Kluwer International Tax Blog

The Contents of Highlights & Insights on European Taxation, Issue 9, 2024

Giorgio Beretta (Amsterdam Centre for Tax Law (ACTL) of the University of Amsterdam; Lund University) · Tuesday, October 1st, 2024

Highlights & Insights on European Taxation

Please find below a selection of articles published this month (September 2024) in Highlights & Insights on European Taxation, plus one freely accessible article.

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– ***Finanzamt T*** **(C-184/23)**. Supply of services within VAT group not subject to VAT. Court of Justice

(comments by **Thomas Stapperfend**) (*H&I* 2024/238)

Assessment of the judgment

The judgment of the Court of Justice of the European Union (hereinafter: 'CJ') is relatively brief. This is probably due to the fact that the Court considered the answer to the questions referred by the V. Senate of the FFC to be clear and, therefore, only referred in its reasoning to Article 4(1) of Sixth Council Directive 77/388/EEC 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 (hereinafter: the 'Sixth Directive') (now Article 11(1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax: hereinafter the 'VAT Directive') and its previous established case law on the necessity of a legal relationship, without going into detail on the teleological interpretation of the law discussed in detail in the

FFC's decision to refer and by Advocate General (AG) Rantos in his Opinion of 16 May 2024 (Opinion of AG Rantos 16 May 2024, C-184/23 *Finanzamt T II*, ECLI:EU:C:2024:416). However, it is interesting in this context that the CJ refers to the guidelines of the VAT Committee to interpret the Directive (CJ 11 July 2024, C-184/23 *Finanzamt T II*, paragraph 41), since these statements by representatives of the executive are not binding (also of Monfort, UR 2024, 572; Widmann, UR 2024, 573). The CJ had already referred to the VAT Committee's guidelines in its ruling of 8 October 2020 in *Weindel Logistic Services* (CJ 8 October 2020, C-621/19*Weindel Logistik Service*, ECLI:EU:C:2020:814). It remains to be seen whether this will become an established interpretative aid in future case law of the CJ.

It is also noteworthy that, in the grounds for judgment, the CJ gives an indication of the significance to be attached to its rulings. The CJ states in paragraph 32 et seq. that, contrary to the referring court's view, in its judgment of 1 December 2022, C-141/20 *Finanzamt Kiel v Norddeutsche Gesellschaft für Diakonie mbH, Norddeutsche Gesellschaft für Diakonie*, ECLI:EU:C:2022:943, it did not address the issue of whether supplies made between members of the same VAT group are subject to VAT. It examined only the question referred to, namely whether a Member State may consider certain entities to be non-independent 'by categorization', without answering the question whether supplies carried out between Member States belonging to the same VAT group fall within the scope of VAT. This should be understood as a clear indication that one should not read too much into the reasoning of CJ's decisions, which, however, the German courts, in particular, tend to do. In addition, only the operative elements of a ruling have a binding effect with which the CJ is referred to by means of a specific question (as already concluded by Hummel, UR 2021, 173; see also Ismer/Endres-Reich, MwStR 2024, 602).

To summarise: the CJ's new judgment puts an end to the discussion as to whether the handling of VAT groups under German law is compatible with the requirements of the Directive. The Court has now confirmed such a compatibility several times (as have also Monfort, UR 2024, 571; Sterzinger, MwStR 2024, 603; Widmann, UR 2024, 573). There is no need to change the current national practice. Nevertheless, it would be desirable for the national legislator to adapt the wording of Paragraph 2(2) No. (2) sentence (1) UStG to the case law of the CJ. This applies in particular to the still existing legal restriction with regard to controlled companies in a VAT group to legal entities. Further consideration should also be given to introducing the right of application (Ismer/Endres-Reich, MwStR 2024, 602).

Prof. Dr. Thomas Stapperfend

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This entry was posted on Tuesday, October 1st, 2024 at 11:56 am and is filed under Customs and Excise, Direct taxation, EU law, Indirect taxation
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