Kluwer International Tax Blog

The Contents of Highlights & Insights on European Taxation

Giorgio Beretta (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, May 2nd, 2025

Highlights & Insights on European Taxation

Please find below a selection of articles published this month (April 2025) in Highlights & Insights on European Taxation, plus one freely accessible article.

Highlights & Insights on European Taxation (H&I) is a publication by Wolters Kluwer Nederland BV.

The journal offers extensive information on all recent developments in European Taxation in the area of direct taxation and state aid, VAT, customs and excises, and environmental taxes.

To subscribe to the Journal's page, please click **HERE**

Year 2025, no. 4

TABLE OF CONTENTS

INDIRECT TAXATION, CASE LAW

– ***Grzera*** **(C-213/24)**. VAT liability for the sale of agricultural land from personal assets for residential development with use of an agent. Court of Justice

(comments by **Giorgio Beretta**) (*H&I* 2025/120)

– ***Adjak*** **(C-277/24)**. Polish joint and several liability of management board members. Access to case files in proceedings. Court of Justice

(comments by **Pawel Mikula**) (*H&I* 2025/119)

CUSTOMS AND EXCISE

– ***C/C*** **(C-351/24)**. Establishment of an error on preferential treatment without initiating a verification procedure. Court of Justice

(comments by **Piet Jan de Jonge**) (*H&I* 2025/128)

– ***Alsen*** **(C-137/23)**. EU law precludes national legislation under which fiscal marking of gas oils is condition for excise duty exemption. Court of Justice

(comments by **Giorgio Emanuele Degani**) (*H&I* 2025/108)

– ***BG Technik. Common*** **(C-129/23 and C-567/23)**. Customs Tariff. Classification of goods. Combined Nomenclature. Wheelchairs and other vehicles for the disabled. Court of Justice

(comments by **Piet Jan de Jonge**) (*H&I* 2025/107)

FREE ARTICLE

– ***Adjak*** **(C-277/24)**. Polish joint and several liability of management board members. Access to case files in proceedings. Court of Justice

(comments by **Pawel Mikula**) (*H&I* 2025/119)

The judgment does not seem fundamentally controversial or surprising. The argument presented by the Court of Justice of the European Union (hereinafter: 'CJ') itself does not seem to require extensive commentary (except, perhaps, that it could have been clearer – but in this regard, the vagueness of the Court's case law is familiar to us, as we feel it frequently). However, it is worth noting that there are a few independent issues related to this ruling.

First, it is worth noting that the CJ still maintains and perpetuates the distinction between two bases of joint and several liability in VAT. Such a distinction seems to have been formed in the judgment C-1/21 (CJ 11 October 2022, C-1/21 *MC v Direktor na Direktsia 'Obzhalvane i danachno-osiguritelna praktika' Veliko Tarnovo pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite*, ECLI:EU:C:2022:788), indirectly confirmed in C-613/23 (CJ 14 November 2024, C-613/23 *KL v Staatssecretaris van Financiën*, ECLI:EU:C:2024:961), and also upheld in the judgment under comment. The first basis is Article 205 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (hereinafter: the 'VAT Directive'), under which Member States may designate the person jointly and severally liable for the VAT liability (along with the person liable by 'default') – but this liability refers to VAT due on a particular transaction. The second basis is Article 273 of the VAT Directive, which authorizes Member States to introduce all measures for the proper collection of VAT. On this second basis, it is possible to introduce other types of liability for VAT – including liability for part or all of the unpaid tax amount in isolation from a specific transaction. Whether such a distinction is useful remains an open question to be considered on other occasions.

Second, the judgment under comment is an interesting example of the Court formulating a specific rule by weighing various general principles of VAT law (and Union law) according to the requirements of proportionality. The Court clearly points to opposing principles (interests, values): on the one hand, the taxpayer's right to good administration (stemming from the Charter of Fundamental Rights of the European Union) and the related right of defence (from which, in turn, derives the right of access to files and the right to be heard), and, on the other hand, the public interest realized by effective VAT collection. In addition, the Court also takes into account legal certainty. Weighing these factors, the CJ ultimately formulates a compromise rule: according to the EU standard, the board member does not have to be a party to the proceedings on the VAT liability itself but must be able to effectively challenge the factual and legal findings made in those proceedings.

Third, commenting on this case, it is worthwhile asking whether it was really necessary to invoke the principle of protection of the right of defence to answer the preliminary question. And without this – that is, it follows from the CJ's case law on joint and several liability itself that a potentially liable person must be able to present evidence that disproves that liability. Since a person has the right to present evidence that he is not liable, he also has the opportunity to present evidence that the tax liability itself does not exist. This follows from Article 273 of the VAT Directive itself and the principle of proportionality. Therefore, it seems that invoking the right of defence is not necessary here.

As a fourth reflection, this more from the Polish backyard, which may be of interest to a wider range of European readers, it is worth pointing out the following. In Poland, it was quite deeply rooted in the case law that in proceedings on the liability of a member of the management board, it is not possible to question the findings of the proceedings on the tax liability itself (especially the judgment of the Polish Supreme Administration Court of 10.11.2021, III FSK 4172/21). Recently, however, there has been a ruling by the Provincial Administrative Court in Warsaw, which broke this established line of case law (judgment of 28 November 2024, *III SA/Wa* 1840/24). The Warsaw court referred in part to arguments also cited by the CJ in the judgment under comment – i.e., with reference to, among others, the *Glencore* judgment (CJ 27 February 2025, C-189/19 *Glencore Agriculture Hungary*, ECLI:EU:C:2019:861). Thus, we see that similar conclusions had already begun to break through before the commented judgment in Polish case law – bolder and reaching more in-depth into the EU acquis.

Fifth, the stubborn persistence of the Polish administrative courts in their stance may come as a surprise – i.e., with the domestic practice to date being unfavourable to board members. After all, it is worth remembering that the Polish Commercial Code has a completely analogous regulation with regard to the liability of company board members for the company's civil law liabilities. There, too, two proceedings can be distinguished: the first concerning the debt itself, and the second concerning the liability of a board member. There, too, finally, there were situations in which the member of the board of directors no longer held this function (and could not dispute the existence of the company's debt itself). With regard to these provisions, the Polish Constitutional Court ruled that such regulations are incompatible with the Polish Constitution (judgment of 12 April 2023, P 5/19). Here, the Polish constitutional court relied, among other things, on the right to a court – and, therefore, similarly to the Court of Justice of the EU.

As part of the sixth thread, it is worth considering what practical effects the CJ's ruling may have. According to Polish regulations, after delivery of the Court's judgment, it will be possible to apply for the resumption of relevant tax and court proceedings. In many situations, although board members will be able to challenge decisions already issued against them in the past – it will not lead to the exclusion of their liability (it will be difficult to challenge the previous decisions on the VAT arrears). However, the ruling may have important procedural significance: the issuance of decisions on the liability of board members is limited by the statute of limitations. Many of the management board members' liabilities will already be time-barred if. Thus, board members will probably succeed because tax authorities may not be able to issue new decisions. As a consequence, they may be compelled to return the liabilities paid by members of the management board with the appropriate (favourable) interest rates.

Seventh and finally, the judgment – although it concerns VAT – probably applies analogously also to other taxes and possibly to other persons jointly and severally liable for taxes (because Polish regulations concern not only VAT and not only members of the management boards of

companies). This is because in other areas, too, the position of Polish administrative courts is similar – as, for example, in cases concerning the obligation to return EU subsidies (see the judgment of the Polish Supreme Administration Court of 18 September 2024 (I GSK 608/24). Again, also here the Polish court stated that the authority determining the liability of a member of the management board does not have the right and obligation to examine the legitimacy of the existence of the obligation for which the management board member is liable.

Dr Pawel Mikula

To make sure you do not miss out on regular updates from the Kluwer International Tax Blog, please subscribe here.

This entry was posted on Friday, May 2nd, 2025 at 11:38 am and is filed under Customs and Excise, Direct taxation, EU law, Indirect taxation
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.