bad faith, constituted an abuse of rights, or was connected with a tax fraud of which the supplier was aware or should have been aware. It is for the referring court to ascertain whether that is the case in the main proceedings.

30 See, to that effect, judgment of 11 April 2013, *Rusedespred* (C-138/12, EU:C:2013:233, paragraphs 28 and 29).

31 See, to that effect, judgment of 12 July 2012, *EMS-Bulgaria Transport* (C-284/11, EU:C:2012:458, paragraphs 68 and 70).