



CJEU Tax Case-law digest

October to December 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-538/20 W AG decided 22 September 2022

Freedom of establishment - Deduction of final losses

W, a German company operates a securities trading bank. It maintained a loss-making PE in the UK which it closed. The German tax authorities In August 2004, W opened a PE in the United Kingdom, which was closed in 2007 after incurring losses. The Tax Office in Germany refused to take account of those losses when determining W's German tax liability. The CJEU was asked whether Articles 49 and 54 TFEU must be interpreted as precluding a tax system of a Member State under which a company resident in that Member State may not deduct from its taxable profits the final losses incurred by its PE situated in another Member State where the Member State of residence has waived its power to tax the profits of that PE under a double tax convention.

The CJEU concluded that since, under the double taxation convention, Germany waived its power to tax the profits made and losses incurred by the PE situated in another Member State, a resident company which has such an establishment is not in a situation comparable to that of a resident company which has a permanent establishment situated in Germany in the light of the objective of preventing or mitigating the double taxation of profits and, symmetrically, the double taking into account of losses. Consequently, in such a situation such, no restriction on the freedom of establishment guaranteed by Articles 49 and 54 TFEU can be established.

Text of case [here](#)

Case C-431/21 X GmbH decided 13 October 2022

Obligation to submit documentation of related party transaction – Freedom of establishment – Freedom to provide services

The case concerned a limited partnership established in Germany which received management services from its limited partner's sole shareholder, Y, a company established in the Netherlands. X submitted documentation to the German tax authorities in the context of a tax audit, which they deemed to be unusable, and ordered X to pay a tax surcharge. X challenged this on the basis that the provision of the German Tax Code pursuant to which the tax surcharge was imposed, infringed the freedom of establishment. The CJEU was asked whether Article 43 EC and 49 TFEU must be interpreted as precluding legislation in terms of which a taxpayer must keep records on the nature and content of business relations with related parties, and under which, where the taxpayer fails to submit those records when requested to do so by the tax authority, or where the records submitted are fundamentally unusable, not only is there a rebuttable presumption that the income subject to tax domestically is higher than the income that was declared, but, in addition, a surcharge is imposed unless non-compliance with that obligation is excusable or if the fault involved is minor.



The court found that, whilst the obligation to provide fiscal documentation is only imposed on resident companies with cross-border transactions with undertakings of interdependence and not on companies with comparable, but purely domestic transactions, is liable to constitute a restriction to the freedom of establishment, the obligation is justified and does not appear to go beyond what is necessary to attain the objective pursued. With regard to the tax surcharge, which penalises failure to comply with the obligation to provide fiscal documentation, the Court noted that, although systems of penalties in the field of taxation come within the powers of the Member States in the absence of harmonisation at EU level, such systems should not have the effect of jeopardising the freedoms provided for by the Treaty. Since the tax surcharge penalises failure to comply with the obligation to provide fiscal documentation, which is capable of constituting a restriction on freedom of establishment, that surcharge is itself capable of constituting such a restriction, which restriction may however be permissible if it is justified by overriding reasons in the public interest. The CJEU held that the tax surcharge was not disproportionate on the basis that the mechanism for the setting off of the amount of the penalty according to a percentage of the adjustment of taxable income makes it possible to establish a correlation between the amount of the fine and the seriousness of the failure to fulfil the obligation; and furthermore, the tax surcharge is not applicable in the case of an excusable or only minor fault. As a result the Court concluded that Article 49 TFEU must be interpreted as meaning that it also does not preclude a tax surcharge such as that at issue in the main proceedings.

Text of case [here](#)

Case C-295/21 Allianz Benelux SA decided 20 October 2022

Limitation on transfer of losses – Directive 90/435

This case concerned a number of insurance companies which had ‘definitively taxed income’ (DTI) surpluses. After a number of mergers, the remaining entities joined to form Allianz Benelux. Allianz Benelux carried forward the full amount of the DTI surpluses to subsequent tax periods and the full deferral was refused by the Belgian tax authorities. The CJEU was asked whether Directive 90/435 (the former EU Parent-Subsidiary Directive) must be interpreted as precluding legislation which provides that dividends received by a company are to be included in its basis of assessment before up to 95% of the total amount is deducted from it and which makes it possible, where appropriate, to carry that deduction forward to subsequent tax years, but which, nonetheless, where that company is absorbed in the context of a merger, limits the transfer of the carry-forward of that deduction to the absorbing company in proportion to the share represented by the net tax assets of the absorbed company in the total of the net tax assets of the absorbing company and the absorbed company.

The CJEU noted that Directive 90/435 does not provide for the possibility of unconditionally carrying forward surpluses which constitute DTI from an absorbed company to an absorbing company. Secondly, neither Directive 90/434 nor any other provision of EU law provide for the right to carry forward surpluses unconditionally, from the absorbed company to the absorbing company in the context of mergers, as claimed by Allianz Benelux. Member States are free to determine, in the light of the requirements of their domestic legal systems, the detailed arrangements for ensuring that the result prescribed by the first indent of Article 4(1) of Directive 90/435 is attained. The court examined whether a system for DTI such as



that at issue in the main proceedings leads to direct or indirect taxation of dividends received, which is incompatible with the first indent of Article 4(1) of Directive 90/435. On the basis of its findings the Court concluded that Article 4(1) of Directive 90/435 does not preclude the legislation implemented by Belgium.

Text of case [here](#)

Case C-433/21 & C-434/21 Contship Italia SpA decided 6 October 2022

Shell Company – Article 49 TFEU

BS is an Italian holding company whose sole shareholder is a German listed entity. BS's activity consisted exclusively or managing its subsidiary Mika. The Italian tax authorities determined that BS met the criteria of a shell company in terms of Law No 724/1994 and computed BS's taxable income for corporate income tax purposes, reconstructing it from the value of that company's sole asset, namely its 100% shareholding in Mika. This measure intended to prevent tax avoidance by shell companies did not apply to 'companies and entities whose securities are traded on Italian regulated markets'.

The CJEU was asked whether the freedom of establishment enshrined in Article 49 TFEU precludes legislation which restricts the ability to take advantage of the ground for exclusion from the scope of the measures to prevent tax avoidance by shell companies only to companies whose securities are traded on national regulated markets, excluding from the scope of that ground for exclusion other companies, whether national or foreign, whose securities are not traded on national regulated markets but which are controlled by companies and entities listed on foreign regulated markets.

The CJEU found that the national legislation at issue only allows companies which are themselves listed on the Italian regulated market to take advantage of the ground for exclusion from the scope of the measures to prevent tax avoidance by shell companies, and it is irrelevant whether a company is the subsidiary of a parent company listed in Italy or abroad. So the fact that, in this case, the shares in BS are held by a German listed entity is not relevant since even if the shareholding company's shares were listed on an Italian regulated market, BS would still not be able to take advantage of the exclusion. Furthermore, there is no tax treatment which confers an advantage on subsidiaries which is subject to the condition that parent companies be listed on the national stock exchange, and therefore the limitation on the exclusion provided for in Law No 724/1994 is not such as to hinder or render less attractive the establishment in Italy of a parent company listed on a foreign regulated market. On this basis the Court found that the measure in question did not breach article 49 TFEU.

Text of case [here](#)



Case C-67/22 Pharol decided 17 October 2022

Dividends – Free movement of capital

This case dealt with the difference in treatment of dividends distributed by a domestic company and dividends distributed by a company resident in a third country that does not have a Treaty with the resident state. The CJEU was asked whether Articles 63 and 65 TFEU must be interpreted as precluding national legislation aimed at eliminating economic double taxation of dividends in terms of which a company resident in the Member State may deduct from its taxable profits dividends which have been distributed to it by another resident company, but may not deduct dividends distributed to it by a company established in a third country on the ground that the latter is not bound to the Member State of taxation by any obligation to communicate tax information, where the in terms of the national legislation, tax deductibility is not dependent on the existence of such an obligation, and where the taxpayer can evidence compliance with the conditions for the deduction.

Acknowledging that a difference in treatment of dividends can discourage investment of capital in third country entities, the CJEU recognised that such a difference may be justifiable for public interest reasons, for example, to ensure the effectiveness of fiscal supervision. The CJEU recognised that where the benefit to a more advantageous tax regime is subject to the fulfilment of conditions which the tax authorities must be able to verify, and where compliance with such conditions can only be verified by obtaining information from the competent authorities of a third country, it is, in principle, legitimate for a Member State to refuse such benefits if, owing to the absence of contractual arrangements with the Third Country, such information cannot be obtained. The CJEU concluded that Articles 63 TFEU and 65 TFEU must be interpreted as not precluding the national legislation at issue.

Text of case (English version not available)

Case C-414/21 VP Capital decided 22 November 2022

Freedom of establishment – transfer of residence

VP Capital, a Luxembourg company, recorded write-downs relating to various shareholdings which it held in other companies. It deducted those write-downs from its taxable income in Luxembourg, which resulted in an increase in its losses which can be carried forward, which however it could not use since it was in a loss-making situation. VP Capital subsequently transferred its registered office from Luxembourg to Belgium, becoming a company incorporated under Belgian law. VP Capital recovered part of the write-downs which it had recorded when its registered office was still in Luxembourg, relying on the Belgian exemption scheme for recovering write-downs on shares in companies. However, in terms of Belgian law, in the event of a transfer to Belgium of the registered office of a foreign company, the capital gains and losses corresponding to assets located abroad and held by that company which were realised after that transfer are determined on the basis of their book value at the time of that transfer. The unrealised capital gains are exempt provided that they are recorded in a separate liability account, and since the recovery of write-downs recorded by VP Capital after the transfer of its registered office to Belgium had not been recorded in a separate liability account, the Belgian tax authorities took the view that that recovery of write-downs was taxable.



The CJEU recognised that the right to freedom of establishment in Article 49 TFEU does not guarantee that a transfer of residence will be neutral as regards taxation. Freedom of establishment does not mean that a Member State is required to change its tax rules to those of other Member States in order to ensure, in all circumstances, taxation which removes any disparities arising from national tax rules. However the CJEU acknowledged that the legislation in question establishes, to the detriment of companies formed under the law of a Member State and exercising their freedom of establishment, a difference in treatment liable to deter them from transferring their registered office to another Member State in order to carry on their economic activity there. That difference in treatment can be permissible only if it relates to cases which are not objectively comparable or if it is justified by an overriding reason in the public interest and is proportionate thereto.

Finding that VP Capital, as a company that had transferred its registered office to Belgium which had no jurisdiction to tax its profits prior to the transfer, is not in a comparable situation with a company that has already been resident in Belgium for tax purposes, the Court held that the legislation in dispute did not breach the freedom of establishment.

Text of case [here](#)

Case C-694/20 Orde van Vlaamse Balies and Others decided 8 December 2022

DAC6 – legal professional privilege

In this case the CJEU considered the compatibility of the provision of Council Directive 2011/16/EU on administrative cooperation in the field of taxation, as amended (DAC 6), which requires lawyer-intermediaries to notify other intermediaries of their reporting obligations in relation to a cross-border reportable arrangement.

The CJEU found that the obligation to notify laid down by the Directive infringes the right to respect for communications between a lawyer and his or her client. It did not accept the argument that the disclosure of the identity of the lawyer-intermediary and of his or her having been consulted would be necessary in order to enable the tax authorities to ascertain whether that lawyer-intermediary is justified in relying on legal professional privilege, recognising that the purpose of the reporting and notification obligations laid down in Article 8ab of the Directive is not to check that lawyer-intermediaries operate within the limits of the relevant national laws that define their profession, but to combat potentially aggressive tax practices and to prevent the risk of tax avoidance and evasion, by ensuring that the information concerning the reportable cross-border arrangements is filed with the competent authorities.

Text of case [here](#)



Case C-83/21 Airbnb decided 22 December 2022

Article 56 TFEU – obligation to collect data, withhold tax and appoint a tax representative

The case concerned the Italian tax regime for short-term property rentals which applies to intermediaries like Airbnb who operate online platforms, obliging them to report certain data relating to the rental agreements to the tax authority, to withhold 21% of the amount of the rent collected or received and pay it to the authorities, and to appoint a tax representative if not resident or has no permanent establishment in Italy. The CJEU held that Article 56 TFEU does not preclude legislation of a Member State requiring providers of property intermediation services, (irrespective of their place of establishment and the manner in which they intervene) to collect and then transmit to the national tax authority the data relating to the rental contracts concluded following their intermediation, and, to withhold at source the amount of tax due on the sums paid by the lessees to the lessors and to pay it to the Treasury of that Member State. However, with regard to the requirement to appoint a tax representative when they reside or are established outside the territory of the Member State of taxation, such a requirement is contrary to article 56 TFEU.

Text of case [here](#)



VAT cases

Case C-98/21 W GmbH decided 8 September 2022

Input tax deduction by active holding company

W was a German active holding company which held shares in subsidiaries and provided accounting and management services to those subsidiaries. The subsidiaries had a limited right to deduct input VAT as their output activities (i.e. construction and sale of buildings) were largely exempt from VAT. W GmbH also contributed various services (e.g. architectural and static calculation services, planning of heat and sound installation, energy supply, network connections, general contracting, etc.) into the KGs in exchange for a participation in the general profits of the KGs. This contribution was not subject to VAT. W GmbH deducted all the input VAT (also the input VAT related to the services it acquired from third parties and which were contributed into the KGs).

The CJEU was asked whether a holding company which makes taxable supplies to its subsidiaries is entitled to deduct the input tax incurred on services it purchased from third parties and supplies to its subsidiaries in return for the grant of a share in the general profit, where, first, the input services have direct and immediate links not with the holding company's own transactions but with the largely tax-exempt activities of the subsidiaries, second, those services are not included in the price of the taxable transactions carried out in favour of the subsidiaries and, third, the said services are not part of the general costs of the holding company's own economic activity.

The Court found that there was no direct and immediate link between the inputs and the accounting and management services supplied by W to its subsidiaries. Furthermore, the making by W of the contribution in kind to its subsidiaries does not constitute an economic activity and therefore does not give rise to a right to a deduction. Looking at the actual use made of the services purchased by W and contributed to the subsidiaries, the court concluded that they were directly linked to the operations of the subsidiaries, and therefore that link precludes the grant of a right of deduction by W of the input tax incurred on those services. Furthermore the costs were not part of the constituent elements of W's management and accounting services.

Text of case [here](#)

Case C-368/21 R.T. decided 8 September 2022

VAT on importation of a vehicle

In this case the CJEU was asked whether the place of importation of a vehicle registered in a third country and imported into the European Union in breach of customs legislation is situated in the Member State in which the customs legislation was infringed and the vehicle was first used in the European Union, or is it in the Member State in which the person who failed to comply with customs obligations resides and actually uses the vehicle.



The case concerned R.T., a German resident, who purchased and registered a vehicle in Georgia in January 2019. In March 2019, R.T. drove the vehicle from Georgia to Germany via Turkey, Bulgaria, Serbia, Hungary and Austria without presenting the vehicle to an import customs office. In May 2019 the German customs office assessed R.T. for customs duties and import VAT. The Court recognised that a specific vehicle, imported in breach of customs legislation, must be regarded as having entered the economic network of the Member State in which the taxable person resides, where that vehicle had actually been used in that Member State, even if, when travelling from a third country to that Member State, that vehicle had physically entered the customs territory of the European Union via another Member State.

Text of case [here](#)

Case C-227/21 HA.EN decided 15 September 2022

Output tax declared but not paid - Input tax deduction entitlement of purchaser

In this case a Lithuanian company (Vendor) sold immovable property to creditor HA.EN. in partial satisfaction of a debt. Vendor issued a tax invoice on which VAT was charged on the sale, declared the output VAT however never paid the output VAT to the authorities. The Authorities denied HA.EN's claim for input tax recovery on the basis that it knew or should have known that the vendor was in financial difficulty, or even insolvent, and that that circumstance could result in the vendor not paying or not being able to pay VAT into the public purse.

The CJEU held that, as previously established, the question whether or not the supplier of the goods has paid the VAT due on sale transactions to the public purse has no bearing on the right of the taxable person to deduct input VAT. Such a pre-condition would lead to the taxable person being subject to an economic burden which should not be theirs, and the avoidance of which is the specific aim of the rules governing deduction. The right to deduct may only be denied if the taxable person has committed tax evasion or and abuse of rights. In so far as the Vendor is concerned, as previously held by the Court, the mere failure to pay duly declared VAT cannot constitute VAT fraud, irrespective of whether such a failure is intentional or not. With regard to the purchaser, the Court found that the fact that the purchaser was aware of the vendor's financial difficulties, was not in itself sufficient to establish that the transaction at issue is an abuse and, therefore, to justify denial of the right of deduction.

The CJEU concluded that Article 168(a) of the VAT Directive read in conjunction with the principle of fiscal neutrality, must be interpreted as precluding a national practice under which, in the context of the sale of an item of immovable property between taxable persons, the purchaser is denied the right to deduct input VAT merely because he or she knew or should have known that the vendor was in financial difficulty, or even insolvent, and that that circumstance could result in the vendor not paying or not being able to pay VAT into the public purse.

Text of case [here](#)



Case C-330/21 The Escape Center decided 22 September 2022

Reduced rate – ‘Sporting facilities’ – fitness centre

The Escape Center operated fitness centres in Belgium and also offered personal training and group classes. It levied VAT at the standard rate of 21%, however based on the outcome of national case-law it determined that the reduced rate of 6% should have applied and sought reimbursement from the tax authorities. The VAT Directive permits Member States to apply a reduced rate to the ‘use of sporting facilities’. The CJEU has previously held that the concept of the ‘use of sporting facilities’ must be understood as covering the right to use facilities for the practice of sport or physical education, and their use for those purposes. In this case the CJEU recognised that there was no doubt that access to a fitness centre with use of sports facilities and coaching of new customers in the responsible use of that fitness centre’s equipment falls within the scope of the ‘use of sporting facilities’ envisaged by the VAT Directive. However, in addition to access to the fitness centre, The Escape Center also offers personal coaching and group classes. Whilst leaving it for the national court to decide, the CJEU’s view was that it appeared from the information available that the personal coaching and group classes to which access to the fitness centre operated by The Escape Center conferred entitlement to are ancillary to the use of the facilities of that centre or to their actual use, and should this be in fact the case, the reduced rate should apply.

Text of case [here](#)

Case C-235/21 Raiffeisen Leasing decided 29 September 2022

Input tax deduction – invoicing

RED, the owner of land, concluded a sale and leaseback transaction with Raiffeisen in order to secure financing for development of immovable property. In terms of the contract, Raiffeisen agreed to buy the property from RED in exchange for the payment of monthly lease instalments up to the value of the land and of the newly constructed building. The agreement indicated the VAT due on the lease payments however Raiffeisen did not provide RED with any tax invoices and did not declare and pay the output tax. RED’s claim for input tax deduction was denied on the basis that no Tax invoice was available and the authorities assessed Raiffeisen to interest on the undeclared output tax. The CJEU was asked whether the contract could be regarded as an invoice and, of so, what details should be included in a contract to be regarded as an invoice. The CJEU held a contract may be regarded as an invoice where that contractual agreement contains all the information necessary for the tax authorities of a Member State to be able to establish whether the substantive conditions for the right to deduct VAT are satisfied.

Text of case [here](#)



Case C-250/21 Fund O decided 6 October 2022

Exemption – Granting of Credit

The case concerned Fund O, a non-standardised securitisation fund, which intended to conclude sub-participation agreements with banks or investment funds. It was explained to the Court that the originator in a sub-participation agreement undertakes to transfer to the sub-participant all the proceeds from receivables specified in that agreement in exchange for a contractually agreed financial contribution which the originator would receive from the sub-participant as soon as that agreement is concluded. The debt securities remain in the assets of the originator. The difference between the financial contribution paid to the originator and the amount obtained, during the term of the agreement, by the sub-participant constitutes the sub-participant's remuneration. Fund O was of the view that the transaction constituted an exempt transaction concerning the granting, negotiation or management of credit whilst the tax authorities were of the view that the services were taxable.

The CJEU found that the services provided by a sub-participant under a sub-participation agreement, consisting of making available to the originator a financial contribution in exchange for payment of the proceeds from the receivables specified in that agreement, those receivables remaining in the assets of the originator, fall within the concept of 'granting of credit' within the meaning of Article 135(1)(b) of the VAT Directive.

Text of case [here](#)

Case C-641/21 Climate Corporation Emissions Trading decided 27 October 2022

Place of supply of services rules – VAT Fraud

Climate Corporation, an Austrian company, transferred greenhouse gas emission allowances to Bauduin, a German company, for consideration. The Austrian authorities categorised the transfers of greenhouse gas emission allowances as a taxable 'supply of goods' and did not permit the application of the exemption for intra-Community supplies since it maintained that Bauduin participated, as a 'missing trader', in a fraudulent VAT carousel and Climate Corporation knew or should have known that those allowances would be used for the purposes of VAT evasion. The national court, determined that the transfer of greenhouse gas emission allowances was a supply of services and that therefore in terms of Article 44 of the VAT Directive the service took place in Germany not Austria. The national court referred to matter to the CJEU in order to determine whether the case-law applicable to intra-EC supplies of goods (e.g. Italmoda C-131/13 wherein it was held that, in the case of intra-EC supplies of goods, the right to deduction of input VAT must be refused to a taxable person who knew, or should have known, that, by the transaction relied on as a basis for those rights, he or she was participating in VAT evasion committed in the context of a chain of supplies) applies to the provision of cross-border services. If in the affirmative, the place of supply of services would have to be regarded as being in Austria and not in Germany, despite the contrary wording of Article 44 of the VAT Directive and the corresponding national provisions.



The CJEU recognised that pursuant to Article 44 of the VAT Directive, the place of supply of the services is located in the Member State of the recipient of the services (Germany). With regard to the claim that the recipient allegedly committed VAT evasion of which the supplier of the services concerned should have known, the CJEU acknowledged its earlier decisions which permit/require Member States to refuse the benefit of the rights laid down by the VAT Directive when they are claimed fraudulently or abusively, such as the right to an exemption in respect of an intra-Community supply of goods, not only where tax evasion has been carried out by the taxable person but also where a taxable person knew, or should have known, that, by the transaction concerned, he or she was participating in VAT evasion carried out by the supplier or by another trader acting upstream or downstream in the chain of transactions. However the CJEU noted that this case concerns not the reliance on a right, such as the right to an exemption in respect of an intra-Community supply of goods, but the determination of the place of a taxable transaction. It held that an interpretation according to which, in the case of VAT evasion, the place of supply of services may be deemed to be in a Member State other than that determined under the place of supply of services rules would run counter to the objectives and the general scheme of those rules. Furthermore, unlike in the case of intra-EC supplies of goods, where a Member State has the competence, pursuant to article 131 of the VAT Directive to refuse the exemption in order to combat avoidance or evasion, the same competence is not afforded in terms of article 44.

The CJEU concluded that the VAT Directive does not permit the authorities of the supplier Member State to take the view that the place of that supply – which, pursuant to Article 44 of that directive, is located, in another Member State – is nonetheless deemed to be located in the former Member State where the supplier knew, or should have known, that he or she was, by that supply, participating in VAT evasion committed by the recipient of that supply in a chain of transactions.

Text of case [here](#)

Case C-607/20 GE Aircraft Engine Services decided 17 November 2022

Supplies of services free of charge

GE, a UK company, operated an awards system for its employees. The winner of a certain reward would receive a retail voucher which it could redeem at specific outlets. HMRC took the view that the provision fell within the scope of Article 26(1)(d) of the VAT Directive which states that “the supply of services carried out free of charge by a taxable person for his private use or for that of his staff or, more generally, for purposes other than those of his business” is a supply of services for a consideration. The CJEU noted that the purpose of article 26(1)(d) is to ensure equal treatment as between a taxable person who applies goods or services for his or her own private use or for that of his or her staff, on the one hand, and a final consumer who acquires goods or services of the same type, on the other. The CJEU concluded that GE’s award free of charge of the retail vouchers at issue to employees nominated under the awards programme was intended to increase the performance of its employees and, therefore, leads to the proper functioning and profitability of the business, with the result that it must be found that that supply of services is not carried out for purposes other than those of the business and, therefore, does not fall within the scope of Article 26(1)(b) of the VAT Directive.

Text of case [here](#)



Case C-458/21 CIG Pannónia Életbiztosító decided 24 November 2022

Exemption for medical services

The case concerned a Hungarian insurance company which sold health insurance policies covering certain illnesses for care overseas. The company concluded an agreement with BestDoctors, a Spanish company, which would handle the administrative aspects when an insured required medical care abroad. The Hungarian company was found to have not declared any VAT on fees paid to BestDoctors. The court was asked whether services consisting in verifying the accuracy of an insured person's diagnosis of serious illness, in order to find the best possible health care with a view to the insured person's recovery and to ensure, where covered by the insurance contract and where the insured person so requests, that the medical treatment is provided abroad, are covered by the exemption provided for in Article 132(1)(c) of the VAT Directive which exempts "the provision of medical care in the exercise of the medical and paramedical professions". The CJEU found that the purpose of the services is not to protect, including maintaining or restoring, human health, within the meaning of the case-law of the Court, but to ensure the organisation of the logistics linked to medical care abroad, and therefore the exemption did not apply.

Text of case [here](#)

Case C-596/21 A decided 24 November 2022

Input tax – fraudulent transaction

A purchased a used car for his business from C, who claimed to be W. W was aware of C's deceit and consented to it. C issued an invoice with VAT to W who in turn issued an invoice with VAT to A for an increased amount (W sent that invoice to C who forwarded it to A). C retained the VAT paid by A. In C's records C reported the sale price of the first invoice to W. W did not record the transaction in his accounts or in his tax returns. A claimed a deduction of input tax which was denied by the German authorities. The CJEU held that the second purchaser of goods may be refused the benefit of deducting input VAT on the ground that he or she knew or ought to have been aware of the existence of VAT fraud committed by the original seller at the time of the first sale, even if the first purchaser was also aware of that fraud.

Text of case [here](#)

Case C-141/20 Norddeutsche Gesellschaft für Diakonie mbH decided 1 December 2022

VAT Grouping

This case concerned German VAT Grouping rules, in terms of which the parent entity of the companies forming part of the VAT Group is considered to be the 'taxable person' and not the VAT Group itself. NGD is a German company having a 51% shareholder, A. Both NGD and A are managed by the same person. NGD took the view that it formed a VAT group with A however the German tax authorities rejected this view on the basis that A did not hold the majority of voting rights in NGD.



The CJEU was asked whether the VAT Directive permits member states to designate, as a single taxable person for VAT purposes, not the VAT group itself, but a member of that group, namely the controlling company of that group. The CJEU held that the objectives of VAT Grouping may justify the designation of the controlling company of the VAT group as a single taxable person, where that controlling company is in a position to impose its will on the other entities forming part of that group, to ensure the correct levying of VAT and recognised that the VAT Directive does not preclude it, provided that that designation does not entail a risk of tax losses.

Secondly, the CJEU was asked whether, for the purposes of forming a VAT group with a controlling company, a Member State can require the controlling company to not only hold the majority interest in the capital of a company, but also to hold a majority of the voting rights. The CJEU found that the requirement for a majority of voting rights, in addition to the requirement relating to a majority shareholding, in terms of the requirement of financial integration, within the meaning of German legislation does not appear to be a measure that is necessary and appropriate for attaining the objectives of preventing abusive practices or behaviour or of combating tax evasion or tax avoidance, and is therefore contrary to the VAT Directive.

Lastly the CJEU was asked whether a Member State is precluded from classifying, by categorisation, given entities as non-independent, where those entities are integrated, in financial, economic and organisational terms, into the controlling company of a VAT group. The Court held that even though the controlling company fulfills the VAT obligations on behalf of the VAT group, those entities bear the economic risks associated with carrying out their respective economic activities, which must therefore be regarded as independent economic activities. As a result, they cannot be classified, by categorisation, as 'non-independent entities' simply because they belong to a VAT group.

Text of case [here](#)

Case C-269/20 S decided 1 December 2022

VAT Grouping

This is another case on the German VAT Grouping rules, in terms of which the parent entity of the companies forming part of the VAT Group is considered to be the 'taxable person' and not the VAT Group itself. The case concerned supplies by a GMBH to its parent company S, both of which formed part of a VAT Group. S is a German foundation governed by public law which supplies VAT-exempt medical services for consideration and also carries out activities in the exercise of its powers as a public authority for which it is not considered to be a taxable person. GMBH supplied cleaning services to S on which no VAT was charged on the basis that the two formed part of a VAT Group.

Two questions were brought before the CJEU. Firstly the CJEU was asked whether a Member State may designate as a single taxable person for VAT purposes, not the VAT group itself, but the controlling company of that group. As in Case 141/20 the court held that the Directive does not prevent a Member State from doing so, where that controlling company is in a position to impose its will on the other entities forming part of that group and provided that that designation does not entail a risk of tax losses. Secondly the Court was asked whether a supply of services by a VAT Group member to the controlling company, for the purposes of the latter's non-economic activity, may be taxed under the rules concerning supplies of services free of charge for private use (art 6(2) of the VAT Directive). The Court rejected the application of



article 6(2) of the Directive to this scenario and concluded that the intra-group services could not be taxed under that provision.

Text of case [here](#)

Case C-512/21 Aquila Part Prod Com decided 1 December 2022

Input tax deduction – VAT fraud

This case concerned a Hungarian company which was assessed and fined for an improper refund claim as well as unpaid tax. In the course of investigations the authorities found that it participated in ‘carousel’ type fraud. It furthermore found that the company did not meet food safety requirements.

The CJEU held that the finding that the supplies form part of carousel transactions is not sufficient to prove the taxable person's involvement in tax evasion/fraudulent transactions nor that person's knowledge of the existence of tax evasion. The taxable person cannot be expected to carry out complex and comprehensive checks on suppliers, such as those that can be carried out by the tax authorities. It is for the national court to assess whether, in the light of all the circumstances of the case, the taxable person has shown due diligence and has taken the measures which may reasonably be required in the circumstances.

Text of case [here](#)

Case C-247/21 Luxury Trust Automobil decided 8 December 2022

Triangulation simplification – ‘reverse charge’ on the invoice

Luxury Trust Automobil, an Austrian seller of luxury cars, purchased vehicles from a UK supplier in 2014 which it resold to a Czech company. The transactions were effected by the respective parties using their respective EU VAT number. The transactions were reported using the triangulation simplification. The Austrian authorities were of the view that the triangulation simplification did not apply since the tax invoices issued by Luxury Trust Automobil did not contain a statement as to the transfer of tax liability. The CJEU recognised that the simplified triangulation is an optional mechanism that departs from the general rules, and the words ‘Reverse charge’ on the invoice are required to ensure that the end customer is aware of their VAT obligations where the intermediary supplier has opted to apply the scheme. The Court therefore held that, in a triangular transaction, the final customer cannot be considered to have been validly designated as liable for payment of VAT where the invoice issued by the intermediary acquiring the goods does not contain the words ‘Reverse charge’. Furthermore, the exclusion of the words ‘Reverse charge’ from an invoice may not subsequently be corrected by adding a statement that that invoice relates to an intra-Community triangular transaction and that the tax liability is transferred to the person to whom the supply is made.

Text of case [here](#)



Case C-378/21 P GmbH decided 8 December 2022

Excess VAT invoiced

P ran a children's playground for which it charged an entry fee with VAT at 20%. The correct VAT rate was 13% and, upon realising the error sought to recover the difference from the authorities. The authorities rejected the claim on the basis that a refund of the difference would unjustly enrich P, given that it would be unable to in turn refund the excess VAT to its customers. The CJEU, analysing article 203 of the VAT Directive which states that "VAT shall be payable by any person who enters the VAT on an invoice", held that the purpose of the said article is to eliminate the risk of loss of tax revenue where the recipient of the invoice in question has a right to deduct such VAT. However in this case, the invoices were issued to final consumers who have no right to deduct VAT. The court concluded that a taxable person who has supplied a service and who has stated an amount of VAT on the invoice which was calculated on the basis of an incorrect rate is not liable for the part of the VAT invoiced incorrectly if there is no risk of loss of tax revenue on the ground that the recipients of that service are exclusively final consumers who do not have a right to deduct input VAT.

Text of case [here](#)

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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