



OVERVIEW OF THE FISCALIS SEMINAR

BARI (ITALY) 8-11 OCTOBER 2018

VAT COMMITTEE 12 APRIL 2019

Introduction

- Aim of the workshop
- Exchange platform
- Lasted 2 days and a half

Introduction

- First day: plenary session.
- Second day: work in subgroups (max 10 participants).
- Third day: sharing and discussion

The future

- Participants appreciated the opportunity of open discussions between judges and tax administrations.
- Participants asked to held this event on a regular basis.

Lessons learned

- INTERACTION Business yes / business no
- JUDGES AND ADMINISTRATION A successful set up
- OUTCOMES Discussions and reports

Lessons learned

- TIMING Receiving documents in advance allows to be more prepared and better organised
- LANGUAGE Attention to language issues.
- TOPICS Too many cases discussed. It would be better to focus on specific complex topics

The set up of the workshops

- Participants of the workshop were divided in six working groups.
- Each group consisted of representatives of Member States' tax administrations and judges.

The working documents

- Choice of cases to be discussed:
 - decided in 2016, 2017 and 2018;
 - indicated by the participants on the registration form, or
 - considered interesting by fellow experts in the field (e.g. during the last Vienna conference on recent VAT jurisprudence).

The purpose

- Participants should identify those cases that they consider the most relevant and discuss them in depth.
- A working group could add other CJEU cases based on the exhaustive list of CJEU judgements decided and published in 2016, 2017 and 2018.

What has been discussed?

- **Group A1/A2:** taxable persons, taxable transactions, taxable amount, special schemes (19 cases)
- **Group B1/B2:** exemptions, reduced rates, place of supply and intra-Community transactions (19 cases)
- **Group C1/C2:** deductions, VAT refund, VAT reimbursement (15 cases)

What has been discussed?

Examples of cases discussed

Taxable Persons

C-520/14 - Borsele

Judgment of the Court (Fifth Chamber) of 12 May 2016

Gemeente Borsele v Staatssecretaris van Financiën and Staatssecretaris van Financiën v Gemeente Borsele

Request for a preliminary ruling from the Hoge Raad der Nederlanden

Reference for a preliminary ruling — Value added tax — Directive 2006/112/EC — Articles 2(1)(c) and 9(1) — Taxable persons — Economic activities — Definition — Transport of schoolchildren

C-344/15 - National Roads Authority

Judgment of the Court (Sixth Chamber) of 19 January 2017

National Roads Authority v The Revenue Commissioners

Request for a preliminary ruling from the Appeal Commissioners

Reference for a preliminary ruling — Common system of value added tax — Directive 2006/112/EC — Article 13(1), second subparagraph — Activity of managing road infrastructure and making it available on payment of a toll — Activities engaged in by a body governed by public law acting as a public authority — Presence of private operators — Significant distortions of competition — Existence of actual or potential competition

Name

-  Collection Judgments group C (chronological).pdf
-  2018 08 07_TGE Gas Engineering_C-16-17.pdf
-  2018 07 25_Gmina Ryjewo_C-140-17.pdf
-  2018 06 27_SGI and Valériane_C-459-17 and C-460-17.pdf
-  2018 04 26_Zabrus Siret_C-81-17.pdf
-  2018 04 12_Biosafe - Indústria de Reciclagens_C-8-17.pdf
-  2018 04 11_SEB bankas_C-532-16.pdf
-  2018 03 21_Volkswagen_C-533-16.pdf
-  2018 02 21_Kreuzmayr_C-628-16.pdf
-  2017 11 15_Geissel and Butin_C-374-16 and C-375-16.pdf
-  2017 10 19_Paper Consult_C-101-16.pdf
-  2017 09 14_Iberdrola Inmobiliaria Real Estate Investments_C-132-16.pdf
-  2017 04 26_Farkas_C-564-15.pdf
-  2016 12 14_Mercedes Benz Italia_C-378-15.pdf
-  2016 11 10_Signum Alfa Sped_C-446-15 (Order_French).pdf
-  2016 09 15_Senatex_C-518-14.pdf
-  2016 09 15_Barlis 06_C-516-14.pdf
-  2016 06 22_Gemeente Woerden_C-267-15.pdf
-  2015 10 22_Sveda_C-126-14.pdf
-  2015 10 22_PPUH Stehcemp_C-277-14.pdf

Decisions Group C

General Observations - Group C1 1

- Case law clearly sets out the substantive and formal conditions underpinning the right to deduct input VAT.
- General trend appears to imply that a breach of a formal condition cannot, in itself, be used to deny deduction where the substantive conditions giving rise to the right in the first instance has been met.
- The right to deduction cannot be relied upon where the persons seeking the right knew or should have known they were taking part in a transaction connected with VAT fraud.

General Observations - Group C1 2

- 'Taxable Person' enjoys a broad definition and Member States cannot call into question a person status as a taxable person by imposing additional conditions not specified in Art. 9 of the VAT Directive
- The right to deduct can be exercised only in respect of taxes actually due and cannot be extended to overpaid input VAT
- The interaction between right to deduction and limitation period should be considered when formal and substantive conditions are met only some time after the original supply took place

General Observations - Group C1 3

- Practical question: how to objectively provide evidence of an intention to engage in economic activity?
- Practical question: how to measure whether a reimbursement is impossible or excessively difficult to obtain?
- “The CJEU has a duty to interpret all provisions of EU law which national courts require in order to decide the actions pending before them, even if the provisions are not expressly indicated in the questions referred to the CJEU “
Barlis C-516/14 para 23

General Conclusions - Group C2 1

- The CJEU clarifies that the deduction of input VAT is allowed if the substantive conditions are met, even in situations where the taxable person failed to comply with formal conditions.
- The CJEU tendency is that a rupture of a formal condition can not, by itself, be a motive to refuse deduction when the substantive conditions have been met.
- Right of deduction can not be granted if those who seek that right knew or should have known they were taking part in a transaction connected with VAT fraud.

General Conclusions - Group C2 1

- The right to deduct on the basis of a corrected invoice relates to the year in which it was corrected.
- The substantive and formal conditions are only met at the time the adjustment was made.
- The immediate use of capital goods free of charge may not, in some circumstances, affect the existence of the direct and immediate link between input and output transactions or with the taxable person's economic activities as a whole.

General Conclusions - Group C2 1

- The taxable person should not be required to carry out checks not required of it, that that taxable person knew or should have known that those services were involved in value added tax fraud.
- To deny the right to deduct the VAT appearing on an invoice, it is sufficient that the authorities establish that the transactions covered by that invoice have not actually been carried out.

General Conclusions - Group C2 1

- The right of deduction can only be granted in respect of VAT that is actually owed. Can not be conceded to overpaid input VAT.
- The right to deduct can not be conceded to overpaid input VAT.
- Right of deduction and its limit period have to take in account the cases where the substantive and formal conditions are only met some time after the original goods supply.

General Conclusions - Group C2 1

→ Questions raised:

✓ How to prove the intention to engage in an economic activity?

C-
140/17 - Gmina Ryjewo

✓ How to determine whether a reimbursement is impossible or excessively difficult to obtain?

C-564/15 – Tibor Farkas & C-628/16 Kreuzmayer

✓ Sveda judgment is leading to a sympathetic interpretation from some national courts on behalf of tax payers, allowing the full right to deduct, even in cases where tax payers also carry non taxable activities.

C-126/14 - Sveda

General Conclusions - Group C2 1

In conclusion:

→ While clustering the findings and results by the chairs and rapporteurs for the preparation of a common reporting, was possible to understand that, basically, both groups C1 and C2 reached the same conclusions.

Groups B1 and B2

- C-386/16 - Toridas
- C-580/16 - Firma Hans Bühler
- C-108/17 - Enteco Baltic
- C-288/16 - L.Č.
- C-33/16 – A OY
- C-526/13 - Fast Bunkering Klaipėda
- C-699/15 - Brockenhurst College
- C-605/15 – Aviva
- C-616/15 - Commission v Germany
- C-326/15 - DNB Banka
- C-40/15 – Aspiro
- C-607/14 - Bookit

Common reporting

Judgements considered most relevant:

Groups B1 and B2 1

C-288/16 - L.Č.

These groups felt that CJEU has created a problem:

- application after CJEU's judgement will be more difficult for the tax payer and tax administrations
- in nearly all Member States the exemption was applied differently
- what proof should the taxable person should have for the exemption?
- guidelines on how to apply this decision would be helpful

Groups B1 and B2 2

C-616/15 Commission –v- Germany

- It was agreed that the court has not provided any guidance on what is meant by the “public interest” or “distortion of competition” in this context, particularly in relation to cross-border supplies.
- This test is very difficult to apply in practice. The CJEU has consistently said that actual distortion does not need to be proved, merely a risk.
- One Member State thinks that it is difficult to know who can determine distortion: courts or legislation?

Groups B1 and B2 3

- One Member State treats the exemption very narrowly, but has very few groups, so it is not an issue.
- Another Member State has a similar law but many groups, so it is an issue.
- For a further Member State the wording of the directive is transposed into domestic law but, in practice, the exemption is treated very restrictively.
- Any broadening of the scope of exemption would need to come from a Commission proposal.
- No obvious enthusiasm in MSs represented in this group to expand the scope of the exemption on their own.

Groups B1 and B2 5

C-526/13 Fast Bunkering Klaipeda

- The authorities of one Member State are treating this as a very specific case.
- Actually, C-33/16 A Oy and C- 288/16 L.Č. cases do not bring any clarity or principle to the situation. It is still a case by case approach.
- However, it seems part of a general trend towards looking at economic reality rather than contractual arrangements. This seems to be a shift from how the court was looking at cases when Missing Trader fraud started.
- To prove that arrangements are abusive is almost impossible except in obvious cases.

Groups B1 and B2 6

- By disregarding genuine transactions between intermediaries and redefining arrangements in accordance with economic reality an MS could lose tax in any cross-border supply situation that it would have been entitled to charge on the basis of the contractual analysis.
- Even if this case can be treated as specific to its own facts, the general approach is significant for supplies made by agents or using fuel cards.
- Hence there is a need for guidance from the VAT Committee in this area.

The ECJ reading

Some basic principles:

- Decisions of the CJEU are meant for and addressed to the referring court and not to the general public
- Answers much depend on the facts as described in the preliminary ruling (and on their quality....)
- The reasoning of a case should be carefully read as it is only a reasoning and not the result
- Finally, “ECJ has only said what it has really said!”

Final questions

- ***Do you recommend organising again such an event?***
- ***Do you see possible improvements?***
- ***Can we link and, if yes, how can we link, such event with the VAT Committee?***