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Giorgio Beretta (Editor) (Amsterdam Centre for Tax Law (ACTL) of the University of Amsterdam; Lund University) and Dennis Weber (Editor) (Amsterdam Centre for Tax Law (ACTL) of the University of Amsterdam; Loyens & Loeff) · Friday, December 29th, 2023

Highlights & Insights on European Taxation

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Year 2023, no. 12

TABLE OF CONTENTS

DIRECT TAXATION, LEGISLATION

– *CBAM Implementing Regulation for the Transitional Phase*

(comments by **Tatiana Falcao**) (H&I 2023/313)

INDIRECT TAXATION, CASE LAW

– *Hauptzollamt Münster (C-7/20)*. VAT on importation. Failure to comply with an obligation imposed by EU customs legislation. Court of Justice

(comments by **Piet Jan de Jonge**) (H&I 2023/319)

– *Deco Proteste – Editores (C-505/22)*. Supply of free tablets or smartphones to new subscribers to magazines is not a supply of goods separate from the magazines. Court of Justice

(comments by **Jeroen Bijl**) (H&I 2023/308)

– *Westside Unicat (C-532/22)*. Place of supply of services. Streaming of interactive erotic video sessions. Court of Justice

(comments by **Giorgio Beretta**) (H&I 2023/318)

CUSTOMS AND EXCISE

– *Flavourstream (C-822/19)*. Combined Nomenclature. Classification of aqueous solution. AURIC GMO FREE. Court of Justice

(comments by **Piet Jan de Jonge**) (H&I 2023/290)

– *UCC Work Programme Progress Report 2022: delays in implementation progress*

(comments by **Piet Jan de Jonge**) (H&I 2023/292)

– *Special Report on AEO programme. European Court of Auditors*

(comments by **Piet Jan de Jonge**) (H&I 2023/289)

– *J.P. Mali (C-653/22)*. Fine in case of an incorrect declaration of the country of origin of the imported goods. Court of Justice

(comments by **Piet Jan de Jonge**) (H&I 2023/309)

FREE ARTICLE

– *Deco Proteste – Editores (C-505/22)*. Supply of free tablets or smartphones to new subscribers to magazines is not a supply of goods separate from the magazines. Court of Justice

(comments by **Jeroen Bijl**) (H&I 2023/308)

Is the CJ disregarding its own earlier case law?

Some existing case law on the VAT treatment of gifts to attract or continue to attract customers indicates that the gifts should be taxed as if they are supplies that are to be distinguished from the transaction that prompted the gift to be given. For example, in *Kuwait Petroleum* (CJ 27 April 1999, C-48/97 *Kuwait Petroleum*, ECLI:EU:C:1999:203), the taxpayer argued that the promotional gifts were not actually given away free of charge, but that part of the price paid by the customers that made a purchase should be allocated to the supply of the promotional goods, and not only to the petrol. This is similar to what the Court of Justice of the European Union (hereinafter: ‘CJ’) ruled in the current case. Why is the outcome of the *Kuwait Petroleum* case and the subject case

different?

In *Kuwait Petroleum*, the CJ ruled that no amount of the consideration paid for the purchases from Kuwait Petroleum could be allocated to the promotional goods. It substantiated that decision with two considerations. First, the promotional goods were described by Kuwait Petroleum as gifts. Second, the price of the fuel, whether or not the purchaser accepted the vouchers (to obtain the promotional goods), was the same, and this was the only price referred to on the invoice relating to the fuel purchase, which the supplier had to issue.

Even though these factual matters were not addressed in *Deco Proteste – Editores*, the facts of that case are unlikely to be different from the *Kuwait Petroleum* case on these two points. So, what is the relevant difference that warrants a different outcome? Perhaps the fact that, in *Kuwait Petroleum*, the promotional goods were never supplied at the same time as the main supply (fuel) demonstrated that these goods had to be an aim in itself. The supply of the promotional goods was always separated in time from the ‘main’ supply because the promotional goods could only be obtained by redeeming points that were issued to purchasers of the main supply.

In *Deco Proteste – Editores*, the promotional goods are supplied automatically after the first payment for the subscription is received by DPE. The difficulty is that the CJ does not make reference to *Kuwait Petroleum* and, therefore, it (obviously) does not elaborate on why it came to a different outcome in *Deco Proteste – Editores*.

Who is ‘the average consumer’?

In *Deco Proteste – Editores*, the CJ ruled that the supply of the smartphone or the tablet is not an aim in itself for the new subscribers but is a means of better enjoying the principal supply. However, from the facts, it is clear that DPE has taken into account the possibility that people subscribe to a magazine simply to obtain the gift item because they can unsubscribe after making the first (monthly) payment, which is the same amount as the subsequent monthly payments, without having to return the gift.

As the CJ stated in paragraph 27: ‘it follows from the order for reference that the applicant in the main proceedings, in its commercial calculation, takes account of the fact that some subscribers will terminate their subscription after payment of the first monthly instalment, which allows them to keep the gift without being obliged to remain subscribers. The fact remains that the subscription gift enables the applicant in the main proceedings to increase the number of its subscribers each year significantly. The provision of such a gift, therefore, has no distinct purpose from the point of view of the average consumer, who agrees to pay at least one month’s subscription in order to obtain the gift.’

I find this an argument against the view that the gadgets are not an aim in itself. Apparently, DPE knows that there are people who only sign up for a subscription and pay one month’s subscription fee in order to obtain the gadget. In my view, these customers are clearly not interested in the subscription. If anything, this could be an indication that the subscription is not the aim of the transaction for these specific customers but a means of obtaining a smartphone or tablet.

Could that mean that the standard VAT rate should have been applied to those transactions instead of the lower rate because the lower-rated supply of the magazines should be considered ancillary to

the main supply of the gadget from the point of view of these customers?

Thus, which of the customers is the ‘average consumer,’ as referred to in paragraph 21 of the ruling, whose perspective must be used to determine whether a multiple-element supply constitutes a single, composite supply? In my view, the CJ does not make sufficiently clear why it chooses to use the view of the customers who decide to continue the subscription for a period that is longer than one month, or even just how to determine which (group of) customer(s) qualifies as ‘the average consumer.’ That is a missed opportunity, as it is highly relevant for solving questions regarding the VAT treatment of composite supplies.

Is introducing yourself as a new customer a service?

It is also interesting to note that the CJ does not refer to its earlier case law on the supply of gifts that businesses give away to new customers, i.e., the *Empire Stores* case (CJ 2 June 1994, C-33/93 *Empire Stores*, [ECLI:EU:C:1994:225](#)). In the *Empire Stores* case, the CJ ruled that the gift should indeed be considered a separate supply but that it should not be taxed under (the applicable equivalent of) Article 16 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (hereinafter: ‘the VAT Directive’), because it was supplied in return for the service consisting of a person introducing himself as a new customer.

From the *Empire Stores* ruling, it is clear that the CJ considers people who introduce themselves as new customers to be providing a service. In that case, the CJ worded this as follows in paragraphs 16 and 17 (underscore JB): ‘The link between the supply of the article without extra charge and the introduction of a potential customer must be regarded as direct, since if the service is not provided no article is due from or supplied without extra charge by Empire Stores. Moreover, since the services provided to Empire Stores are remunerated by the supply of goods the value of the services can unquestionably be expressed in monetary terms.’

If this line of reasoning is applied to *Deco Proteste – Editores*, the first consideration received by DPE does not only consist of the first monthly payment in money, but also of the service provided by the new subscribers, i.e., introducing themselves as new subscribers. Following this reasoning, the value of this service could be equal to the purchase price of the gadgets, even if one were to agree that only one single, composite, supply is made. The first supply consists of one or more magazines and a gadget, all subsequent supplies consist of only magazines. The first payment consists of money and a service, all subsequent payments consist of money only. Therefore, it could be argued that the value of the service is equal to the purchase price of the gift, based on the *Empire Stores* case (*Empire Stores*, C-33/93, paragraph 20).

However, how much sense does it actually make to qualify introducing yourself as a new customer as a service? In a case that was ruled on after the *Empire Stores* case, the CJ clearly steps away from considering this a service. In the *Mirror Group* case (CJ 9 October 2001, C-409/98 *Mirror Group*, [ECLI:EU:C:2001:524](#), paragraph 26), the CJ held that: ‘a tenant who undertakes, even in return for payment from the landlord, solely to become a tenant and to pay the rent does not, so far as that action is concerned, make a supply of services to the landlord’. I do not see why the same reasoning could not be applied to *Deco Proteste – Editores*. And because the CJ does not make any reference to the possibility that the introduction as a new subscriber can be a service, one may assume that this part of the *Empire Stores* ruling has been superseded by more recent case law.

All in all, the above seems to warrant the outcome of *Deco Proteste – Editores*, even though the CJ

does not make reference to any of the cases discussed.

Functionally attractive?

The last point I address in this comment is how to determine whether an ancillary supply qualifies as a means of better enjoying a principal supply. In the very first case about this type of composite supply (CJ 22 October 1998, joined cases C-308/96 and C-94/97 *Madgett and Baldwin*, [ECLI:EU:C:1998:496](#), paragraph 24), the CJ held that the relevant ancillary supplies are services which take up a small proportion of the (total) price compared to the main supply and are among the tasks traditionally entrusted to the supplier of the main goods or services. This seems to imply a kind of functional link between the ancillary supply and the main transaction, where the ancillary supply is meant to enable better use of the main supply.

In *Deco Proteste – Editores*, the CJ makes reference to this view, where it states the following in paragraph 28: ‘(...) the subscription gift offered (...) enabled new subscribers to benefit, under the best possible conditions, from the service provider’s main service, namely the reading of the magazines for which the subscription was taken out, in so far as a tablet and a smartphone make it possible, for example, to consult a digital version of those magazines’.

However, the CJ mentions this as an additional thought (‘In addition (...)’). In other CJ’s case law, this functional link seems absent or at least less important. In one of the earliest cases on this topic, *Card Protection Plan* (CJ 25 February 1999, C-349/94 *Card Protection Plan (CPP)*, [ECLI:EU:C:1999:93](#)), the CJ does not mention this functional aspect of the attractiveness. It also does not do so in *Frenetikexito* (CJ 4 March 2021, C-581/19 *Frenetikexito*, [ECLI:EU:C:2021:167](#)), even though the CJ makes specific reference to this case in *Deco Proteste – Editores*. This particular point, whether a supply can only be considered ancillary to a main supply if it is meant to enable better use of the main supply, deserves more research, for which this comment is not the right place.

Considering all of the above, I agree with the outcome of this case, even though the CJ could have been clearer or more transparent on some specific points.

Prof. Jeroen Bijl

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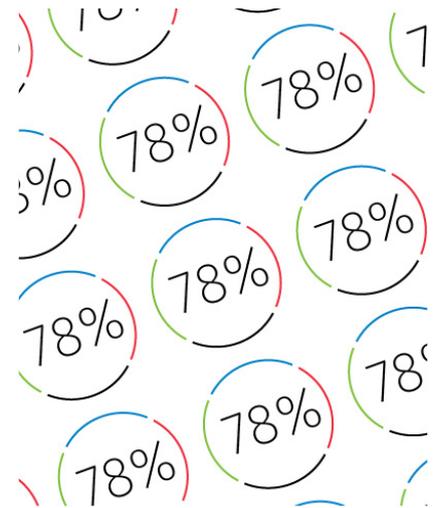
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