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VAT and the Public Broadcasting Services. Advocate General conclusions in the Case C-21/20 Public Bulgarian Television

Marcos Alvarez Suso (Spanish Tax Administration) · Thursday, April 8th, 2021

The VAT treatment of the activities carried out by public entities has traditionally been a source of debate.

Article 13 of the VAT Directive offers a short and limited regulation of the activities of public entities for VAT purposes.

Generally speaking, the activities of public entities acting as such (that is to say: when using the specific powers conferred by the domestic law to the Public Authorities) are out of the scope of VAT.

However, this general conclusion is not applicable where not paying VAT could lead to a significant distortion of competition. With this idea of preserving fair market competition in mind, some specific activities listed in Annex I of the VAT Directive are subject to VAT.

For the purpose of this comment, the activities of public broadcasting are included in the activities subject to VAT according to Annex I, as far as those activities are not exempted from VAT.

Notwithstanding this general framework, there are several entities and activities where the VAT treatment of public activities is not straightforward, making room for many CJEU cases.

Amongst other debated topics, one can mention:

- what type of entities can be regarded as public entities; or
- when those entities are considered acting as such in contrast with mere private activities; or
- what must be regarded as a “significant” distortion of competition; or
- to what extent a “public” entity with a mixed activity, public and private, bears the right of VAT deduction.

Public broadcasting services and their VAT consequences have been a perfect scenario for those discussions. These activities are characterised by limited or no source of income subject to VAT (advertising, products selling, etc.) and a predominant source of income by public funding in the shape of subsidies and the like.

In two posts published on this blog site during 2021, the author draws the readers’ attention to the pending CJEU’s Case C-21/20, where VAT on the public Bulgarian TV activities was under

discussion. For a more detailed description of the case facts and the referred questions, see the author's blogs: <http://kluwertaxblog.com/2021/01/08/the-economic-activities-subsidised-by-the-public-budget-and-their-right-treatment-under-vat-the-case-of-public-television-services/>; <http://kluwertaxblog.com/2021/01/12/public-broadcasting-services-and-vat-some-issues-to-be-solved/>.

The author suggested two possible reasons for the CJEU's decision:

- one based on the promotion of certain activities performed in the public interest, where very few transactions were subject to VAT, but a generous right of VAT deduction is granted; and
- one based on the neutrality principle, where very few transactions were subject to VAT, but the right of VAT deduction was granted accordingly at a very limited level.

THE AG CONCLUSIONS

On 25 March 2021, Advocate General Szpunar issued his conclusions in Case C-21/20, *Balgarska natsionalna televizija* (“Bulgarian national public television” or “BNT”).

The Advocate General (AG), after analysing the previous jurisprudence in this regard – especially the CJEU's decision in Case C-11/15 (*Cesky Rozhlas*), where Mr Szpunar acted as the AG – and the Guidelines of the VAT Committee, proposes the CJEU to answer to the referred questions as follows.

1) That the activity of a public body consisting of the provision of the public radio and TV service does not constitute a provision of services carried out for consideration, insofar as that activity is financed through subsidies from the State budget.

In this regard, the AG considers that the general subsidies received by BNT are not directly linked to the services rendered to the public audience. So, the AG finds that those subsidies are not the consideration of the public broadcasting services, but a means to finance the public activity.

In his opinion, the AG steps aside from other CJEU's rulings, such as Case C-151/13 (*Le Rayon D'or*), and the EU Commission's opinion, thus concluding in favour of the position of BNT (and of the Spanish government). With this conclusion, the AG's opinion is that a substantial part of the activities of BNT, notably the publicly financed services, are rendered for no consideration at all.

2) That the concept of commercial activity of public radio and TV organizations includes operations carried out for consideration and that do not constitute activities of general interest, as well as services provided free of charge, to the extent that these are financed with income from operations carried out for consideration.

Although the AG holds that a substantial part of the BNT activities is not subject to VAT, he considers it useful to analyse what should be the distinction between commercial broadcasting activities and activities made in the general interest, the latter exempted from VAT, according to Article 132, paragraph 1, letter q) of the VAT Directive.

For the AG, the essential difference relates to the means to finance both activities.

In the case of commercial activities, like the ones provided by private broadcasting companies,

income derives from commercial communication, advertising, etc.

In the case of public broadcasting, the means to finance the activity are somewhat more complex, including a substantial part of public funding in the shape of subsidies. The activities subsidised are not subject to VAT, or even where subject to VAT (which the AG considers not being the case), those activities are exempted from VAT.

In the absence of consideration, public broadcasting activities do not bear the right of VAT deduction, which leads to the AG to the third conclusion proposed to the CJEU.

BNT alleged that all its activity is of a commercial nature, given that most of the programs (films, sporting competition broadcasting, entertainment programs) are oriented to increase the share of audience and, consequently, to sell its advertising services better. Following this interpretation, BNT deducted the VAT incurred for these programs in full.

The AG does not share the interpretation of BNT while distinguishing commercial programs from other types of programs. The AG considers the proposed distinction as essentially arbitrary, given that even commercial programs, like BNT called them, contribute to the activities of the general interest, and taking into account that the democratic, cultural and social needs of the society also include leisure, films and sporting activities.

3) As for the right of BNT to deduct VAT, the AG proposes the CJEU to conclude that a body having these characteristics has the right to deduct input VAT to the extent that it is financed by income from taxable transactions.

In the absence of reliable and detailed accountancy allocating every input to the activities of a different nature (commercial and public activities), in paragraph 73 of his conclusions, the AG suggests taking into account the turnover obtained from taxed transactions with respect to the total turnover of the taxpayer, that is, a sort of pre-pro rata with financial criteria, based on the percentage of the total income coming from activities subject to VAT, and excluding from this percentage the income derived from public funding.

AUTHOR'S CONCLUSIONS

The interpretation of the case proposed by the AG tends to support the prevalence of the principle of neutrality. This prevents distortions of competition that may arise where a substantial part of the public broadcasting activity is not subject to VAT, while, at the same time, the public entity had fully deducted the VAT incurred.

Indeed, this lack of symmetry between the output and input VAT is not consistent with the basic principles underlying the tax.

In the author's experience, this is the case of public broadcasting activities and many other publicly generally subsidised activities, where a substantial part of their income is not subject to VAT.

This conclusion is perfectly consistent with other CJEU's recent decisions regarding subsidies and activities rendered for consideration.

In the author's opinion, where a subsidy is granted as an economic incentive or compensation to perform a specific type of activity or service (i.e., a research project), it should be, in general,

regarded as a consideration of the activity concerned.

However, the situation is different where a general subsidy (or any public funding from the public budget) is granted for the overall functioning of a public entity to balance the structural difference between the income from third parties (if any) and the expenses of the activity. In this second case, the subsidies received should not be regarded as the consideration of the activities, but as general public funding. The examples of public schools, the Army or police bodies are mentioned in this regard by the AG (see paragraph 27 of the AG conclusions).

And the VAT to be deducted by those public entities with mixed activities must be calculated according to the level of taxable income in the VAT of the entity's activities. In the absence of specific provisions in the VAT Directive, the criteria to calculate the exact level of VAT deduction are to be determined by each Member State on an individual basis.

Notwithstanding certain "creative" criteria, like the one proposed by BNT (see paragraph 54 of the AG conclusions), and other more accurate criteria, based on the effective use of any input received to carry out activities subject to the VAT (which, however, would require the existence of detailed analytic accountancy), a reasonable means to determine the level of VAT deduction is based on the percentage of the total income of the entity corresponding to taxable transactions in comparison with the overall income received by the entity.

This financial criterion, based on the way the entity obtains the means to carry out its activities, is indeed the one proposed by the AG to the CJEU in the case at hand.

Unquestionably, the decision by the CJEU in this regard will be worth reading in close detail.

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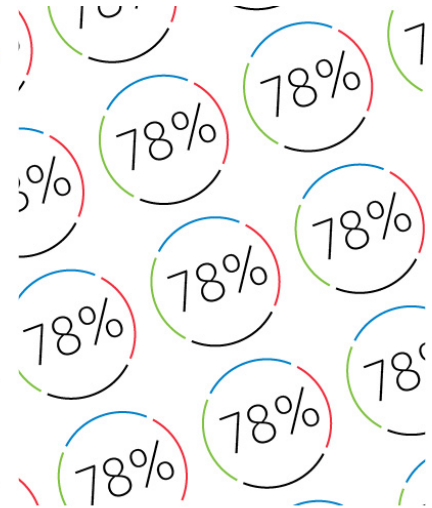
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