
Kluwer International Tax Blog

The Contents of Highlights & Insights on European Taxation, Issue 7, 2024

Giorgio Beretta (Amsterdam Centre for Tax Law (ACTL) of the University of Amsterdam; Lund University) · Friday, August 2nd, 2024

Highlights & Insights on European Taxation

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– *Elite Games* (C-576/23). VAT rate. Admission to amusement parks. Court of Justice

(comments by **Marilena Ene**) (H&I 2024/189)

It is noteworthy that the order of 14 March 2024 is particularly pertinent to Romanian taxpayers insofar as it was issued in a manner which did not include any commentary regarding the fact that Article 291(3)(b) of the Romanian Tax Code stipulated a reduced rate of 5% for services which pertain to providing access to fairs, amusement and leisure parks whose activities are categorised under Classification of Activities of the National Economy (CNEA) codes 9321 and 9329.

In essence, the Romanian Tax Code incorporates a reference to these two CNEA codes, which is not mentioned in Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax OJ L 347, 11.12.2006, p. 1–118 (hereinafter: ‘the VAT Directive’) and was not subject to the analysis made by the Court. This text was in effect from 1 November 2018 until 31 December 2023.

The initial version of the Romanian Tax Code, which came into force on 1 January 2016, did not include any stipulation for a reduced rate on services rendered by amusement and leisure parks.

Currently, the provision is written in an identical format, but the applicable reduced rate is 9%.

The CJ considered that the answer to the question referred for the preliminary ruling should be given in a reasoned order where the existing case law is clear. The reasoned order is published only in Romanian and French, without an Opinion of the Advocate General.

The principal arguments presented in this case can be found in paragraphs 23 and 24 of the order. In paragraph 23, three paragraphs from *Phantasialand* (CJ 9 September 2021, C-406/20 *Phantasialand*, [ECLI:EU:C:2021:720](#)) were incorporated, explaining the legal conditions

for a Member State to apply this type of reduced rate.

The Court initially established that neither the VAT Directive nor Implementing Regulation 282/2011 contains a definition of the terms ‘fairs’ or ‘amusement parks’. In accordance with Article 98 (2) and point 7 of Annex III of the VAT Directive, Member States are permitted to apply reduced rates to ‘admission to shows, theatres, circuses, fairs, amusement parks, concerts, museums, zoos, cinemas, exhibitions and similar cultural events and facilities’. This implies that the two concepts of ‘fairs’ and ‘amusement parks’ represent autonomous elements of EU law, which must be interpreted in a consistent manner across the EU, regardless of how they are characterised in each Member State. This is in line with the previous rulings of the Court in *AJPF Cara?-Severin and DGRFP Timi?oara* (CJ 9 July 2020, C-716/18 *AJPF Cara?-Severin and DGRFP Timi?oara*, [ECLI:EU:C:2020:540](#), paragraph 30) and *Staatssecretaris van Justitie en Veiligheid (Signing-on of seamen in the Port of Rotterdam)* (CJ 5 February 2020, C-341/18 *Staatssecretaris van Justitie en Veiligheid (Signing-on of seamen in the Port of Rotterdam)*, [ECLI:EU:C:2020:76](#), paragraph 40).

The CJ then stated that the terms in question ‘must be interpreted in accordance with their usual meaning in everyday language’ and, at the same time, ‘must be interpreted strictly’, as the possibility of applying a reduced rate constitutes a departure from the principle of applying a standard rate.

The final argument pertains to the definitions of these terms as understood by the Court, with due regard to the written observations of the European Commission in this regard. The expression ‘amusement park’ is defined as ‘an area of landscaped land’ containing a variety of recreational and amusement facilities. By contrast, although a ‘fair’ also typically encompasses the same range of attractions, it is distinguished by its periodic occurrence, albeit with a certain regularity, over a limited time span.

Based on these three paragraphs, the CJ concluded, in paragraph 24, that the concept of ‘amusement park’ is defined by the existence of a ‘landscaped area’, which can be understood as a space on the surface of the ground that has been specially adapted for the operation of facilities intended for recreation and amusement. It thus becomes apparent that an area with restricted access, situated within a specific location, cannot meet the criteria outlined above.

Consequently, the establishment of playgrounds within commercial premises or shopping malls, as illustrated in the case at hand, does not fall under the concept mentioned above. The Court ruled that the services provided by Elite Games SRL, involving amusement machines in commercial premises, do not qualify for the reduced VAT rate applicable to amusement parks.

It would be erroneous to assume that the conclusion resulting from this order should be considered definitive for Romanian taxpayers. The Romanian Tax Code stipulates two categories of parks for which the access fee is subject to a reduced rate: namely, amusement parks and leisure parks. The VAT Directive only encompasses the concept of amusement parks, whereas the Romanian legislation is wider in its scope referring also to the CNEA codes 9321 and 9329.

It is my considered opinion that the Romanian provision is in breach of the VAT Directive. The CJ has already held the view that the principle of fiscal neutrality cannot serve to extend the scope of reduced rates of VAT (CJ 5 March 2015, C-502/13 *Commission v Luxembourg*, [ECLI:EU:C:2015:143](#), paragraph 51; and CJ 15 November 2012, C-174/11 *Zimmermann*, [ECLI:EU:C:2012:716](#), paragraph 50).

It is imperative that the Romanian taxpayers invoke the principles of legal certainty and the protection of legitimate expectations, given that they relied in good faith on the national legislation. They must be protected, even if the CJ does interpret the applicability of the reduced rate in a strict manner. It is incumbent upon the Member States to observe these principles when exercising the powers conferred upon them under EU directives (CJ 9 July 2015, C-183/14 *Salomie and Oltean*, [ECLI:EU:C:2015:454](#), paragraph 30 and the case law cited).

Dr. Marilena Ene

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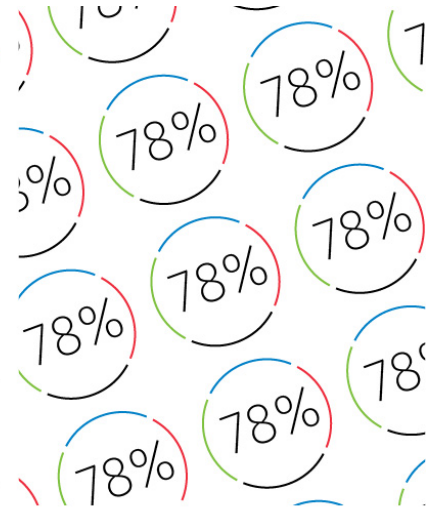
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