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VAT and Public Radio and Television Activities. Solved Case?

Marcos Alvarez Suso (Spanish Tax Administration) · Thursday, September 23rd, 2021

Introduction

In two previous posts on this blog ([1](#) and [2](#)), the author analyzed the VAT treatment of activities carried out by public entities, particularly public entities that offer radio and television services.

Case C-21/20 referred to the Court of Justice of the European Union (CJEU) by a Bulgarian court, and in which various aspects of VAT taxation of Bulgarian Public Television were analyzed, concerns this issue.

The CJEU issued its [judgment](#) on this case on 16 September 2021, after the [opinion](#) of Advocate General Szpunar, counting on the observations of two Member States (Bulgaria and Spain) and the European Commission.

The five-judge chamber's ruling provides some clarification on this complex debate, although it also leaves some issues open, essentially on the actual method to calculate the deductible input VAT.

The CJEU's Judgment

As will be recalled, the facts of the case and the situation presented before the Court are as follows.

The Bulgarian National Television (BNT), a legal person, is the national public provider of audio-visual media services (radio and TV) in Bulgaria.

For its activities, BNT receives two different streams of income:

1. A subsidy from the state budget, in the form of a flat-rate compensation per programme hour, fixed by the Council of Ministers. The consequences of this source of funding for VAT purposes is the crux of the matter.
2. Self-generated income from advertising and sponsorship. These activities are, out of any doubt, subject and non-exempted from VAT. Accordingly, they generate a right to VAT deduction. To what extent these activities create a right to VAT deduction is another critical point for the CJEU to decide.

Significantly, the amount of the subsidy exceeded the revenue obtained from taxable supplies

many times over.

As a result of a tax audit, the Bulgarian tax authorities recognized only a partial input tax deduction for the indicated supplies, regarding which BNT had made a full input tax deduction.

BNT believes that it has the right to full input tax deduction concerning the purchases used for its commercial activity. In contrast, it claims partial input tax deduction concerning the purchases used simultaneously for activities of a commercial nature and activities of a non-exclusive commercial nature.

The Bulgarian tax authorities consider that BNT provided both taxable supplies, namely advertising activities, and exempt supplies, namely broadcasting of programmes, and that, in the exercise of the right to an input tax deduction, it could not be established whether the purchases were only connected with exempt supplies or instead with taxable supplies.

The referring Court takes note of the prior Bulgarian court's cases issued in 2018. In those previous Bulgarian court's decisions, the domestic Court decided that BNT was entitled to a full input tax deduction only if it could prove that certain purchases it made, which were intended for its commercial activity, were financed entirely by advertising or other revenues related to the broadcasting activity and not by the public subsidies received. In this connection, the Bulgarian Court stressed that the funds generated by the sale of advertising time had to cover the expenditure for the purchase of programme products, namely films, among other things, broadcast in one of the BNT programmes. However, BNT did not carry out detailed analytical accounting of which part of the television broadcaster's expenditure was borne by the public subsidies and which amount was instead paid by the sale of advertising time. Thus, previous national Court's rulings recognized to BNT only a partial right of VAT deduction.

The referred case raises four main questions for the CJEU to decide, briefly summarized by the author as follows:

1. whether the subsidies received constitute the consideration for the public broadcasting services or whether those services are instead rendered for no consideration at all;
2. in case the subsidies constitute the consideration for the services, whether Article 132(1)(q) of the VAT Directive applies so that the subsidies are exempted from VAT;
3. whether the right of an input tax deduction for purchases is dependent not only on the use of the purchases (for taxable or non-taxable activity) but also on how those purchases are financed (namely, self-generated income and subsidies received);
4. in the case of public television broadcaster's activities consisting of both taxable and exempt supplies, having regard to its mixed financing, the scope of the right to an input tax deduction in respect of those purchases and the criteria applicable in this regard.

In its judgment of 16 September 2021, the Court answers the first question that, in the application of the VAT Directive, the activity of a national public television provider that consists of providing television viewers with audio-visual communication services, which the State finances through a subsidy and that does not give rise to the payment by viewers of any fee for television broadcasting does not constitute a provision of services carried out for consideration, within the meaning of that provision.

To conclude this, the Court reminds that the activities subject to VAT are those carried out for consideration, in which there is a direct link between the service provided and the consideration

received (paragraphs 30 and 31).

The EU judges highlight that access to public television services is free in Bulgaria, and the activity benefits all viewers in general.

Furthermore, the Court considers in this case that the subsidies received do not constitute the consideration of the TV services, among other reasons, because the subsidies are received irrespective of the actual use of such services for the TV viewers.

In this regard, the Court does not consider the situation similar to that in *Le Rayon D'or* (Case C-151/13, judgment of 27 March 2014).

As for the third and fourth questions, essentially related to how to determine the right to deduct VAT in this type of mixed or “dual” activities, the Court concludes that the national public television provider is entitled to deduct the VAT borne by acquisitions of goods and services used for the needs of its activities that generate the right to deduction and is not entitled to deduct the VAT borne by acquisitions of goods and services used for the needs of its activities not included in the scope of the VAT.

It is for the Member States to determine the methods and criteria for the distribution of input VAT between operations subject to tax and operations that are not included in the scope of VAT, taking into account the purpose and structure of this Directive with due respect to the principle of proportionality.

To reach this conclusion, the Court emphasizes that what justifies the deduction of input VAT is the use of the goods and services acquired for taxable operations. It also understands that the method of financing such acquisitions of goods and services is irrelevant for determining the right to deduct (paragraph 52).

Further, it recalls that the pro-rata criteria for VAT deduction (Articles 173 to 175 of the Directive) are, in principle, applicable to economic activities that only partially allow the right to deduct (paragraph 53).

And finally, in paragraphs 55 and 56, the Court concludes that the calculation method that may be established to determine the right to deduct input VAT between economic and non-economic activities belongs to the powers of the Member States. The Member States must establish an objective distribution method that considers the nature of the operation, without being obliged to a particular method.

Author's Comments

The CJEU's judgment of 16 September 2021 clarifies that a public entity whose services are offered to the general public and which are financed essentially through public subsidies cannot constitute an economic activity for VAT purposes.

The absence of consideration paid and the lack of a direct link between the service and the consideration received is the decisive factor in this case to conclude that a substantial part of the activity is not an economic activity for VAT purposes.

This conclusion is also partially applicable to those entities that simultaneously carry out economic and non-economic activities. In the case of Bulgarian public television, the main economic activity is the provision of advertising services.

This consideration of a “dual” or mixed activity in the entity, so that a part of its activity is considered economic for VAT purposes and another part that is not of that nature, inevitably leads to the conclusion that the entity only bears a partial right to deduct the VAT borne by all its acquisitions of goods and services.

On this first point, the Court’s ruling is clear and will provide legal certainty in the case of the activities of public entities financed to a greater or lesser extent by the public budget, normally in the form of subsidies or similar ways of funding.

However, the conclusion cannot be so clear when it comes to the criteria to distribute the total input VAT between the activities that give the right to the deduction because they are economic activities and the activities that do not give the right to the deduction because they are not economic in nature.

The perfect distribution method would be to pay attention to the effective use of each good or service acquired for each of the two types of activities carried out (economic and non-economic). However, in most cases (and a good example is Bulgarian public TV) this distribution is very difficult or impossible to carry out in practice.

In practice, there are significant discrepancies between what results from the distribution criteria that dual public entities apply (and thus the input VAT that they intend to deduct) and what the Tax Administrations consider reasonable.

Cases such as *Geemente Borsele* (Case C-520/14, judgment of 12 May 2016), *Cesky Rozhlas* (Case C-11/15, judgment of 22 June 2016) and the Bulgarian Public TV show that such discrepancies occur frequently.

In the absence of highly detailed analytical cost accounting, it is necessary to make use of more objective methods for the distribution of inputs between both types of activities and, with this, to calculate more accurately what degree of deduction of input VAT corresponds reasonably to the proportion of activities that give the right to the VAT deduction.

Even though the European Commission and the Member States that have made observations, as well as the conclusions of the Advocate General, suggested a distribution criterion based on the proportion to the volume of income represented by economic activities subject to VAT with respect to the total, a kind of “pre-pro rata” rule, the Court did not want to go that far as to establish this criterion as the only or the predominant one.

In its judgment, the Court recalls that the Member States have broad discretion when setting the distribution criteria mentioned above, provided that the said criteria take into account the purpose and structure of the VAT Directive and that objectively reflects the part of the expenses incurred that is actually attributable to each of these two activities (paragraph 55).

In the author’s opinion, the CJEU did not dismiss this pre-pro rata rule as an apportionment method accurately reflecting the distribution of inputs to both types of activities. Instead, the Court simply stated that the pre-pro rata rule is not the only possible apportionment method that the

Member States can use. As an apportionment method, the pre-pro rata rule is objective and constitutes a good indicator of the relative importance of both types of activities.

In conclusion, and in the author's opinion, the judgment in case C-21/20 makes it very clear when a subsidized activity may be of economic nature for VAT purposes with its consequences in the deduction of input VAT, but it leaves some room to discuss the reasonable degree of deduction of input VAT that corresponds to these "dual" activities.

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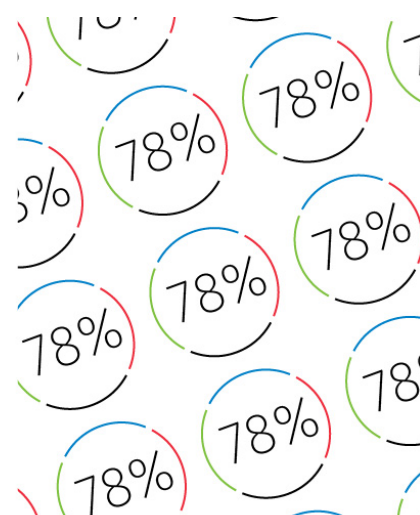
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