



Dear Colleagues:

Attached is an article prepared by our Secretary-General, Friederike Grube, of the Bundesfinanzhof in Munich, Germany.

We are fast approaching the 4th Assembly to be held in Amsterdam on August 30 and 31, 2013. I hope that you have marked it out in your calendar. The program is very expansive with many interesting topics. There has been a tremendous amount of effort put in by our European colleagues in developing the program and ensuring that we have many interesting speakers from over fifteen countries participating in the program. We solicit your support by your attendance. Please register for the Assembly as soon as possible. Particulars may be found on our website and a draft of the program Agenda is attached.

I thank you for your continued participation and support of the IATJ and extend my very best wishes to you.

Kindest personal regards,
E.P. Rossiter, President

The 2012-2013 executive for the IATJ is:

Associate Chief Justice Eugene Rossiter (Canada), President
Judge Philippe Martin (France), 1st Vice-President;
Judge Bernard Peeters (Belgium), 2nd Vice-President;
Judge Friederike Grube (Germany), Secretary-General
Judge Willem Wijnen (Netherlands), Treasurer

executive members at large include: Judge Malcolm Gammie (U.K.), Judge Peter Panuthos (U.S.A.), Counsellor João Francisco Bianco (Brazil), Judge Dagmara Dominik-Ogińska (Poland), Justice Clement Endresen (Norway), Pramod Kumar (India), Judge Manuel Garzón (Spain), President Brahim Zaim, (Morocco), Dr. Manuel Luciano Hallivis Pelayo (Mexico), Justice Tony Pagone (Australia).

VAT: Right to deduct input tax – Services of lawyers performed in the context of criminal proceedings for corruption brought in a personal capacity against the managing director and main partner of a limited company

I. Introduction

VAT-law is harmonized in Europe since 1977. Due to the fact that the parliaments and governments of the Member States of the European Union do not always understand the European VAT-directives the same way, there are sometimes differences in the national rules of VAT-law .

However, the VAT-law is getting more and more important for traders especially in the European Union also due to the existence of high tax rates in several Member states: For example, the general VAT-tax-rate in Sweden is 25 % and we have a general VAT-tax-rate of even 27 % in Hungary.

Therefore, the importance of the jurisdiction especially of the European Court of Justice (ECJ) in Luxembourg concerning VAT-cases equally increases. Art. 267 of the European Treaty of Lissabon allows the national Courts to ask questions to the ECJ in a so-called "preliminary ruling".

The Tax Courts in Germany quite often ask the ECJ in preliminary rulings not only in VAT-cases but also in procedures concerning direct taxation. For instance the Supreme Tax Court in Munich alone brought 11 cases to the ECJ in Luxembourg in the year 2012. One of them is the interesting case C-104/12 "Becker" which has been decided by the ECJ the 21 February 2013¹:

II. The case

Mr. Becker was a sole trader and a majority shareholder in the A-GmbH, a limited company (A-Ltd.). The A-Ltd. carries out construction works being subject to VAT. Mr Becker and X were managing directors of the A-Ltd. P was the authorized representative of the A-Ltd. and also became a managing director of that company later on.

Mr. Becker and the A-Ltd. were linked by an "Organschaft" for tax purposes within the meaning of the national VAT-law in Germany. Therefore Mr. Becker and the A-Ltd. were treated as one single taxable person and Mr. Becker took responsibility for the fiscal obligations of the group of undertakings consisting of his sole-trader undertaking and the A-Ltd.

After the A-Ltd. had won and performed a construction contract for consideration and subject to tax, the competent prosecuting authority brought criminal proceedings against Mr. Becker and P.

In effect, the A-Ltd. was suspected of having benefited, prior to the conclusion of the contract, from confidential information concerning the tenders admitted by competing undertakings and of having therefore been able to submit the most advantageous tender.

¹ Judgement of the ECJ 21.2. 2013, Becker, Case C-104/12, Deutsches Steuerrecht 2013, 411

In order to obtain that information, it made payments which under criminal law were likely to be regarded as bribery of aiding and abetting on the part of Mr. Becker and P, and accepting a bribe on the part of the recipient of those payments.

The criminal proceedings brought against Mr. Becker and P were discontinued following the payment of amounts pursuant to the German Code of Criminal Procedure.

In the context of the criminal investigation proceedings, Mr Becker and P were each represented by their respective lawyers. However, under the terms of those lawyers fee agreements, Mr. Becker's lawyer represented Mr. Becker, as accused, and the A-Ltd., whereas P's Lawyer represented P, as accused, and the A-Ltd. Both agreements were signed, on the part of the clients, only by the A-Ltd. and affixed with the official stamp of the A-Ltd., represented by Mr. Becker and P as managing directors. The lawyers addressed their invoices to the A-Ltd. Mr. Becker, as controlling entity, deducted, for the year in question, namely 2005, the VAT charged on those invoices.

The tax office considered that the VAT in question was not deductible and it therefore issued an additional assessment against Mr. Becker. Since his objection lodged before the tax office was rejected, Mr. Becker started proceedings before the tax court in Cologne, which granted his action.

The Supreme Tax Court notes that, according to the Court's case-law, the exercise of the right of deduction is based on the assumption that there is a direct link between the input and the output transactions. However, the tax office has doubts as to whether the existence of such a link depends on the objective content of the supply acquired or rather on the reason for the acquisition of that supply. Having regard to the considerations of the tax office, the Supreme Tax Court decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling²:

1. Is the direct and immediate link, which is regarded by the case-law of the ECJ as being determinant for interpreting the term "for the purposes of his taxable transactions" within the meaning of Article 17 (2) (a) of the sixth directive, to be determined:

- according to the objective content of the supply acquired by the taxable person (in the present case: the activity of a criminal defence lawyer with a view to preventing the conviction of a natural person); or
- according to the fact which gave rise to the supply acquired (in the present case: the economic activity of the taxable person during which a criminal act was purportedly committed by a natural person)?

2. If the fact which gave rise to the supply is determinant: Is a taxable person who commissions a supply together with an employee entitled to deduct input tax in full or only in part under Article 17 (2) (a) of the sixth directive and, where a supply is acquired by several recipients, what requirements exist as to issuing of the invoice pursuant to the fifth indent of Article 22 (3) (b) of the sixth directive?

² Bundesfinanzhof, Beschluss vom 22. 12. 2011, V R 29/10, Bundessteuerblatt II 2012, 441

III. The solution

1. Answer of the ECJ

The existence of a direct and immediate link between a given transaction and the taxable person's activity as a whole for the purposes of determining whether the goods and services were used by the latter "for the purposes of taxable transactions" within the meaning of Article 17 (2) (a) of the sixth directive depends on the objective content of the goods or services acquired by that taxable person.

In this case, the supplies of lawyers' services, whose purpose is to avoid criminal penalties against natural persons, managing directors of a taxable undertaking, do not give that undertaking the right to deduct as input tax the VAT due on the services supplied.

Because of the answer to the first question there is no need to give an answer to the second question.

2. Essential considerations of the ECJ

The existence of a direct and immediate link between a particular input transaction and one or more output transactions giving rise to the right to deduct is, in principle, necessary before the taxable person is entitled to deduct input VAT and in order to determine the extent of such entitlement³.

It is however also accepted that a taxable person has a right to deduct even where there is no direct and immediate link between a particular input transaction and one or more output transactions giving rise to the right to deduct, where the costs of the services in question are part of his general costs and are, as such, components of the price of the goods or services which he supplies. Such costs do, in effect, have a direct and immediate link with the taxable persons' economic activity as a whole⁴.

Where it is clear that a transaction has not been performed for the purposes of the taxable activities of a taxable person, that transaction cannot be considered as having a direct and immediate link with those activities within the meaning of the Court's case-law, even if that transaction would, in the light of its objective content, be subject to VAT.

In the present case, first, according to the information provided by the referring court, the supply of services by lawyers at issue in the main proceedings sought directly and immediately to protect the private interests of the two accused who were charged with offences relating to their personal behaviour. Furthermore the criminal proceedings were brought against them solely in a personal capacity, and not against the A-Ltd., although proceedings against the A-Ltd. would also have been legally possible. In the light of their

³ Judgment of the ECJ 8. 06. 2000, Midland Bank, Case C-98/98, ECR 2000 I-4177, paragraph 24; Judgment of the ECJ 22. 02. 2001, Abbey National, Case C-408/98, ECR 2001 I-1361, paragraph 26; judgment of the ECJ 8. 02. 2007, Investrand, case C-435/05, ECR 2007 I-1315, paragraph 23

⁴ Judgment of the ECJ 8. 06. 2000, Midland Bank, Case C-98/98, ECR 2000 I-4177, paragraph 31, Judgment of the ECJ 26. 05. 2005, Kretztechnik, Case C-465/03, ECR 2005 I-4357, paragraph 36

objective content the costs relating to those supplies can not be considered as having been incurred for the purposes of the economic activities of the A-Ltd. as a whole.

Secondly the referring court states that, since the supplies would not have been performed by the two lawyers at issue if the A-Ltd. had not exercised an activity which produced turnover and, consequently, which was taxable, there would be a causal link between the costs relating to those services and the economic activity of the A-Ltd. as a whole. It should, however, be noted that that causal link cannot be considered to constitute a direct and immediate link within the meaning of the Court's case-law. As the referring court itself observes, there is no legal link between the criminal proceedings and the A-Ltd., and those services must therefore be considered to have been performed entirely outside the taxable activities of the A-Ltd.

In that regard, it should be added that the fact that domestic civil law obliges an undertaking such as that at issue in the main proceedings to incur the costs relating to the defence, in criminal proceedings, of its representatives' interests is not relevant for the interpretation and application of provisions relating to the common system of VAT. In the light of the objective scheme of VAT set up by that system, only the objective relationship between the supplies performed and the taxable economic activity of the taxable person is decisive⁵. Otherwise the uniform application of European Union law in that area would be severely undermined.

IV. Personal comment

This judgment of the ECJ was not at all expected by the tax consultants or lawyers in Germany. Their surprise was based upon the rulings valid for direct taxation:

In Germany it is possible to deduct the costs for the defence counsel as business expense or professional expense if the criminal offence which has been committed was the direct result of the activity for the company or the work⁶ and not the result of private motives. In a dispute in direct taxation our plaintiff probably would have won the case because he had no private reasons to commit the criminal offences in question.

The ECJ however made clear that the VAT on the costs for the defence counsel as a result of a criminal offence committed by persons working as a sole trader and/or for a limited company may not be deducted as input-VAT, because the criminal offence was the result of personal inappropriate behaviour. The existence of a causal link between the criminal offence and the taxable activities of a taxable person is not sufficient.

Friederike Grube, Judge at the Bundesfinanzhof in Munich, Secretary General of the IATJ

⁵ Judgement of the ECJ 22. 12. 2010, RBS Deutschland Holdings, Case C-277/09, ECR 2010 I-13805, paragraph 54

⁶ f. ex. judgment of the Finanzgericht Münster, 5. 12. 2012, 11 K 4517, Entscheidungen der Finanzgerichte 2013, 425, judgment of the Finanzgericht Hamburg, 14. 12. 2011, 2 K 6/11, Entscheidungen der Finanzgerichte 2012, 925

10 May, 2013

**IATJ 4th Assembly
August 30 and 31, 2013**

**International Bureau of Fiscal Documentation
H.J.E. Wenckebachweg 210
Amsterdam, The Netherlands**

AGENDA

Thursday, August 29, 2013

6:00 p.m. Meeting of the Executive and Board of Directors – [restaurant in Leiden]

Friday, August 30, 2013

IBFD, H.J.E. Wenckebachweg 210, 1096 AS Amsterdam

8:00 a.m. to 9:00 a.m.	Registration
9:00 a.m. to 9:45 a.m.	IATJ Business Meeting
9:45 a.m. to 10:00 a.m.	Health Break
10:00 a.m. to 10:05 a.m.	Welcome by Sam van der Feltz (CEO IBFD)
10:05 a.m. to 12:30 p.m.	Substantive Session on Tax Avoidance/ Evasion Chair: Peter Panuthos (US) Panel: Jurgen Brandt (GER), Malcolm Gammie (UK), Stef van Weeghel (NL), Frank Pizzetelli (CAN), Pierre Collin (FRA)
12:30 p.m. to 2:00 p.m. A'dam	Lunch on board boat IBFD to Court of Appeal
<i>Court of Appeal Amsterdam</i>	
2:00 p.m. to 3:30 p.m.	Substantive Session on Indirect Taxation: Subjective Elements in VAT Chair: Friederike Grube (GER) Panel: Dagmara Dominik-Oginskaja (POL), Timothy Lyons (UK), Emmanuelle Cortot-Boucher (FRA)

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- 3:30 p.m. to 3:45 p.m. Health Break – coffee/tea
- 3:45 p.m. to 5:00 p.m. **Substantive Session on Objective Law and Subjective Judges:**
Chair: Eveline Faase (NL)
Presentation: Geert Corstens (NL)
Opponent: (.....)
Moderator: Richard Happé (NL)
- 5:00 p.m. to 5:45 p.m. **Conducted tour** with architect in the new building of the Court of Appeal
5:45 p.m. to 7:30 p.m. **Cocktail Reception Court of Appeal**

Saturday, August 31, 2013

IBFD, H.J.E. Wenckebachweg 210, 1096 AS Amsterdam

- 9:00 a.m. to 10:30 a.m. **Substantive Session on Transfer Pricing:**
Chair: Philippe Martin (FRA)
Panel: Nadia Djebali (NL), Stefan Wilk (GER), Gerald Rip (CAN), Pieter van der Vegt (NL), Philippe Martin (FRA), (Indian speaker)
- 10:30 a.m. to 10:45 a.m. Health Break
- 10:45 a.m. to 11:30 a.m. **Substantive Session Transfer Pricing** (continued)
- 11:30 p.m. to 12:30 p.m. **Substantive Session recent Case Law on Treaty Override:**
Chair: Joao Bianco
Panel: Manuel HallivisPelayo (MEX), Peter Panuthos US), Anthony Gafoor (TT), Pramod Kumar (IND), Peter Darak (HUN), Jennifer (AUST), Ulrich Schallmoser (GER)
Davies
- 12:30 p.m. to 2:00 p.m. Lunch – IBFD
- 2:00 p.m. to 3:30 p.m. **Substantive Session recent Case Law on Treaty Overriding** (continued)
- 3:30 p.m. to 3:45 p.m. Health Break – coffee/tea

3:45 p.m. to 5:15 p.m.
of

Bokdam-
(Belgian judge) (Finnish)

5:15 p.m. to 5:30 p.m.

5 :30 p.m.

7:30 p.m.

**Substantive Session on Conclusive Force
Declarations of Foreign Authorities:**

Chair: Robert Jan Koopman (NL)

Panel: Clement Endresen (NOR), Emilie
Tognetti (FRA), Petri Sauko (FIN)

**Substantive Session on Excise Duties in EU
Presentation:** Harald Jatzke (GER)

Boat tour - Cocktail on board

Closing Dinner - Okura hotel

Guest Speaker: Peter Wattel (NL)

Sunday, September 1, 2013

Leiden

00:00

Meeting of the Executive and Board

00:00

Excursion

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