

THE NATIONAL IMPLICATIONS OF THE ECJ JUDGEMENT IN C-463/14 CASE CONCERNING THE TAXATION ON SUPPLY OF CONSULTING SERVICES

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ABSTRACT: *On the 3rd of September 2015 the Court of Justice of the European Union rendered its Judgement in C-463/14 case concerning a request for a preliminary ruling under Article 267 of TFEU from the Administrativen sad – Varna (Bulgaria). As a matter of essence, the referring court asked for the interpretation of the term ‘supply of services’ encompassed in Article 24(1) of the Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (the VAT Directive) and in particular, whether the term ‘supply of services’ includes subscription contracts for the supply of consulting services, specifically those of a legal, commercial or financial nature, under which a supplier has agreed to be available to the customer during the term of the contract. Depending on the result of the interpretation, the operations are taxable or not. The Judgement of the ECJ clarifies certain aspects of Romanian social life, aspects which are the primary target of this paper.*

KEYWORDS: *supply of services, supply of consulting services, the VAT Directive, social implications, ECJ*

JEL CODE: *K0*

1. INTRODUCTION

Recently, The European Court of Justice (hereinafter the ECJ) rendered a preliminary ruling clarifying the meaning of the VAT Directive provisions regarding the chargeable event and chargeability of VAT in case of subscription for supply of consulting services.

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The judgement unravels a legal issue that typically arises in connection with the deduction of input VAT related to these transactions and overturns the existing national legislation and court practices of some European Union state members upon this subject matter, including Romania. This paper is aimed at capturing the rationale behind the judgement rendered by the ECJ on the interpretation of the terms `subscription contracts` and `supply of services` for the purpose of the VAT Directive on the one hand, and to identify the pro and con arguments of the ECJ's finding, on the other hand. The ultimate aim of this article is to determine the national implications of this preliminary ruling upon the existing and future Romanian Fiscal Code.

2. THE CONTEXT OF THE C-463/14 CASE

The C-1463/14 case concerns a request for a preliminary ruling under art. 267 from the Treaty on Functioning of the European Union¹ referred to the ECJ by a court from Varna (Bulgaria), regarding the interpretation of articles 24(1), 25(b), 62(2), 63 and 64(1) of the Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (hereinafter the VAT Directive).² The request has been made in the proceedings between Asparuhovo Lake Investment Company OOD (hereinafter ALIC) and the Director of the Varna Appeals and Tax and Social Security practice Directorate at the Central Office of the National Revenue Agency (hereinafter the Director).

2.1. The dispute before the national court

The dispute before the Bulgarian court concerned the deduction of input VAT levied on the purchase of consulting services by subscription.

ALIC is a Bulgarian company involved in agriculture, horticulture and livestock rearing activities that entered into subscription contracts for legal, commercial, financial and information security consulting services with four providers legally represented by the same person. Under the contracts, the providers agreed to make themselves available to ALIC for consultation when needed and to obtain documents and information necessary to guarantee the efficient activity and protection of its customer. As agreed by parties, the contracts contained an exclusivity clause providing that the consulting companies would refrain from supplying services to any competitor of ALIC. Correlatively, ALIC undertook to pay the companies a weekly remuneration for the services supplied, disbursed every Monday following the week for which it was due. Under the Bulgarian Law on VAT, ALIC deducted the VAT stated on the invoices issued by the companies.

The dispute has arisen when following a tax inspection, the Bulgarian Tax authorities refused the applicant company to deduct VAT invoiced by companies on basis that no

¹ Treaty on the Functioning of the European Union, published in the Official Monitor of the European Union C326/49 from 26.10.2012.

² Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, published in the Official Monitor of the European Union L 347/1 from 11.12. 2006, available at <http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:32006L0112>, accessed on 30.10.2015.

proof has been provided as to type, quantity and nature of services actually provided, although no other fraudulent findings have been ascertained. As a consequence of these findings, the tax authorities issued an adjusted tax notice refusing ALIC the right to deduct the VAT, concerning the sum of about 17.000 EUR. ALIC challenged the tax notice and brought an action before the referring court.

2.2. The questions referred to the ECJ for a preliminary ruling

Having doubts as to whether a subscription contract falls under the definition of 'supply of services' (being thus subject to VAT treatment and implicitly giving rise to the right to deduct VAT), or whether only specific consulting services fit the provisions of the VAT Directive, the Varna Court decided to stay the proceedings and refer the following questions³ to the ECJ for a preliminary ruling:

(a) whether term 'supply of services' encompassed in art.24(1)⁴ and 25(b)⁵ of the VAT Directive also includes subscription contracts for supply of consulting services such as those at issue in the present case;

(b) whether for the purpose of art. 63⁶ and 64(1)⁷ of the VAT Directive the chargeable event in case of subscription of consulting services occurs on expiry of the period in respect of which the payment was agreed, irrespective of whether and how often the customer makes use of the supplier's on-call services;

(c) whether under art. 62(2)⁸ of the VAT Directive, in case of a person supplying services in connection with a subscription service contract, the VAT charge arise only if the customer has made use of the consultant's services over corresponding taxable period, or the charge arise on expiry of the period in respect of which the subscription fee was agreed;

3. THE JUDGEMENT OF THE ECJ AND THE RATIONALE BEHIND IT

In its Judgement from the 3rd of September 2015, the ECJ ruled that for the purpose of the VAT Directive, the term 'supply of services' must be interpreted as including

³C-463/14, Application (OJ) 21.11.2014, para. 27, available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=159933&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=1186063>, accessed on 30.10.2015.

⁴Article 24(1) of the VAT Directive is worded as follows: 'Supply of services shall' mean any transaction which does not constitute a supply of goods.

⁵Article 25 of the VAT Directive provides: A supply of services may consist, inter alia, in one of the following transactions:.....(b) the obligation to refrain from an act, or to tolerate an act or situation.

⁶Article 63 of the VAT Directive reads as follows: The chargeable event shall occur and VAT shall become chargeable when the goods or the services are supplied.

⁷Article 64(1) of the VAT Directive provides: Where it gives rise to successive statements of account or successive payments, the supply of goods, other than the consisting in the hire of goods for a certain period or the sale of goods on deferred terms, as referred to in point (b) of Article 14(2), or the supply of services shall be regarded as being completed on expiry of the periods to which such statements of account or payments relate.

⁸Article 62 of the VAT Directive stipulates: For the purpose of the [VAT] Directive: (1) 'chargeable event' shall mean the occurrence by virtue of which the legal conditions necessary for VAT to become chargeable are fulfilled; (2)VAT shall become 'chargeable' when the tax authority becomes entitled under the law, at a given moment, to claim the tax from the person liable to pay, even though the time of payment may be deferred.

subscription contracts for the supply of consulting services to an undertaking, in particular those of legal, commercial or financial nature, under which the suppliers have agreed to make themselves available to the customer during the term of the contract.⁹ Moreover, the Court concluded that the chargeable event and the chargeability of the VAT occur upon the expiry of the period in respect of which the payment has been agreed, irrespective of whether and how often the customer has actually made use of the supplier's services.

In deciding so, the ECJ has made an analysis of the questions referred to it by examining whether a subscription contract for consulting services, such as that at issue in the case referred to it, fits the general definition of `supply of services` for the purpose of the VAT Directive.

3.1. Subscription contracts for the supply of consulting services fall within the meaning of the term `supply of services` as per art. 24(1) and art. 25(b) of the VAT Directive

Regarding the first question referred to it, the ECJ has recalled, as a preliminary aspect, that according to its well-established case-law¹⁰ the very essence of the taxable character of supply of service operations stays in the direct link between the service supplied and the consideration actually received.¹¹ The meaning of the `direct link` criterion was clarified by the Court in its previous judgements:¹² a direct link is established if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance - the remuneration received by the provider in return for the service supplied to the recipient.

In this context, the process of thought followed the ECJ involved the following judicial reasoning: if the VAT basis of assessment for a supply of services is the existence of a direct link between the service supplied and the consideration received (Lang , 2014), is this criterion affected, in the case at hand, by the fixed payment made under a subscription contract in exchange of the permanent availability of a provider to supply, when appropriate time, the consulting services agreed?

The following two issues have arisen in regards to this question: (a) to what extent a subscription contract establishing the consulting field in general, but where the services are neither defined in advance nor personalized, can be considered `supply of services` within the scope of VAT; and (b) whether the fix payment made under a subscription contract for supply of services constitutes consideration in return for the permanent

⁹ECJ Judgement in C-463/14 case, *Asparuhovo*, ECLI:EU:C:2015:542, para 43.

¹⁰ECJ Judgement in C-16/93 case, *Tolsma*, [1994] ECR I-743, paras 13, 14; Judgement in C-174/00, *Kenmer Golf* [2002] ECR I-3293, para 39.

¹¹The ECJ also refers to the *direct link* as *the legal relationship between the provider and the recipient*, see Judgment in C-16/93, *Tolsma* [1994] ECR I-743, para. 14; for a theoretical approach of the *direct link*, see (Schenk, et al., 2005).

¹²ECJ Judgement in C-37/08 case, *RCI Europe* [2009] ECR I-07533, para. 24, 30; ECJ Judgement in C-520/10 case, *Lebara*, ECLI:EU:C:2011:818, para. 27.

availability of the provider to be at its customer's disposal as agreed, irrespective of the number of services provided and received.

The ECJ considered these issues together by making reference to its findings in the previous case-law related to the application of VAT to operations of supply of services and by examining to what extent a subscription of consulting services, such as that at issue, meets those criteria. Although not expressly mentioned in the judgement, the view taken by the Court indisputably leads to the conclusion that a subscription for supply of consulting services preserves the characteristics of 'supply of services', irrespective the fact that the services are neither determined nor personalized in advance, as long as the service has the potential to be personalized.¹³ In this context, the ECJ has already established that the permanent availability of a supplier to provide to its customer the services agreed, constitutes a 'supply of services' for the purpose of the VAT Directive.¹⁴ Moreover, in the present case, the object of the supply of services is not to provide specific advice, but to be available to the customer in order to advise it.

The reasoning of the ECJ continues with a waterfall argumentation. First, the Court reiterates that in case of contracts for supply of consulting services characterized by the availability of the supplier in order to provide, at the appropriate time, the services required, it is not necessary, in order to find that there is a direct link between the service and the consideration received, to establish that a payment relates to a specific supply of service at a specific time carried out at the request of a customer.¹⁵ Secondly, regarding the payment method, the Court ruled that the fact that the customer pays by way of a single fixed sum paid periodically (such as in the present case), or by way of annual subscription fees,¹⁶ or in form of a lump sum,¹⁷ is not such as to affect the direct link between the supply of services made and the consideration received, since the difference relating to those payments does not concern the taxable nature of the activity, but the arrangement for payment. Consequently, in case of a subscription contract for consulting services the remuneration agreed between the parties by way of fixed sums, represents consideration for the purpose of the VAT Directive, irrespective of the quantity and nature of the consulting services actually supplied during the period to which the remuneration relates.

In the light of these findings, the ECJ has ruled that the term 'supply of services' as per art. 24(1) of the VAT Directive must be interpreted as including subscription contracts for supply of consulting services, in particular those of legal, commercial or financial

¹³Judgement in C-151/13 case, *Le Rayon d'Or* EU:C:2002:200, para. 25.

¹⁴Judgement in C-151/13 case, *Le Rayon d'Or* EU:C:2002:200, para. 40.

¹⁵Judgement in C-174/00, *Kenmer Golf* [2002] ECR I-3293, para.40; Judgement in C-151/13 case, *Le Rayon d'Or* EU:C:2002:200, para. 36.

¹⁶Judgement in C-174/00, *Kenmer Golf* [2002] ECR I-3293, para.40;

¹⁷Judgement in C-151/13 case, *Le Rayon d'Or* EU:C:2002:200, para. 32.

nature, where the supplier has agreed to make himself available to the customer during the term of the contract.¹⁸

3.2. In respect of subscription contracts for consulting services, the chargeable event and the chargeability of the tax occur upon the expiry of the period in respect of which the payment has been agreed

The interpretation of the ECJ pursuant to which a subscription for supply of consulting services is assimilated to the term `supply of services` from the VAT Directive point of view, being thus a transaction subject to VAT, is in fact the key answer to the subsequent questions referred. After clarifying the taxable nature of operations such as those at issue in the present case, the question when VAT becomes payable is closely related to the moment of the right to deduction, which is the main issue in the proceedings between ALIC and the Director.

As a preliminary aspect, it is important to note that the `chargeable event` within the scope of art. 62(1) of the VAT Directive represents the basic tax point, “the occurrence by virtue of which the legal conditions necessary” to charge VAT are fulfilled (Ben & Julie , 2007). Furthermore, article 63 of the VAT Directive establishes the general rule according to which the chargeable event occurs and the tax becomes “chargeable when the goods are delivered or the services are performed” (Antonio & Marques, 2014).

In light of the conclusions reached in answering the first question referred to it, the ECJ considered appropriate to analyze the second and the third questions together, as they are closely related to each other. The Court ruled that a service which in essence entails being permanently available to the customer in order to provide it with consulting services and which is remunerated by means of fixed sums paid periodically, must be regarded as being supplied in the period to which the payment relates, whether or not the service provider has actually provided advice to its customer during that period. It follows that at the end of each period to which the payments relate, the supply must be regarded as have been completed and consequently, the chargeable event and the chargeability of the tax occur upon the expiry of the period in respect of which the payment has been agreed, irrespective of whether and how often the customer has actually made use of the supplier’s service.

4. PROS AND CONS THE APPLICATION OF VAT TO SUBSCRIPTION CONTRACTS FOR SUPPLY OF SERVICES

The ECJ interpretation of the term `supply of services` as including subscription contracts for supply of consulting services to an undertaking, especially those of judicial, commercial and financial nature, where the suppliers make themselves available to the recipient during the term of the contract, is at least controversial.

¹⁸ECJ Judgement in C-463/14 case, *Asparuhovo*, ECLI:EU:C:2015:542, para 43.

It is true that the within the scope of the VAT Directive the term `supply of services` needs to be interpreted in a relatively broad way, however, a correct interpretation of this term also depends on the meaning of `economic activity`, as the two concepts are interrelated. In either case there is a presumption of profit obtained from that activity and consequently, the transaction is subject to VAT treatment. When it comes to subscription contracts for supply of consulting services, after the input of VAT, the right to deduct the VAT depends on the existence of reciprocal benefits between the parties involved in the economic activity, between the supplier and the recipient. Within the ECJ case-law, the reciprocal benefit is referred to as the direct link between the service supplied and the consideration actually received in exchange of that service. The ECJ has stated that the VAT basis of assessment for a supply of services is exactly the existence of a direct link between the service supplied and the consideration received. Or, such an interpretation implies that, independently of the taxable character of subscription contracts for supply of services, the basis of assessment is dependent on the `veracity` of the services supplied and on the synallagmatic nature of this type of contract. This is the context in which the Bulgarian court referred to the ECJ the preliminary questions regarding the nature of the subscription contract for supply of consulting services, because the reality of the synallagmatic nature of the contract is questioned by the failure of the applicant company to provide the court evidence that the services have been actually supplied.

In the light of the above-mentioned considerations, there are two aspects which we want to emphasise. On the one hand, we consider that the ECJ judgement expresses a rather rigid approach of the issue, focusing on the fact that the actual service provided by the supplier under a subscription contract for supply of consulting services constitutes the availability of the provider to be at the disposal of its customer. Yet, the reasoning of the ECJ is inconsistent, because although it recognises the availability of the provider to be at the disposal of its recipient, it also reminds the referring Court that it has an obligation to verify the veracity of the services provided by the supplier. Moreover, in the field of consulting services, the interpretation of the term `supply of services` such as to include the availability of the provider to supply services when needed, poses the risk of circumventing the legal provisions applicable to determination of the taxable profit of an undertaking.

From another point of view, the judgement of the ECJ is likely to cover to some extent the tax-evasion and corruption practices existing in some European Union state members.¹⁹ Moreover, the ECJ ruling in the C-463/14 case could be used to avoid discretionary denial for the deduction right in case of operations involving supply of consulting services where the providers make themselves available to the costumer to provide such services when needed.

¹⁹<http://www.evz.ro/victor-ponta-trimis-in-judecata-de-dna.html>, accessed on 30.10.2015.

5. THE IMPLICATIONS OF THE ECJ JUDGEMENT TO ROMANIAN LEGISLATION AND COURT PRACTICES

In our opinion, the judgement rendered by the ECJ in the above mentioned case, and in particular the finding that the taxable nature of supply of services characterized by the availability of the provider to supply the services required when necessary, is not dependant on the fact that the services have been actually provided, is one of great importance when it comes to deduction of input taxes related to those transactions.

Even if in Romania, the legal issue approached in this section has often occurred in matters regarding the rights to deduct expenses incurred for supply of services for purpose of generating taxable income, and not in the context of VAT deduction, we consider that the determination of the taxable character of `supply of services` should be uniform in either case.

Under the Romanian legislation, the provisions regarding the conditions imposed for the right to deduct the relevant expenses for consultancy services seem to exceed the limits of the European Union standards, reaffirmed in the recent judgement of the ECJ, because they impose the requirement for the taxpayer to provide evidence on the actual performance of the services.

A recent decision of the High Court of Cassation of Justice²⁰, the highest Romanian court, casts doubts on the compliance of the Romanian fiscal provisions regarding this subject matter with the standards of the European Union legislation. The case involved a dispute between a Romanian company and the National Agency for Fiscal Administration, regarding the deductibility of expenses incurred for supply of management, consultancy and assistance services. The Highest Court of Cassation and Justice has overruled the decision of the first instance court, considering that the applicant company has failed to provide evidence that the services stated in contracts were actually supplied. In reaching this conclusion, the Highest Court relied on the relevant provisions which establish the conditions which are to be fulfilled cumulatively in order to deduct expenses for supply of services.

These requirements are provided in point 48 of the Methodological Norms²¹ for the enforcement of the Fiscal Code,²² which reads as follows:

48. In order to deduct the expenses for services of management, consulting, assistance or other supplies of services, the following conditions shall be cumulatively met:

²⁰Decision no. 978/2014 of the Romanian Highest Court of Cassation and Justice from 26th February 2014, rendered in file no. 9068/2/2009.

²¹Decision no. 44 of 22nd January 2004, for the approval of the methodological norms for the enforcement of law no 571/2003 on the fiscal code, published in the Romanian Official Gazette no. 112/06.02.2004.

²²Law no. 571/2003 regarding the Fiscal Code, published in the Romanian Official Gazette no. 927/23.12.2003. Law no. 571/2003 will be replaced by Law no. 227/2015 published in the Official Gazette no. 688/10.09.2015 regarding the New Fiscal Code, which becomes effective 1 January 2016. There is no change in the New Fiscal Law regarding the conditions in order to deduct expenses for supplies of services.

- *the services shall be indeed provided, executed based a contract concluded between parties or based on any contractual form provided by the law; the veracity of the supplied services shall be verified as follows: situations of works, minutes of reception, work reports, feasibility, market studies, market or any other suitable material;*

- *the taxpayer must prove that such expenses are occasioned by the needs resulting from the specific activities carried out.*

From the wording of this provision, one can easily conclude that, as far as deductibility of supply of consulting services is concerned, the Romanian legislator does not even take into account the type of supply of services contracts characterized by the availability of the supplier to provide when needed, the consulting services agreed, irrespective of the services actually provided.

In the light of the ECJ judgement analyzed, we consider that the Romanian legislation provides stricter conditions for taxpayers to deduct their expenses in relation to supplies of consulting services as the European Union legislation prescribes. Within this context, one can question whether the Romanian legislation or the European Union standards is the correct one in the context of tax application to supply of consulting services by subscription.

6. CONCLUSION

In our opinion, the solution to clarify the legal issue of the taxable nature of subscription contracts for supply of consulting services involves the modification of the VAT Directive in order to ensure the veracity of the consulting services actually provided under a subscription contract. The modification should consist in a provision that clearly states that the availability of the provider in order to supply the service required when needed represents a basis of assessment per se, while the actual provision of service should constitute a distinct basis of assessment.

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