



CJEU Tax Case-law digest

January – March 2022

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

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

The Malta Institute of Taxation is a professional body for advisors, practitioners and academics operating in the field of taxation in Malta, which has as its main purposes, the promotion of tax learning and ongoing professional education, as well as contributing toward the development of local tax policy and legislation. The Institute does not provide tax advice and is not a lobby group for tax professionals.



Direct Taxation cases

Case C-257/20 'Viva Telecom Bulgaria' EOOD decided 24 March 2022

Withholding tax on notional interest on an interest-free loan granted to a resident subsidiary by a non-resident parent company

The case concerned an interest-free convertible loan repayable after 60 years from execution of the loan agreement in 2013, granted to Viva Telecom Bulgaria by InterV Investment Luxembourg, its parent company. The tax authorities, applying national anti-avoidance provisions, made a tax adjustment in respect of Viva Telecom Bulgaria, ordering it to pay 10% withholding tax in relation to the loan granted to it by InterV Investment, concerning the period from 14 February 2014 to 31 March 2015. Viva Telecom challenged the withholding tax charge.

The questions put to the CJEU related to the interpretation of the relevant provisions of Directive 2003/49, Directive 2011/96 and Directive 2008/7, as well as Articles 49 and 63 TFEU, Article 5(4) and Article 12(b) TEU, and Article 47 of the Charter of Fundamental Rights.

The CJEU held that, based on settled case-law, the notional interest set by the tax authorities could not be regarded as interest payments for the purposes of the Interest and Royalties Directive (Dir 2003/49), nor as distributed profits for the purposes of the Parent Subsidiary Directive (Dir 2011/96), since there was no actual payment made between the companies. The CJEU also found that Directive 2008/7 concerning indirect taxes on the raising of capital did not apply to the circumstances under review since that Directive prohibits Member States from subjecting contributions of capital to 'indirect tax' whilst the withholding tax at issue in the main proceedings must be regarded as a direct tax.

Analysing the compatibility of the withholding tax assessed by the tax authorities with the fundamental freedoms, the CJEU recognised that the legislation in question did in principle constitute a restriction on the free movement of capital which is, in principle, prohibited by Article 63 TFEU. However the CJEU found the restriction to be capable of being justified by the objectives of safeguarding a balanced allocation between the Member States of the power to impose taxes and ensuring the effective collection of tax in order to prevent tax avoidance.

Text of case [here](#).



VAT cases

Case C-697/20 W.G. decided 24 March 2022

Taxable Person - Common Flat Rate Scheme for Farmers

This case dealt with the provisions of the 'Common Flat Rate Scheme for Farmers' under the VAT Directive (2006/112 EC), which optional scheme has not been implemented in Malta. However, one of the questions addressed related to the status of individuals as independent taxable persons where they carry on an economic activity separately, albeit using common-owned property.

The CJEU held that in the circumstances of the case, "a person carrying on an agricultural activity on a holding which he or she owns with his or her spouse as part of the marital community of property, has the status of a taxable person, within the meaning of Article 9(1) of the VAT Directive, where that activity is carried out independently because he or she acts in his or her own name, on his or her own behalf and under his or her own responsibility, bearing only the economic risk associated with carrying out his or her activity."

Text of case [here](#).

Case C-515/20 B AG Decided 3 February 2022

Reduced Rate – Fiscal Neutrality

The case concerned the application of the reduced rate of VAT for the supply of 'wood for use as firewood' to the supply of wood chips. The applicant traded in wood chips bearing the protected designations 'Flokets weiss' ('industrial' wood chips) and 'Flokets natur' ('forest' wood chips) and ensured the maintenance of heating installations using wood chips as fuel.

Article 122 of the VAT Directive allows Member States to apply a reduced rate to the supply of 'wood for use as firewood'. The CJEU was asked whether this encompasses any wood which, on the basis of its objective properties, is intended exclusively for burning, and whether in applying that provision, a Member State may limit its scope, in accordance with Article 98(3) of that directive, with reference to the Combined Nomenclature. The CJEU was furthermore asked whether Member States could exclude the supply of wood chips from the benefit of the reduced rate which applies to the supply of other types of wood for use as firewood.

The CJEU held that the concept of wood for use as firewood in article 122 designates any wood which, on the basis of its objective properties, is intended exclusively for burning. A Member State may limit the scope of the reduced rate as regards some categories of supplies of wood for use as firewood with reference to the Combined Nomenclature, however subject to compliance with the principle of fiscal neutrality. In this regard the CJEU held that the principle of fiscal neutrality must be interpreted as not precluding national law from excluding from the benefit of the reduced rate of value added tax the supply of wood chips, even though it grants that benefit to supplies of other types of wood for use as firewood, subject to wood chips



not being interchangeable, from the point of view of the average consumer, with other types of wood for use as firewood, which it is for the referring court to ascertain.

Text of case [here](#).

Case C-513/20 Termas Sulfurosas de Alcafache SA Decided 13 January 2022

Exemption for hospital and medical care – public interest exemptions

Termas Sulfurosas operates thermal baths, a primary care unit which is not part of the Portuguese national health service and does not have the capacity to provide hospital care. Access to the thermal bath treatments require registration for which Termas Sulfurosas charges a fee. The services involved compiling an individual file, including the user's clinical history, which entitles the user to purchase 'traditional thermal cure' treatments. The question brought before the CJEU was whether the VAT exemption under article 132(1)(b) – the exemption for *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* – would apply, i.e. whether the services could be regarded as an activity closely related to medical care.

The CJEU held that Article 132(1)(b) of the VAT Directive must be interpreted as meaning that an activity consisting in compiling an individual file, including the user's clinical record, which entitles the user to purchase 'traditional thermal cure' medical care within a spa establishment, is liable to come within the exemption from VAT provided for by that provision as an activity closely related to medical care, where those files set out data relating to the user's state of health, planned and prescribed medical care as well as the manner in which that care is to be administered which must be consulted for the provision of care and to achieve the therapeutic objectives pursued. That medical care and activities closely related to it must also be undertaken, under social conditions comparable to those applicable to bodies governed by public law, by a centre for medical treatment or diagnosis or by another duly recognised establishment of a similar nature within the meaning of Article 132(1)(b).

Text of case [here](#).

Case C-156/20 Zipvit decided 13 January 2022

Input tax deduction – VAT “due or paid”

Zipvit, a company established in the United Kingdom, supplies vitamins and minerals by mail order. Royal Mail, the operator responsible for the public postal service in the United Kingdom, supplied postal services to Zipvit under contracts which had been negotiated individually with Zipvit. The services were treated as VAT exempt.

Further to the Court's judgement in *TNT Post UK* (C-357/07) on 23 April 2009 that the exemption from VAT referred to in Article 132(1)(a) of Directive 2006/112 does not apply to services supplied by the public postal



services for which the terms have been individually negotiated, Zipvit took the view that the payments which it had made to Royal Mail had therefore to be regarded retrospectively as including VAT, and submitted two applications for deduction of input VAT relating to the supplies at issue. HMRC dismissed the application on the grounds that the supplies at issue had not been subject to VAT and that Zipvit had not paid that tax. Royal Mail did not attempt to recover the VAT mistakenly unpaid from Zipvit and HMRC had failed to issue a tax adjustment notice against Royal Mail. Both HMRC and Royal Mail could no longer take such steps, given the expiry of the limitation periods.

The CJEU was asked to interpret article 168 of the VAT Directive, which provides that a taxable person is entitled to deduct the “VAT due or paid” in respect of supplies to him of goods or services. The CJEU held that article 168(a) of Directive 2006/112 must be interpreted as meaning that VAT cannot be regarded as being “due or paid”, in the case where, first, that person and its supplier have mistakenly assumed, on the basis of an incorrect interpretation of EU law by the national authorities, that the supplies at issue were exempt from VAT and that, consequently, the invoices issued did not refer to it, in a situation where the contract between those two persons provides that, if that tax were due, the recipient of the supply should bear the cost of it, and, second, no step to recover the VAT was taken in good time, with the result that any action by the supplier and the tax and customs administration to recover the unpaid VAT is time-barred. That VAT is therefore not deductible by the taxable person.

Text of case [here](#).

Case C-90/20 Apcoa Parking Danmark A/S decided 20 January 2022

Supply of services - consideration

Apcoa is a private company which operates car parks on private land under contracts with the site owners. Apcoa determines the general terms and conditions for use of the car parks that it manages, such as those relating to pricing and maximum parking time. One of the terms of entrance to a car park involves the levying of a control fee for infringement of the car park regulations by car park users. Apcoa considered such fees to be outside the scope of VAT whilst the tax authorities disagreed.

The CJEU was asked to determine whether the control fees constituted consideration for a supply of services. The CJEU considered that parking in a particular space in one of the car parks managed by Apcoa gives rise to a legal relationship between that company, as a service provider and manager of the car park concerned, and the motorist who used that space. In the context of that legal relationship, the parties enjoy rights and assume obligations, in accordance with the general terms and conditions for use of the car parks concerned, which include, in particular, the provision of a parking space by Apcoa and the obligation on the motorist concerned to pay, in addition to the parking fees, where appropriate, in the event of failure to comply with those general terms and conditions, the amount corresponding to the control fees. Therefore the condition of the existence of reciprocal performance appeared to be fulfilled.

The CJEU was of the view that the payment of parking fees and, where appropriate, of the amount corresponding to the control fees for parking in breach of the regulations constituted consideration for the provision of a parking space. The Court found there to be a direct link between the control fees and the parking service, based on a number of factors, including the benefit derived by a motorist choosing to park in breach of regulations (e.g. exceeding the parking time) and thus charged the control fee. The CJEU thus



concluded that the control fees must be regarded as consideration for a supply of services and, as such, subject to VAT.

Text of case [here](#).

Case C-9/20 Grundstücksgemeinschaft Kollaustraße 136 decided 10 February 2022

Cash accounting scheme – time the tax becomes chargeable - Input tax deduction

Kollaustraße leased a plot of land which it sub-let for industrial and commercial purposes. An option to tax was exercised in connection with the lease to Kollaustraße. VAT was accounted for under the cash accounting scheme. From 2004 the Lessor granted Kollaustraße a deferral of the payment of the rent. As a result from the period 2013 to 2016 Kollaustraße made lease payments for the years 2009 to 2012. VAT was charged and paid on those lease payments. Kollaustraße exercised its right to deduct input tax in the period in which the payment was made however the tax inspector took the view that the input tax deduction claim should have been made in the period during which the services were performed.

The CJEU was asked to determine whether the right to deduct input VAT in accordance with Article 167 of the VAT Directive always arises at the time when the deductible tax becomes chargeable, even where the tax becomes chargeable to the supplier of goods or services only when the remuneration is received and has not yet been paid (i.e. under the cash accounting scheme) pursuant to a derogation under article 66.

The CJEU held that in order to ensure that Article 66(1)(b) of the VAT Directive is interpreted consistently with Article 167, which provides that the right of deduction is to arise at the time the tax becomes chargeable, it must be concluded that, when, pursuant to Article 66(1)(b), the tax becomes chargeable no later than the time the payment is received, the right of deduction also arises at the time when such payment is received.

It concluded that Article 167 precludes national legislation which provides that the right of input tax deduction arises at the time the transaction takes place if the tax becomes chargeable to the supplier of goods or services only when the payment is received (under the cash accounting scheme) and the VAT has not yet been paid.

Text of case [here](#).

Case C-605/20 Suzlon Wind Energy Portugal decided 10 February 2022¹

Recharging of supplies – time the tax becomes chargeable - Input tax deduction

Suzlon Wind Energy Portugal (SWEP) purchased wind turbines from Suzlon Energy Limited (SEL), a group company established in India. The turbines, which were still under warranty, started to show defects. SWEP

¹ Decision not available in the English language



concluded an agreement with SEL for their repair or replacement, pursuant to which SWEP agreed to carry out the repairs itself (or by engaging subcontractors). SWEP deducted the VAT paid on the invoices issued by these subcontractors and invoiced SEL for the costs of the repairs (without mark-up). SWEP did not charge VAT on the invoices to SEL on the basis that the recharging of costs was not consideration for a supply. The Portuguese tax authorities took the view that the payment was consideration for services provided by SWEP to SEL.

The CJEU concluded that SWEP made a supply with consideration to SEL. The Court considered the possibility that the amounts could qualify as “amounts received by a taxable person from the customer, as repayment of expenditure incurred in the name and on behalf of the customer and entered in his books in a suspense account” under Article 79(c) of the VAT Directive, however recognised that there were a number of factors that suggested otherwise.

Text of case [here](#).

Case C-582/20 SC Cridar Cons SRL decided 24 February 2022²

Suspension of administrative proceedings pending outcome of criminal proceedings – Article 47 of the Charter of Fundamental rights

Cridar Cons SRL is in the business of construction works for roads and motorways. In the course of a criminal investigation for tax evasion, an inspection by the tax authorities found a number of purchases made by Cridar Cons to be fictitious. Cridar Cons was denied input tax recovery on the basis of irregularities detected by the authorities concerning the suppliers of the appellant. Cridar challenged the input tax denial however administrative proceedings were suspended by the tax authorities pending the criminal investigation into the fraudulent activities. The matter brought before the CJEU was the compatibility of the national legislation permitting the stay in proceedings with the VAT Directive and Article 47 of the Charter of Fundamental Rights of the European Union.

The CJEU held that the Directive and the Charter must be interpreted as meaning that they do not preclude national legislation which allows the national tax authorities to stay the proceedings on an administrative complaint against a tax assessment notice denying a taxable person the right to deduct input tax on account of that taxable person's involvement in a tax fraud in order to obtain additional objective evidence of that involvement, provided, first, that such a stay does not have the effect of delaying the outcome of the administrative complaint procedure beyond a reasonable period of time, second, that the decision ordering the stay is reasoned in law and in fact and is subject to judicial review and thirdly, that, if it is ultimately found that the right to deduct has been denied in breach of Union law, the taxable person may obtain repayment of the corresponding sum within a reasonable period and, where appropriate, interest on late payment. Under these conditions, it is not required that, during this stay of proceedings, the said taxable person benefit from a stay of execution of this notice, except, in the case of serious doubt as to the legality

² Decision not available in the English language



of the said notice, if the granting of a stay of execution of the same notice is necessary to avoid serious and irreparable damage to the interests of the taxable person.

Text of case [here](#).

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