

ECJ and VAT on 2020

The background features a 3D-rendered scene with a blue-toned sky and a grey road surface. Three red location pins are placed on the road, with the largest one in the center foreground. The pins are stylized with a circular hole at the top.

Francisco Javier Sánchez Gallardo

INDEX

- Taxable persons
- Tax events
- Fixed establishments
- Financial transactions
- Taxable base: discounts and non-payments
- Deductions: overheads and changes in mind
- Tax procedures: taxpayers rights and options
- Double taxation
- And the anecdote...

Taxable persons

- **17-12-2020, WEG Tevesstraße, case C-449/19:**
 - Article 135(1)(l) (generic exemption for real estate leases) opposes a national regulation that exempts the supply of heat by a **homeowner's association** to owners who are part of said association.
 - Problem: this is subject ... (insistence on continuity and permanence in income)

Tax event (I)

- **11-3-2020, San Domenico Vetraria, case C-94/19:**
 - Temporary transfers of personnel from a parent company to its subsidiary, made against the **mere reimbursement** of the corresponding **costs**, are services for VAT purposes, provided that the amounts paid by the subsidiary to its parent company, on the one hand, and such temporary transfers, on the other hand, are mutually conditional.

Tax event (II)

- **11-6-2020, Vodafone Portugal, case C-43/19:**
 - The **amounts** received by an economic operator in the event of **early termination**, for reasons attributable to the customer, of a service contract that provides for the observance of a minimum period of permanence as consideration for granting that customer advantageous commercial conditions are the consideration for an **onerous provision of services**.
 - Complement of the judgment of 19-4-2018, MEO - Serviços de Comunicações e Multimédia, case C-525/16.

Fixed establishments

- **7-5-2020, Dong Yang Electronics, case C-547/18:**
 - From the mere fact that a company domiciled in a third State has a **subsidiary** in a Member State, a service provider cannot infer the existence, on the territory of that State, of a **fixed establishment**. In addition:
 - It cannot be absolutely discarded the existence of such a fixed establishment. It is necessary to analyse the operating conditions.
 - Conclusion similar to the judgment of 20-2-1997, DFDS, case C-260/95.
 - The service provider is not obliged to investigate, for the purposes of such an assessment, the contractual relationships between the two entities.

Financial transactions (I)

- **2-7-2020, BlackRock Investment Management (UK), case C-231/19:**
 - A provision of management services performed by a **computer platform** belonging to a third party provider in favour of a fund management company that includes both mutual funds and other funds is not exempt as mutual fund management.

Financial transactions (II)

- **17-12-2020, FRANCK, case C-801/19:**
 - The exemption from the granting of credits and for operations related to other commercial effects, (art.135(1)(b) and (d), respectively, of the VAT Directive), applies to an operation in which the taxpayer, on the one hand, makes available to another taxable person, in exchange for remuneration, funds obtained from a **factoring** company as a result of the transmission to it of a promissory note issued by the second taxable person and, on the other, guarantees the return of said promissory note to its expiration.

Taxable base, discounts

- **28-5-2020, World Comm Trading, case C-684/18:**
 - The granting of discounts requires the **regularization** of the **VAT borne** by the **recipient**, even if the supplier has ceased to operate in said Member State and, therefore, such supplier can no longer request the refund of a part of the VAT that payment.
 - Something else:
 - Part of the discounts was for **intra-EU operations**,
 - Where is the **principle of full regularization**?

Taxable base, non-payments (I)

- **15-10-2020, E., case C-335/19:**

- The VAT Directive opposes a national regulation that makes the reduction of the tax base in the case of non-payments subject to the requirement that, at the time of the transaction and the day before the filing of the tax return requesting that reduction, the **debtor** is registered as a VAT taxpayer and is not involved in a bankruptcy or liquidation procedure, as well as the fact that the day before the filing of the aforementioned tax return, the **creditor** himself continues to be registered as a VAT taxpayer.

Taxable base, non-payments (II)

- **11-6-2020, SCT, case C-146/19:**

- Art.90 of the VAT Directive opposes a national regulation that denies the right to modify the tax base for non-payment if the taxable person did not declare that claim in the **bankruptcy proceeding** against his debtor, even if the aforementioned taxable person demonstrates that, if he had declared it, that credit would not have been collected.
- The national court, in accordance with the obligation to adopt all the appropriate measures to guarantee the execution of this provision, must **interpret** national law in accordance with the latter or, if such a compliant interpretation is not possible, **refrain from applying** any national regulation whose application leads to a result contrary to the aforementioned provision.

Taxable base, non-payments (III)

- **29-4-2020, Ramada Storax, case C-756/19 (this is an order):**
 - The VAT Directive opposes national legislation that prevents the modification of the tax base for bad debts in the event of **insolvency** when the impossibility of collecting such loans is declared in another EU State in accordance with the latter's legislation.

Deductions (I), overheads

- **16-9-2020, Mitteldeutsche Hartstein-Industrie, case C-528/19:**
 - It is compatible with the Directive the deduction of the VAT paid for some **works to extend a road** carried out for the benefit of a municipality when said road is used both by the taxable person in its economic activity and by the public, to the extent that said works have not exceeded what is **necessary** for the exercise of economic activity and that their **cost is included in the price** of the operations carried out by him.
 - For VAT purposes:
 - The **operating authorisation** for a quarry granted unilaterally by an Administration does not constitute the **consideration** obtained by a taxpayer who has carried out, without consideration in money, expansion works of a road belonging to a municipality, so that said expansion works do not constitute an operation carried out for consideration.
 - The aforementioned works cannot be considered as **self-consumption** for these purposes.

Deductions (II), exclusions

- **17-9-2020, Super Bock Bebidas, case C-837/19 (auto):**
 - The VAT Directive does not oppose a national legislation that entered into force on the **date of accession** to the EU that excludes from the right to deduct input VAT on accommodation, food, beverages, vehicle leasing, fuel, and tolls, which also applies to expenses related to the taxed operations.
 - Relevant for countries introducing VAT on the occasion of their accession to the EU.

Deductions (III), when you change your mind

- **12-11-2020, Sonaecom, case C-42/19:**
 - A mixed holding company that intervenes in the management of its subsidiaries may deduct the VAT paid for consulting services in the field of market research for the **acquisition of shares** in another company, even when this acquisition of shares has not finally taken place.
 - On the contrary, the VAT borne by the commission paid to a credit institution for the organization and structuring of an obligation loan intended to make investments in a specific sector, when such investments have not finally materialized and the totality of the capital obtained by means of this loan it has been delivered to the parent company of the group in the form of a **loan**, it is not deductible.

On options

- **30-4-2020, CTT - Correios de Portugal, case C-661/18:**
 - The Directive, together with the principles of **neutrality, legal certainty and proportionality**, do not oppose that a State that authorizes to make the deduction by the procedure of real allocation of all or part of the goods and services used to carry out interchangeably operations with the right to deduction and operations that do not generate such a right prohibit such taxpayers from **changing the VAT deduction method** after setting the final pro rata.
 - On the contrary, they do oppose a national regulation according to which, a taxable person who made his deductions using the method based on turnover, is denied the possibility, after setting the final pro rata, to apply the method of real allocation to rectify said deductions, in a **situation** in which:
 - the concerned State authorizes taxable persons to make the deduction by the procedure of real allocation of all or part of the goods and services used to carry out indistinctly operations with the right to deduction and operations that do not generate such a right,
 - the taxpayer was unaware in good faith, when he chose the deduction method, that an operation that he considered exempt was not actually exempt,
 - the general limitation period established by national regulations to carry out the regularization of the deductions has not yet been completed and,
 - the change in the deduction method allows to establish the part of VAT that refers to the operations that give rise to the right to deduction.

Right to be heard

- **4-6-2020, CF, case C-430/19:**

- In accordance with the general principle of the right of defense, when a taxable person has not had **the possibility of accessing**, within the framework of a tax control procedure, the **information** that appears in his administrative file and that was taken into account in the adoption of an administrative resolution, since the court hearing the matter verifies that, without this irregularity, the procedure could have given rise to a different result, the said resolution should be annulled.
- The principles that regulate the application of VAT, in particular those of neutrality and legal certainty, are opposed to the fact that, in the face of mere suspicions lacking evidence about the effective performance of the operations that led to the issuance of an invoice, the recipient of the invoice is denied to deduct VAT when it cannot provide, in addition to said **invoice**, other proofs of the reality of the carried economic operations.

Double taxation

- **18-6-2020, Krak Vet Marek Batko, case C-276/18:**
 - The VAT Directive and Council Regulation (EU) 904/2010, on administrative cooperation on VAT, do not preclude the tax authorities of a Member State from **unilaterally** giving the operations a VAT tax treatment different from that in by virtue of which they were already taxed in another Member State.
 - For the **distance selling** regime purposes, the fact that the goods are delivered by a company recommended by the supplier, but with which the purchasers are free to enter into a contract for the purpose of that delivery, those goods must be regarded as dispatched or transported ‘by or on behalf of the supplier’ where the role of that supplier is predominant in terms of initiating and organising the essential stages of the dispatch or transport of those goods.

And the anecdote... eatable

- **1-10-2020, X, case C-331/19:**
 - The concepts of “foodstuffs for human consumption” and “products normally used to supplement or substitute foodstuffs” refer to all products that contain **restorative, energetic and regulatory nutrients** of the human body, necessary for the maintenance, operation and development of said organism, consumed in order to provide such nutrients to that organism.
 - It seems to be a narrow concept...



THANK YOU!