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Certified Public Accountants

VAT NEWSLETTER Q4 - 2017

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ABOUT US

Zampa Debattista is a boutique accounting and assurance firm primarily focused on international business. Its main areas of specialization are VAT, Audit and Assurance, and Financial Reporting. Zampa Debattista is in a position to offer its clients quality professional services whilst at the same time retaining a high level of partner involvement.

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LOCAL NEWS

1.1 GUIDELINES ON GAMBLING AND BETTING ACTIVITIES

By Notice No. 1293 in the Government Gazette of 21st November 2017, the Commissioner for Revenue published guidelines setting out which supplies related to gambling, when supplied in Malta, classify as exempt without credit in terms of Item 9 of Part Two of the Fifth Schedule to the VAT Act. The guidelines should be welcome by the gaming sector in Malta and advisors alike, as they aim to explain the VAT treatment of gaming and betting transactions by type.

The guidelines are available on the following link:
http://vat.gov.mt/en/VAT-Information/Guidelines-to-certain-VAT-procedures/Documents/Guidelines%20on%20Gambling%20and%20betting%20Actiivities.pdf

1.2 AMENDED GUIDELINES REGARDING VAT TREATMENT OF YACHT AND AIRCRAFT LEASING

The Commissioner for Revenue has published amended versions of the guidelines regarding the VAT treatment of yacht and aircraft leasing. It is noted that the determination of the period that the boat/aircraft spends within the territorial waters/airspace of the EU is not carried out by automatic reference to the published table but shall be subject to approval by the Commissioner after that the rental company shows to his satisfaction that it cannot reasonably carry out a physical assessment of such time outside the EU due to reasons beyond its control. Each application submitted is examined on a case by case basis and has to be approved in writing by the Commissioner.

The amended guidelines are available on:
http://vat.gov.mt/en/VAT-Information/Guidelines-to-certain-VAT-procedures/Documents/Guidelines%20on%20VAT%20treatment%20of%20Yacht%20Leasing%20_1_.pdf

1.3 GUIDELINES REGARDING USE OF SPORTS FACILITIES

By means of Notice No. 1315 in the Government Gazette of 28th November 2017, the Commissioner for Revenue published guidelines for the application of a reduced rate of 7% on the use of sporting facilities consisting of movable equipment which is used exclusively for physical activity with effect from 1st January 2018.

It is our understanding the provision covers the rental of bicycles and as such is intended to implement a measure announced in the Budget Speech for 2018.

The guidelines may be accessed on: http://vat.gov.mt/en/VAT-Information/Guidelines-to-certain-VAT-procedures/Documents/Govt.%20Notice%201315%20-%20Reduced%20Rate%20on%20sports%20equipment-Bicycles.pdf

1.4 LEGAL NOTICE 347 PUBLISHED ON 6TH DECEMBER 2017

Under this new regulation, which came into force on date of publication, "food supplied in terms of item 9 of Part One of the Fifth Schedule (i.e., food for human consumption excluding food supplied in the course of catering), where such food is served for consumption by any person in the same establishment, shall be considered as food supplied in the course of catering".

Comment: This regulation is aimed to extinguish the practice adopted by a number of specialised catering establishments that did not apply VAT to food purchased raw but charged the VAT only on the service of cooking the raw food and serving it on their premises. As a result of this amendment VAT has to be levied on the full price charged to the customer as the supply of the raw good is considered food in the course of catering once it is served for consumption in the same establishment.

1.5 LEGAL NOTICE 348 PUBLISHED ON 6TH DECEMBER 2017

This legal notice introduces the rules for the treatment of vouchers which come into effect as from the 1st of January 2019. Essentially, it contains the definitions of a single-purpose voucher, a multi-purpose voucher, their respective VAT treatment and the taxable value for a multi-purpose voucher. The legal notice implements the provisions of Council Directive 2016/1065/EU amending Council Directive 2006/112/EC regarding the treatment of vouchers.

Comment: The popularity and steady increase in the use of vouchers render these regulations very important particularly for businesses issuing, handling or redeeming vouchers.

1.6 VAT APPEALS DECIDED BY THE ADMINISTRATIVE REVIEW TRIBUNAL (ART)

On 17th October 2017 the ART published the following three decisions:

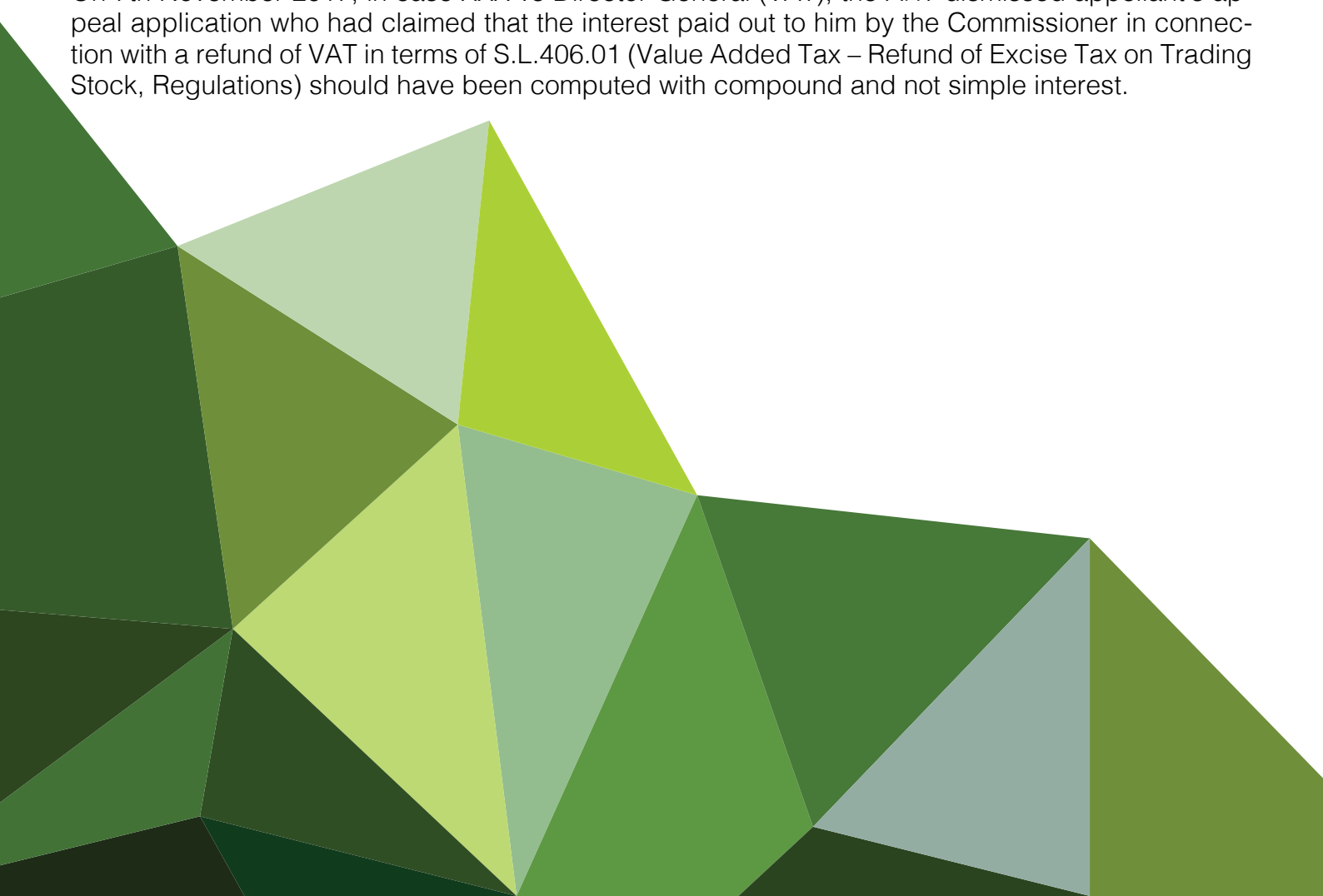
- In case XXX vs Director General (VAT) it partially reduced the interest due on tax payable in respect of VAT returns which were submitted after their due date. In its appeal the appellant XXX had requested that the interest be waived in full as in the light of the circumstances of the case it contested that the interest was unfairly charged and furthermore alleging that the Director General by merely reducing the /administrative penalties did not exercise fairly his discretion to waive/reduce the interest. The Director General rebutted these claims maintaining that the interest was imposed in terms of the pertinent VAT legal provisions and that his discretion was limited only to waiving/reducing administrative penalties but not interest. The ART was of the view that given the particular circumstances of the case, and acknowledging that the discretion of the

Director General was indeed limited to waiving/reducing administrative penalties, yet he ought to have carried the request to the Minister (for Finance) who had such discretionary powers to waive/reduce interest in terms of the VAT Act, and not simply and conveniently rested on the legal provision which did not empower him to reduce the interest.

- In case XXX vs Commissioner of Value Added Tax it partially revised the appealed VAT assessments in favour of appellant company (a transport service provider). The assessments were issued following an audit trail exercise carried out by the VAT Department Inspectors principally on the company subcontractors to ascertain the correctness of company XXX Input VAT claims. Pursuant to this exercise the VAT Department had raised assessments to cancel the Input VAT which according to its judgement was not in conformity with the pertinent VAT deduction provisions. Following a laborious verification exercise the ART concluded that the VAT Department was not entirely correct in its judgement particularly since in the case of some tax invoices the certification exercise was minimal whereas a deeper investigation would have led to more robust results.

- In case XXX vs Commissioner of Value Added Tax it partially revised the appealed VAT assessments in favour of appellant company (manufacturing company). The Commissioner had raised these VAT assessments following an investigation in respect of which XXX allegedly did not furnish all the documentation requested by the Commissioner relative to the tax periods under investigation. After examining all the facts of the case, the ART observed that except for an error in one of the computation tables and an adjustment of an amount of €50,741 which had not been taken into consideration, it was satisfied that the basis of the assessments was correct. Furthermore, appellant company did not provide any credible proof in defence of its claim to have the assessments overturned. In the light of the foregoing, the ART ordered the revision of the assessments to take on board the computation error and the €50,741 adjustment.

On 7th November 2017, in case XXX vs Director General (VAT), the ART dismissed appellant's appeal application who had claimed that the interest paid out to him by the Commissioner in connection with a refund of VAT in terms of S.L.406.01 (Value Added Tax – Refund of Excise Tax on Trading Stock, Regulations) should have been computed with compound and not simple interest.



2.0 EUROPEAN NEWS

2.1 COMMISSION PROPOSALS FOR A SINGLE VAT AREA

On 4th October 2017, the European Commission tabled three proposals for adoption by the Council to reform the EU VAT system in line with the Communication to the Council and European Parliament for an Action Plan on VAT Towards a Single EU VAT area.

These measures continue to implement the master plan for the reform of the EU VAT system within the framework of the Action Plan for the Future of VAT launched by the Commission in December 2011. These proposals follow others already adopted and on which significant progress has been achieved, such as modernisation of cross-border e-commerce and VAT rate for e-publications.

COM(2017) 569 final – Proposal for amending Directive 2006/112/EC as regards harmonising and simplifying certain rules in the value added tax system and introducing the definitive system for the taxation of trade between Member States.

COM(2017) 568 final – Proposal amending Implementing Regulation (EU) 282/2011 as regards certain exemptions for intra-Community transactions.

COM(2017) 567 final – Proposal amending Regulation (EU) 904/2010 as regards the certified taxable person.

In summary the proposals will be laying out the legal framework and practical procedures for the VAT treatment of cross-border supplies of goods based on the destination principle.

Under the proposed new system, goods supplied cross-border shall be taxed at the country of destination. The supplier shall be the person liable to pay the VAT in the Member State of destination, which VAT he shall charge and levy from his customer. Unless classified as a certified taxable person, the customer shall have to pay the VAT to the supplier and recover it as Input VAT in his domestic VAT return. A certified taxable person would be a taxable person who is issued a certificate (viewable in the VIES system) by the Tax Administration in the Member State of establishment and as result of which he shall be exempt from paying the VAT to his supplier on cross-border supplies of goods. Tax Administrations will only issue such certificates to compliant registered persons and shall have the power to withdraw them at any time according to their judgement.

To complement the smooth functioning of the proposed system and prevent the registration obligation in various Member States, a ‘One Stop Shop’ simplification concept (similar to the Mini One Stop Shop currently used for B2C electronically supplied services) will be introduced,

whereby the supplier will file a single on-line VAT return with one payment in the Member State where established and the Tax Administration in the Member State will in turn distribute the tax to the respective Member States where it was due.

The Commission has set out a road-map for the full implementation of the reform as follows:

- By end 2017, a Proposal for a modernised system of setting VAT rates with the scope of modernising the VAT rates framework and give greater flexibility to Member States as regards VAT rates;

- By end 2017, a Proposal to reinforce administrative cooperation between Member States to enable them to share information more quickly and to cooperate more;

- By end 2017, a Proposal to simplify VAT for SMEs which aims to update special VAT rules for smaller companies, including looking at how to ease VAT obligations for small and medium-sized enterprises;

- By Spring 2018, a full technical adaptation of the VAT Directive to reflect the changes needed to practically implement the VAT definitive regime as proposed by the Commission;

- In 2022, entry into force of the Single EU VAT area, once agreed.

2.1 COMMISSION PROPOSALS FOR A SINGLE VAT AREA

On 5th December 2017, the Economic and Financial Affairs Council adopted the new rules for VAT on e-commerce in line with the EU's digital single market strategy. The new rules will make it easier for businesses carrying out on-line trading to comply with their VAT obligations by reducing red tape thus achieving both cost savings for businesses and increased tax revenue for the Member States. Since VAT for distance sales shall be payable in the Member State of the consumer, the Mini One-Stop Shop currently in use for B2C telecommunication, broadcasting and electronically supplied services will be extended for use with distance sales, basically under the same conditions. For start-ups and SMEs, a simplification measure whereby cross-border on-line sale of goods below a yearly threshold of €10,000 can be taxed in the Member State of establishment, can apply. The new rules set out the following timeline:

- By 2019, the coming into force of simplification measures for intra-EU sales of electronic services;

- By 2021, the extension of the one-stop shop to distance sales of goods, both intra-EU and from third countries, as well as the elimination of the VAT exemption for small consignments

3.0 ANALYSIS OF WORKING PAPERS DISCUSSED IN 109TH MEETING OF THE VAT COMMITTEE[1]

3.1 WORKING PAPER NO. 934 – ISSUES ARISING FROM CJEU CASE C-526/13 FAST BUNKERING KLAIPEDA (FOLLOW UP)

By a decision in Case C-526/13 published on 3rd September 2015 the Court of Justice of the European Union ruled that whilst in principle the supply of fuel (to be eventually used to provision ships navigating on the high seas for commercial activities) to intermediaries acting in their own name is not covered by the Art. 148(a) exemption, yet in the circumstances such as those at issue in the main proceedings (where the legal ownership of the fuel was directly transferred from the fuel supplier to the ship operator bypassing the intermediary) the exemption may apply also on the supply to the intermediary (a matter, however, to be decided by a national court).

As a follow-up to this case, the VAT Committee on 8th July 2016, published a set of guidelines where it was interpreted unanimously that insofar as the qualification of transactions involving goods supplied through intermediaries is concerned: (a) the decision (to be construed narrowly) shall be seen as predicated on the specific facts of the case in question; and (b) where goods are being supplied through intermediaries (chain transactions) qualification must be given to the provision that a transfer of goods pursuant to a contract under which commission is payable on purchase or sale shall be regarded as a supply of good in which case the recipient of the first supply shall be the intermediary acting in his own name.

This paper was introduced by Denmark following concerns by business representatives who contacted them and expressed fear that there is a real danger that the judgment of the CJEU is being applied in different ways and measure in Member States thus leading to an unfair competitive advantage. The Danish delegation wished to know how the CJEU decision was being interpreted in the respective Member States. The Commission legal services whilst supporting the analysis developed when Working Paper No. 907 was discussed which eventually led to the publication of the guidelines, the discussion this time should focus on identifying the possible divergencies in the application of Art 148(a) of the VAT Directive and possible ways of finding a common ground in this respect between Member States. For this purpose, the delegates were invited to give their opinion on a set of issues/questions set out in the paper.

3.2 WORKING PAPER NO. 936 – SCOPE OF THE EXEMPTION IN ARTICLE 135(1)(G) FOR THE MANAGEMENT OF SPECIAL INVESTMENT FUNDS

The working paper sets out to analyse in detail the scope of the exemption provided in Article 135(1)(g) of the VAT Directive concerning the management of special investment funds. It aims to clarify the concepts of "management" and "special investment funds" for the purpose of applying the exemption and in particular addresses two fundamental questions: (i) whether certain activities outsourced by fund managers (in particular, advisory services) could be seen as fulfilling the specific and essential functions of the management of special investment funds and thus also be exempt; and (ii) whether certain types of funds could be seen as special investment funds for the purposes of the exemption. If such funds are found to fall within the definition of special investment funds, management services provided in respect of them would also be exempt.

The Commission legal services, by reference to settled case law of the CJEU, noted that the purpose of the exemption of transactions connected with the management of special investment funds is, particularly, to facilitate investment in securities by means of investment undertakings by excluding the cost of VAT and, in that way, ensuring that the common system of VAT is neutral as regards the choice between direct investment and investment through collective investment undertakings. However, it is to be kept in mind that under the common system of VAT exemptions must be interpreted strictly, since they constitute an exception to the general principle that VAT is to be levied on all services supplied by a person for consideration.

There are two fundamental conditions that are to be met for the exemption to apply, namely, that the services must qualify as "management services" and secondly that they are supplied in respect of funds which qualify as "special investment funds". As regards, the first condition, it should be examined whether certain supplies of services which can be outsourced by fund management companies, such as advisory services, could be seen as fulfilling the specific and essential functions of the management activity whereas with regard to the second condition it is to be seen whether the special investment fund (not defined in the VAT Directive) falls into the concept of "special investment fund" as defined by the pertinent Member States. In the case of the latter , the CJEU in case C-363/05 JP Morgan Fleming Claverhouse, set out the principle that whilst the exemption provided in Article 135(1)(g) of the VAT Directive has its own independent meaning in EU law which must give a common definition so as to avoid divergencies in application of the VAT system between Member States and at the same time the legislation confers to Member States the task of defining the concepts in question in their own domestic law then the Member States have to ensure that those concepts as defined in their own domestic law are in line with and fulfil the objectives set out in the VAT Directive.

The paper then proceeds to outline in detail the different types of funds fall under the UCITS[2] or the AIFM[3] directives and which tests need to be carried out to determine whether such funds configure into the concept of a "special investment fund" for the purpose of applying the Article 135(1)(g) exemption.

4. UPDATE OF LATEST CJEU DECISIONS IN THE FIELD OF VAT

4.1 Case C-298/16 Ispas

On 9th November 2017 the CJEU ("the Court") released its judgment in the above case regarding a reference for a preliminary ruling by the Court of Appeal of Romania as to whether the general principle of EU law on the respect for the rights of the defence must be interpreted as a requirement that, in national administrative procedures of inspection and establishment of the basis for VAT assessment, an individual is to have access to all information and to all documents in the administrative file and considered by the public authority when it adopted its decision. Since the Court was not being asked for a ruling on an interpretation of any particular VAT Directive provision and furthermore since the grounds that the order for reference did not provide sufficient detail on the facts of the case in the main proceedings to enable it to give a useful answer, the Romanian Government and the European Commission opposed the hearing of the case. The Court however ruled that the case was admissible for hearing since the general obligations ensuing from the VAT Directive are easily identifiable and it was in a position to give a useful reply to the national referring court.

The dispute in the main proceedings concerned a claim by Mr and Mrs Ispas (property developers) that the VAT assessment notices served on them by the Tax Authority following an inspection of their business activity were null and void on grounds that their rights of defence had not been respected. According to them, the mere invitation to a final discussion over the assessments was not sufficient to enable them to subsequently be in a position to challenge the assessments. They contend that they had a right to be given access to the all the relevant information on the basis of which the Tax Authority issued the assessment notices.

The Court recalled that respect for the rights of the defence is a general principle of EU law which is to be applied where the authorities are prepared to adopt, in respect of a person, a measure that will adversely affect him. In line with that principle the addressees of decisions that significantly affect their interests must be placed in a position in which they can effectively make known their views as regards the information on which the authorities intend to base/or have based their decision. On the other hand, account has to be taken of a Member State's obligations arising from the application of EU legislation, to take all legislative and administrative measures appropriate for ensuring collection of all the VAT due on its territory and for preventing fraud, which obligations may include measures such as submitting taxpayers to a tax inspection procedure. The situation at issue in the main proceedings had therefore to be examined in the light of these two general principles.

The Court observed that failing any relevant EU rules governing the matter, the detailed procedural rules designed to ensure the protection of the rights which taxpayers acquire under EU law are a matter for the domestic legal order of each Member State in accordance with the rules of procedural autonomy of the Member State provided that they are not less favourable than those governing domestic situations (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of the rights conferred by the EU legal order (principle of effectiveness). Whilst the Court found no issue concerning the application of the principle of

equivalence, with regard to the principle of effectiveness it noted that in a tax inspection procedure as is the case in the main proceedings, the purpose of which was to verify whether the taxable person had performed his VAT obligations, it is indeed legitimate go expect that those persons would request access to those documents and information, with a view, if need be, providing explanations or supporting their claims against the point of view of the tax authorities. If the rights of the defence are to be genuinely respected, there must nonetheless be a real possibility of access to those documents and that information, unless objectives of public interest warrant a restriction of that access.

On those grounds the Court ruled that the general principle of EU law of respect for the rights of the defence must be interpreted as a requirement that, in national administrative procedures of inspection and establishment of the basis for VAT assessment, an individual is to have an opportunity to have communicated to him, at his request, the information and documents in the administrative file and considered by the public authority when it adopted its decision, unless objectives of public interest warrant restricting access to that information and those documents.

Comment: The above decision may in our view become relevant for taxpayers to assert their rights of defence when served with VAT assessments by the Commissioner, ideally at Provisional Assessment stage. Taxpayers have long complained that they are not given adequate information and access to documentation until and unless the assessments are challenged in the Administrative Review Tribunal.

4.2 Case C-101/16 SC Paper Consult srl.

On 19th October 2017 the CJEU ("the Court") published its judgement in the above case concerning the exercise of the right of deduction.

According to the facts of the case Paper Consult were challenging a decision of the Tax Authority by virtue of which their entitlement to claim an amount of €44,560 input VAT paid on services provided by Rom Packaging was being refused. On the basis of Romanian national legislation taxpayers are precluded from claiming input VAT charged to them by taxpayers who are declared inactive (and hence forcibly de-registered) by the Tax Authority and whose names are published on its website, such as is the case with Rom Packaging. Paper Consult challenged this decision submitting that to be able to benefit from the right of deduction it suffices to meet the conditions laid down in Article 178 of the VAT Directive.

Referring to settled case law on the right of deduction, the Court remarked that the right of deduction is a fundamental principle of the EU common system of VAT aimed as it is to guarantee neutrality for businesses. On the other hand, account has to be taken of the Member States obligation to ensure the collection of the tax due in their respective territories and to prevent evasion and fraud. Any consideration to be made has therefore to seek a balance between the two. The Court in previous cases had established that the right to deduct VAT is subject to compliance with both substantive and formal requirements or conditions. Accordingly, the fundamental principle of VAT neutrality requires deduction of input VAT is to be allowed once the substantive requirements, such as the supply is made by another taxable person; that the goods and services are to be used in the course and furtherance of an economic activity; and, that no evidence of evasion or fraud have been detected, have been met.

The fact that a person failed to comply with the formal requirements such as, in the case of the main proceedings, not verifying that his supplier Rom Packaging was declared inactive by the Tax Authority, does not preclude the right of deduction. If this was the case, the measures set out by the Member State even though legitimately introduced with the scope of fighting VAT fraud and evasion, would go beyond the objectives set out in the VAT

Directive. Such failures to comply with the formal obligations of the right of deduction can be sanctioned by an administrative penalty but certainly not by refusing the right of deduction.

On those grounds the Court ruled that Council Directive 2006/112/EC must be interpreted as precluding national rules, such as those at issue in the main proceedings, under which the right to deduct VAT is refused to a taxable person on the ground that the trader which supplied the service to that taxable person and issued a corresponding invoice, on which the expenditure and the VAT are indicated separately, has been declared inactive by the tax authorities of a Member State, that declaration of inactivity being public and accessible on the internet to any taxable person in that State, in the case where that refusal of the right to deduct is systematic and final, making it impossible to adduce evidence that there was no tax evasion or loss of tax revenue.

[1] The VAT Committee is an advisory committee set up in terms of Article 398 of Council Directive 2006/112/EC to promote the uniform application of the provisions of the VAT Directive. It is chaired by the Commission and attended by VAT experts from the Member States. Working papers and guidelines are available via the link: https://ec.europa.eu/taxation_customs/business/vat/vat-committee_en

[2] Directive 2009/65/EC

[3] Directive 2011/61/EU

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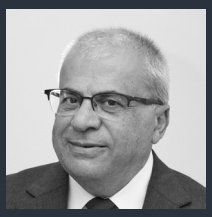

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