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Highlights & Insights on European Taxation

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– ***Dyrektor Krajowej Informacji Skarbowej* (C-108/22)**. Resale of accommodation services is covered by special VAT scheme for travel agents. Court of Justice

(comments by **Krzysztof Lasi?ski-Sulecki**) (H&I 2023/228)

Sole service

It is beyond doubt that Company C. fulfils the basic criteria of the scheme connected with purchasing the services in its own name. Therefore, Company C. does not act as a sole intermediary, to whom the scheme is not applicable, as Article 307(1), second sentence of the VAT Directive states explicitly. The core issue was such that in the predominant majority of cases, Company C. purchased a single accommodation service and made this accommodation available further to its customer, without providing any ancillary services.

The dispute before the referring court was initially focused on a Polish provision implementing the scheme for travel agents. Under Article 119(1) of the VAT Act of 11 March 2004 (*ustawa z dnia 11 marca 2004 r. o podatku od towarów i us?ug*, current consolidated text: Journal of Laws (*Dziennik Ustaw*) 2023, item 1570, as amended), under the taxable amount in respect of the provision of tourist services shall be the amount of the margin, reduced by the amount of tax due, without prejudice to paragraph 5, Article 119(2) of the VAT Act states that the ‘margin’ referred to in paragraph 1 shall mean the difference between the amount to be paid by the purchaser of the service and the cost of the purchase by the taxable person of goods and services from other taxable persons for the direct benefit of the traveller; ‘services for the direct benefit of the traveller’ shall mean services forming part of the tourist services provided and, in particular, transport, accommodation, meals and insurance.

Company C. argued that the tourist service does not necessarily have to be a composite one and that an accommodation service falls into the broader category of tourist services.

Between Text, Objectives and System

A purely textual analysis of provisions underlying the scheme reveals that they are based on the use of the plural ('use supplies of goods and services provided by other taxable persons' – Art. 306(1), first sentence of the VAT Directive). It should not escape the attention of an interpreting person that the provision mentioned above also refers to travel agents in the plural. The importance of using nouns in plural should, therefore, not be over-estimated. Moreover, in the case of Company C., Article 306 of the VAT Directive could definitely apply as this company uses services provided by accommodation providers, i.e., other taxable persons.

Article 307 of the VAT Directive, and the use of plural therein, might, at least at the very first sight, be of certain relevance, as it requires treating transactions as a single service supplied by the travel agent. This article introduced certain fiction that several (at least two) transactions are viewed as one for VAT purposes. In a sense, this is the concept of a composite supply based on explicit provisions of the VAT Directive (unlike the concept of the composite supply in general, which has been developed in case law). For rather obvious reasons, this provision is at least unnecessary when an agent's business is limited to providing one clearly delineated accommodation service. This might be viewed as an argument in favour of the approach presented by the Polish tax authorities, which rejected the possibility of applying the scheme where no services ancillary to accommodation are provided. On the other hand, Article 307 is of a technical and supplementary nature. It only regulates the taxation of supplies that fall under Article 306(1) of the VAT Directive. It may, therefore, be so that certain services covered by Article 306 do not require the application of Article 307 of the VAT Directive. Similarly, rules contained in Article 308 or Article 309 of the VAT Directive may not be necessary in a given case, but this does not rule out the application of Article 306 thereto. The Court of Justice of the European Union (hereinafter: 'CJ') also did not elaborate on the concept of 'the journey' used in Article 307 of the VAT Directive.

The CJ made a very limited analysis of the text of the VAT Directive. It did make references to the VAT system and its objectives. Remarkably, the Court performed its analysis almost completely detached from the wording of the provisions in question.

The CJ presents the scheme for travel agents as a derogation from the normal VAT regime and arrives at a preliminary conclusion that the scheme should be applied only to the extent necessary to attain its objectives. The CJ identifies the objectives of the scheme as connected with the multiplicity of rules applicable to services and aimed at eliminating hazards created by this multiplicity. As the CJ refers to the deduction of input VAT, the multiplicity mentioned above must be connected with services supplied to an agent covered by the scheme. The CJ stated that the fact that a travel agent sells services previously acquired from various jurisdictions is an element of this multiplicity. The same approach had already been presented in the case law of Polish courts (for instance, the judgment of the Supreme Administrative Court (*Naczelny S?d Administracyjny*) of 26 April 2016, 26/15 *I FSK*).

The CJ is definitely right in that the special scheme for travel agents should be used to facilitate the functioning of certain businesses, at least from a tax perspective. It is also right to claim that these findings should affect the direction of interpretation. It may be worthwhile to make certain side

remarks. Teleological or system-based interpretation should be supplementary to the textual interpretation. It should not affect the results of text-based interpretation, especially to the detriment of a taxable person. Obviously, the EU law has its peculiar features, such as multilingualism, which naturally direct addressees of legal acts more towards non-textual interpretation. It is also more intricate to assess what works in favour and what works against persons subject to VAT (especially in the sphere of VAT and particularly when the CJ deliberates on a question with some reference to the facts of a case only). This should not, however, lead to abandoning the analysis of the text of legal provisions altogether.

Avoiding the complexity of the system

The CJ stresses that a necessity to apply different VAT regimes to services depending on the constituent parts would increase the complexity of the system, and the approach having such a result should be avoided.

Previously, the CJ opted for a more predictable understanding of VAT rules (CJ 6 November 2008, C-291/07 *Kollektivavtalsstiftelsen TRR Trygghetsrådet v Skatteverket*, ECLI:EU:C:2008:609, paragraph 33). It also opted for simplicity:

'As was the case under Directive 77/388/EEC: Sixth Council Directive of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes – Common system of value added tax: Uniform basis of assessment (OJ 1977 L 145, para. 1; hereinafter: the Sixth Directive), the place where the taxable person has established his business as the primary point of reference appears to be a criterion that is objective, simple and practical and offers great legal certainty, being easier to verify than, for example, the existence of a fixed establishment.' (CJ 16 October 2014, C?605/12 *Welmory sp. z o.o. v Dyrektor Izby Skarbowej w Gda?sku*, ECLI:EU:C:2014:2298, para. 55; see also, CJ 26 January 2012, C?218/10 *ADV Allround Vermittlungs AG, in liquidation v Finanzamt Hamburg-Bergedorf*, ECLI:EU:C:2012:35, paragraphs 28-31).

It also held in one of cases that rules of taxation based on *unverifiable circumstances were unacceptable* (Opinion of Advocate General Kokott delivered on 14 November 2019 in the case C-547/18 *Dong Yang Electronics Sp. z o.o. v Dyrektor Izby Administracji Skarbowej we Wroc?awiu*, ECLI:EU:C:2019:976, paragraph 43). Still, the directive for avoiding complexity is a valuable development.

Conclusions

The answer given by the CJ to the question posed by the referring court is the right one. The judgment definitely contributes to the development of the case law on the margin scheme for travel agents, although on the basis of the Sixth Directive the CJ had already held that the fact that transport of the traveller is not arranged by a travel agent or a tour operator and that the latter merely provides the traveller with holiday accommodation is not such as to exclude the services provided by such undertakings from the field of application of the special scheme for travel agents (based on Art. 26 of the Sixth VAT Directive, judgment in CJ 12 November 1992, C-163/91 *Fiscal group Beheersmaatschappij Van Ginkel Waddinxveen BV, Reis- en Passagebureau Van Ginkel BV and Others and Inspecteur der Omzetbelasting te Utrecht*, ECLI:EU:C:1992:435, para. 27). The judgment also adds an element of utmost importance in all cases going beyond the special scheme for travel agents. Namely, the CJ rightly prefers the way of understanding tax provisions that

allows for limiting the complexity of tax settlements. Such an approach, going even beyond the requirements of well-founded principles of law, like the principle of legal certainty, undoubtedly deserves to be adhered to

Prof. Krzysztof Lasi?ski-Sulecki

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