MALTA
INSTITUTE
OF TAXATION

# CJEU Tax Case-law digest

April - June 2022

*A compilation of summaries of select judgements of the CJEU in the field of taxation*

## Table of Contents



This document contains summaries of select decisions of the CJEU during the relevant period. The contents of this document are for information purposes only.

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# Direct Taxation cases

## Case C-342/20 A SCPI decided 7 April 2022

*Exemption for investment funds – free movement of capital*

The case concerned the Finnish corporate income tax and withholding tax exemption for investment funds pursuant to legislation in force since 1 January 2020. The legislation requires investment funds to be contractual and not in any other legal form (such as a corporate form), in order to be eligible for the exemption. The exemption is in principle granted to domestic investment funds (which can only take a contractual form) and comparable foreign funds. In this case, a French open-ended real estate fund (an AIF under the AIFM directive) constituted as a company (an SCPI), invested in Finnish real estate. The Finnish tax authorities issued an advance ruling, finding that the French fund was comparable to a Finnish limited liability company and therefore did not qualify for the exemption.

The CJEU found that although the condition in Finnish legislation relating to contractual form does not constitute a condition which only resident collective investment undertakings are capable of fulfilling, the fact remains that the said condition is liable to place those undertakings at an advantage over collective investment undertakings constituted under statute in accordance with the legislation of the Member State in which they are established. It held that the condition imposed is liable to deter non-resident collective investment undertakings from investing in immovable property in Finland and therefore constitutes a restriction on the free movement of capital prohibited, in principle, by Article 63 TFEU.

Noting that, pursuant to Article 65(1)(a) TFEU, Article 63 TFEU is without prejudice to the right of Member States to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested, the CJEU noted that differences in treatment are permitted only when they concern situations which are not objectively comparable or, otherwise, when they are justified by an overriding reason in the public interest. In this case, the CJEU found the non-resident fund established by Statute to be comparable to Finnish funds established by contract and found no justification for the difference in treatment.

***Text of case here.***

## Case C-556/20 Schneider decided 12 May 2022

*Parent-Subsidiary Directive – double taxation of dividends*

The case concerned the compatibility with the Parent Subsidiary directive ('PSD') of a system of dividend taxation which applied in France until 2004 in terms of which French companies that received dividends from a domestic subsidiary received a tax credit of 50% of the dividend. Where the profits underlying the distribution either had not been taxed or had been only partially taxed, an advance tax payment was imposed at the level of the distributing company, with the tax credit attached to the distribution offset against the advance tax payment due on the redistribution of such dividends. The tax credit was not granted where the French parent received a dividend from subsidiaries in other EU Member States.

Previous decisions of the court (e.g. case C-310/09) had already determined that where a French parent company received dividends from a non-resident subsidiary and subsequently was subject to advance payment of tax upon a redistribution, that company should be entitled to a tax credit. In this case the CJEU was asked to determine the compatibility of the scheme with the PSD.

The CJEU concluded that the advance payment on redistributions combined with not granting the tax credit for dividends received from EU subsidiaries constituted an infringement to article 4 of the PSD. Furthermore, the advance payment is not covered by article 7(2) of the PSD and could not be justified on that ground.

***Text of case here.***

## Case C-572/20 ACC Silicones **decided 16 June 2022**

*Free movement of capital – Reimbursement of tax on income from capital paid by a non-resident company*

The case concerned the compatibility of one of the conditions under German legislation for the reimbursement of tax on income from capital with the principle of free movement of capital. The legislation in question makes the reimbursement of tax on income from capital paid on dividends from 'free-float' shares received by a company established in another Member State subject to proof that that tax cannot be set off or its set-off cannot be carried forward in favour of that company, or in favour of its direct or indirect shareholders, nor deducted by that company as work-related outgoings or an operating cost. The same condition is not imposed in the case of reimbursement of tax paid on income from capital by a resident company receiving the same type of income.

The CJEU held that the national legislation in question, which applies a different treatment to income received by a resident company and to the same kind of income received by a non-resident company, restricts the free movement of capital, unless the difference in treatment is fully neutralized by a double tax convention.

**See text of case here**

# VAT cases

## Case C-637/20 DSAB decided 28 April 2022

*Vouchers – Multi-purpose Vouchers*

DSAB sells cards to tourists visiting Stockholm, which give a cardholder the right (without payment of any supplement) to be admitted to around 60 attractions, such as sights and museums, for a limited period of time and up to a certain value, as well as access to certain passenger transport services (e.g. 'Hop-on-Hop-off' buses) and sightseeing tours with other organisers. Some of the services for which the card can be used are subject to VAT at rates ranging from 6% to 25%, while others are exempt. When a cardholder uses the card for one of the services, the service provider receives from DSAB consideration equal to a percentage of the normal price of admission or use. Once the value limit of the card is reached, it can no longer be used by the cardholder.

The CJEU was asked to determine whether this card constituted a 'voucher' and specifically whether it constituted a 'multi-purpose voucher'. Confirming that the two criteria in the definition of 'voucher' in Article 30a(1) of the VAT Directive are cumulative, the CJEU held that the said two criteria appear to be satisfied, although left it to the referring court to determine. The fact that the card had a validity period was not relevant to this determination.

On the question as to whether this was a multi-purpose voucher, noting the residual definition of the term, the CJEU maintained that since the VAT due on the services obtained by the cardholder is not known at the time of issue of the card it cannot be classified as a 'single-purpose voucher' within the meaning of Article 30a(2) of the VAT Directive, and as a result, in so far as the card classifies as a voucher, then it would constitute a 'multi-purpose voucher'.

***Text of case here***

## Case C-612/20 Happy Education decided 28 April 2022

*Exemption – Education - organisation recognised as having similar objects'*

Happy Education is a Romanian company which provides a variety of educational services as part of the 'School after school' programme (homework support, extra-curricular activities etc). The question arose as to the VAT treatment of its services, and whether the exemption in article 132(1)(i) applied thereto. The CJEU was essentially asked whether the concept of an 'organisation recognised as having similar objects' to those of a body governed by public law, for the purposes of Article 132(1)(i) of Directive 2006/112, covers a private entity which carries out teaching activities in the public interest consisting of, inter alia, the organisation of activities supplementing the school curriculum, such as homework support classes, educational programmes and foreign language classes.

The CJEU recognised that Article 132(1)(i) does not specify the conditions or procedures under which the 'similar objects' may be recognised, and that Member States have discretion to lay down the rules in accordance with which that recognition may be granted to such organisations. Such discretion must be exercised taking into account the principles of European Union law, in particular the principle of equal treatment, which, in the field of VAT, takes the form of the principle of fiscal neutrality.

The CJEU considered that under Romanian law recognition as an organisation with similar objects to those of an educational body governed by public law, for the purposes of Article 132(1)(i), is granted primarily through the conclusion of a partnership with an educational establishment under the 'School after school' programme, which partnership Happy Education had not concluded. The CJEU concluded that the concept of an 'organisation recognised as having similar objects' to those of an educational body governed by public law, for the purposes of Article 132(1)(i) does not cover a private entity which carries out teaching activities such as those carried out by Happy Education, where that entity does not, in any event, satisfy the conditions under national law for obtaining such recognition.

***Text of case [here](here).***

## Case C-333/20 Berlin Chemie **decided 7 April 2022**

*Fixed Establishment – subsidiary as a fixed establishment of the parent – discernible structure, human and technical resources*

Berlin Chemie is a German company forming part of the Menarini group which markets pharmaceutical products in Romania for the purposes of the regular supply of wholesale distributors of medicinal products there. It has a storage contract with a company established in Romania, a tax representative in Romania and is registered for VAT there. Berlin Chemie entered into a marketing, regulatory, advertising and representation services contract with a Romanian subsidiary, Berlin Chemin Menarini. The Romanian tax authority took the view that the services supplied by the Romanian company to the German company were received by the latter in Romania, where the German company had a fixed establishment, on account of the technical and human resources which belonged to the Romanian company, but to which the German company had continuous access.
The CJEU recognised, based on earlier decisions of the Court, that there cannot be a fixed establishment, first, without a discernible structure, which is evidenced by the existence of human or technical resources. Second, that structure cannot exist only occasionally.

Whilst recognising that it is possible that a subsidiary constitutes the fixed establishment of its parent company, such a classification depends, however, on the substantive conditions set out in Implementing Regulation No 282/2011, in particular in Article 11 thereof, which must be assessed in the light of the economic and commercial realities. Therefore, the existence, in the territory of a Member State, of a fixed establishment of a company established in another Member State may not be deduced merely from the fact that that company has a subsidiary there.

***Text of case [here](here)***

## Case C-228/20 I GmbH decided 7 April 2022

*Exemption – Medical services - 'under social conditions comparable with those applicable to bodies governed by public law'*

The applicant 'I' is a German company which operates a private hospital. Its treatment of its services as VAT-exempt was challenged by the tax authorities on the basis that under German VAT law a hospital which is not a body governed by public law may qualify for exemption from VAT if that hospital is approved within the meaning of the relevant legislation, either because it is included in a *Land*-level hospital plan or because it has concluded care supply contracts with the statutory health insurance or substitute funds.

Article 132(1)(b) of the VAT Directive provides that Member States are to exempt hospital and medical care and closely related activities undertaken by bodies governed by public law or, 'under social conditions comparable with those applicable to bodies governed by public law, by hospitals, centres for medical treatment or diagnosis and other duly recognised establishments of a similar nature'.

The Court held that national legislation which exempts the provision of medical care by a private hospital if that establishment is approved in accordance with the national provisions relating to the general health insurance regime, following its inclusion in a *Land*-level hospital plan or the conclusion of care supply contracts with statutory health insurance or substitute funds, when comparable private hospitals which supply similar services under social conditions comparable with those applicable to bodies governed by public law are treated differently as regards the exemption, is contrary to the VAT Directive.

The Court furthermore held that in order to determine whether medical care provided by a private hospital is supplied under social conditions comparable with those applicable to bodies governed by public law, the tax authorities may take into consideration – where they are intended to attain the objective of reducing medical costs and making high-quality care more accessible to individuals – the regulatory conditions applicable to the services supplied by hospitals governed by public law and indicators of that private hospital's performance in terms of staff, premises and equipment and the cost-efficiency of its management, in so far as those indicators are also applicable to establishments governed by public law. Account may also be taken of the method of calculating fixed-rate daily fees and the fact that the services supplied by that private hospital are borne by the social security regime or under contracts concluded with public authorities, so that the cost borne by patients is similar to that borne by patients for similar services supplied by hospitals governed by public law.

**Text of case here.**

## Case C-218/21 DSR decided 5 May 2022

*Reduced rate – 'renovation and repairing of private dwellings*

DSR, a company which produces lifts, hoists and conveyor belts and also provides lift repair and maintenance services, applied a reduced rate of VAT to lift refitting and repair services supplied, while invoicing the materials incorporated in connection with those supplies at the standard rate of VAT. The tax authorities challenged the application of the reduced rate. Point 2 of Annex IV to the VAT Directive, read in conjunction with Article 106, authorises Member States to apply a reduced rate of VAT to services relating to the 'renovation and repairing of private dwellings, excluding materials which account for a significant part of the value of the service supplied'. The CJEU was asked whether the concept of 'renovation and repairing of private dwellings', within the meaning of that provision, covers repair and renovation services for lifts in residential buildings.

The CJEU held that in the case of a residential building consisting of several apartments, shared facilities are, as a general rule, important or even indispensable for the use of individual apartments, and that therefore, in the case of such residential buildings, shared facilities are covered by the term 'private dwellings'. As a result, renovation and repair services relating to those facilities fall within the scope of 'services relating to the 'renovation and repairing of private dwellings', and lifts, which form an integral part of the buildings that have them, are included in those facilities. However, maintenance services for such lifts are excluded.

**Text of case here**

## Case C-570/20 BV decided 5 May 2022

*Ne bis in idem rule – severity of penalties must not exceed the seriousness of the offence*

The case referred by the French court concerned an accountant and sole trader who was convicted of the under-declaration of income tax and VAT and sentenced to imprisonment. BV appealed, claiming a breach of the principle ne bis in idem enshrined in Article 50 of the Charter, on the ground that he had already been the subject of a tax adjustment procedure in respect of the same acts which resulted in the imposition of final tax penalties amounting to 40% of the charges evaded. The appeal was rejected on the basis that the national legislation at issue complied with the requirements arising from the relevant case-law of the Constitutional Council, which limited the possibility of duplication of penalties to, inter alia, the most serious cases . BV appealed to the referring court claiming that the national legislation at issue does not satisfy the requirement of clarity and foreseeability with which a duplication of prosecutions and penalties of a criminal nature must comply (as per the CJEU in Case C-524/15 *Menci*), and that, in addition, national legislation does not provide for rules to ensure that the severity of all of the penalties imposed does not exceed the seriousness of the offence identified.

The CJEU held that Article 50 of the Charter does not preclude national legislation which limits the duplication of proceedings and penalties of a criminal nature in the event of fraudulent omissions from a VAT return only to the most serious cases, provided that it is reasonably foreseeable, at the time when the offence is committed, that that offence is liable to be the subject of a duplication of proceedings and penalties of a criminal nature.

However, the Charter does preclude national legislation which does not ensure, in cases of the combination of a financial penalty and a custodial sentence, by means of clear and precise rules, that all of the penalties imposed do not exceed the seriousness of the offence identified.

**Text of case here.**

## Case C-596/20 DuoDecad **decided 16 June 2022**

*Place of supply of services*

DuoDecad is a Hungarian company involved in computer programming, which provided technical support services to Lalib, a company established in Madeira, Portugal. Lalib provides entertainment services by electronic means. Applying article 44 of Directive 2006/112 EC DuoDecad issued invoices to Lalib without VAT. The Hungarian tax authorities challenged the invoices, taking the view that the services were in fact supplied to another Hungarian Company, WebMindLicenses, on the basis that the latter was the holder of the know-how for the entertainment services supplied by electronic means by Lalib, and had entered into a licence agreement with Lalib for the purpose of exploiting that know-how. DuoDecad was assessed to Hunagrian VAT.

Essentially the referring court was looking to establish whether, following the 17 December 2015 decision of the Court in *WebMindLicenses* (C-419/14), it was Lalib or WebMindLicenses which must be regarded as the actual provider of the entertainment services (since the know-how enabling those entertainment services to be supplied was the subject of a licence agreement concluded between WebMindLicenses and Lalib), and therefore the recipient of the technical support services from DuoDecad.

The Court noted that, following the said 2015 judgment in case C-419/14, the Hungarian tax authority and the Portuguese tax authority have treated the same transaction differently, despite the information provided by the latter authority to the former authority in response to a request for international cooperation. The CJEU also noted that the referring court merely identified a large number of circumstances and issues without indicating how they raise a difficulty in interpreting the provisions of Directive 2006/112, such that it appears that the referring court is in fact asking the Court of Justice not to interpret the VAT directive but to determine itself, in the light of those circumstances, whether it is WML and not Lalib which must be regarded as the true supplier of the entertainment services at issue in the main proceedings.

The CJEU concluded that, since a request for a preliminary ruling cannot concern the issues of fact raised in the main proceedings, in the present case, the Court has no jurisdiction to answer the questions referred. Furthermore, it is for the referring court to assess whether the contract between DuoDecad and Lalib arises itself from an abuse of rights in the sphere of VAT.

**Text of case** [here]()

## Case C-56/21 ARVI **decided 30 June 2022**

*Option to tax immovable property*

The case concerned the Lithuanian VAT rule in terms of which a supplier of immovable property can opt to tax the sale thereof only if the customer is a taxable person registered for VAT. The CJEU was asked to determine whether this condition is in accordance with the VAT Directive and the principles of neutrality and effectiveness.

According to Article 137(2) of the VAT Directive the Member States 'shall lay down the detailed rules governing exercise of the option under paragraph 1' and 'may restrict the scope of that right of option', thus allowing Member States not only to grant taxable persons the right to opt for taxation of transactions covered by that provision, but also allows them to restrict the scope of that right or withdraw it. Member States have a wide discretion under that article. The court concluded that the legislation imposing conditions under which a taxable person may exercise the right of option for taxation of a supply of immovable property was not contrary to the VAT Directive. Furthermore, the rules and practices under which the seller of immovable property is required to adjust the deduction of input VAT on that property following the refusal to recognise the seller's right of option for taxation in respect of that sale on the ground that, at the time of the sale, the purchaser did not satisfy the conditions laid down in order for the seller to exercise that right, is not contrary to the provisions of the VAT Directive and the principles of fiscal neutrality, of effectiveness and of proportionality.

**Text of case here**

## Case C-146/21 DGRFP Bucureşti **decided 30 June 2022**

*Derogation from Article 193 – reverse charge*

VB, the owner of forest land in Romania, operated that land on the basis of contracts for the sale of standing timber concluded with several companies specialising in forestry operations. He exceeded the threshold for small undertakings and failed to register for VAT and was therefore assessed to VAT on sales made during the period after the threshold was exceeded. VBF challenged the assessment on the basis that the reverse charge applied on its supplies to taxable persons (as per the derogation allowed to Romania), and that the reverse charge should apply even though he was not VAT registered.

Noting the rationale behind the condition imposed by Romanian legislation, and the right of Member States implementing the derogation to impose conditions for the application of that mechanism, provided those conditions do not contravene the principle of fiscal neutrality, the CJEU held that the VAT Directive and the principle of fiscal neutrality do not preclude national legislation under which the reverse charge mechanism is not applicable to a taxable person who had neither applied for nor obtained on his or her own initiative, before carrying out the taxable transactions, his or her registration for the purposes of VAT.

**See text of case here**

## Case C-714/20 U.I. Srl **decided 12 May 2022**

*Joint and several liability of the indirect customs representative and the importing company for VAT and Customs Duties*

The CJEU has held that Article 77(3) of Regulation (EU) No 952/2013 (Union Customs Code) must be interpreted as meaning that, according to only that provision, an indirect customs representative is liable solely for the customs duties payable in respect of goods which he or she has declared for customs purposes, but not also for the import value added tax in respect of the same goods.

Article 201 of Council Directive 2006/112/EC (the VAT Directive) must be interpreted as meaning that an indirect customs representative cannot be held jointly and severally liable with the importer for the payment of import value added tax where there are no national provisions explicitly and unequivocally designating or acknowledging that indirect customs representative as being liable for that tax.

**See Judgement here**

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