

## Tax News+



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**Below you will find the tasks and potential issues arising from key tax law changes of the past month and recent weeks. We would be ready and glad to discuss with you any of your company specific issues.**

## **VAT treatment of taxes recharged in connection with supply of services**

### **Judgment of the Court of Justice of the European Union in joined cases C 618/11, C 637/11 and C 659/11**

In the referred joined cases the Court of Justice of the European Union (Court) examined whether the recharge of taxes arisen in connection with supply of services should be included in the value added tax (VAT) base of the services concerned. Based on the Court's decision it is suggested reviewing the VAT treatment of tax recharges.

We summarise the case in the following.

The Portuguese court referred the question to the Court, whether the commercial advertising screening tax recharged to the recipient of the advertising services should be included in the VAT base of the advertising services.

In the main proceedings a Portuguese broadcasting company (TVI) provided advertising services to various customers. Pursuant to the relevant Portuguese regulations, commercial advertising services are subject to screening tax. The base of the tax is 4% of the fee payable for the services. The recipient of the services is liable to pay the tax. However, the recipient of the services does not directly pay the tax to the tax authority but the service provider is obliged to collect the amount of the tax and pay it to the tax authority (i.e. the person subject to the tax and taxpayer are not the same person).

TVI invoiced the fee for the advertising services together with the amount of the screening tax and accounted for VAT on the total amount.

According to TVI's view, screening tax should not be included in the VAT base. This is based on the arguments that TVI pays the tax in the name and for the account of the recipient of the services. In addition, the collected tax amount is accounted in TVI's books as a temporary item to be paid to the

tax authority. TVI was of the opinion that the advertiser acquiring the service is subject to screening tax. TVI solely collects and forwards the payment to the tax authority.

Based on the above, TVI filed an application to the Portuguese tax authority claiming the refund of the VAT paid on the screening tax. The tax authority rejected the claim. TVI appealed at the Portuguese court. The Portuguese court referred the case to the Court.

In order to decide whether TVI should have paid VAT on the screening tax, first, the Court examined whether there is a direct link between the screening tax and the supply of the advertising services.

The VAT and screening tax liability arise at the same time when the services are provided. Furthermore, VAT and screening tax liability arises only in case services are provided. Thus, the Court concluded that there is a direct link between the screening tax and the supply of the advertising services.

As a second step, the Court analyzed who is the person obliged to pay the screening tax.

Pursuant to the Court' interpretation, TVI is liable to pay the screening tax to the tax authority regardless of whether the advertiser reimburses the amount to TVI. In addition, the advertisers do not have a direct contact with the Portuguese tax authorities. Considering these characteristics, the Court concluded that TVI pays the tax in its own name and for its own account.

In accordance with the above, the Court decided that the Portuguese screening tax should be included in the VAT base of the commercial advertising services.

Based on the decision of the Court, it is suggested reviewing the VAT treatment applied to tax recharges.

### **Curia decision regarding the VAT liability of free-of-charge supplies**

According to a recent press release, the Curia (Highest Court of Hungary) decided a case regarding the VAT treatment of free-of-charge supply of goods. The decision may have significant influence on the current practice regarding such transactions.

In the proceedings, the plaintiff built roads and public utilities in connection with a housing project. The roads and public utilities were transferred free-of-charge to the local municipality. The plaintiff accounted for VAT on the supply. The tax authority performed a tax audit at the plaintiff. The tax authority did not have any findings during the tax audit.

The plaintiff appealed against the decision of the tax authority. The plaintiff argued that the audit failed to assess that no VAT should have been paid with respect to the transfer of roads and utilities. The case was referred to the Curia.

Based on the facts of the case at hand, the Curia concluded that no VAT liability arose due to the transfer. In its reasoning, the Curia ruled that VAT liability arises with respect to free-of-charge supply

of goods when a taxable person permanently disposes of goods forming part of his business assets without any compensation for his own or its employees private use. Free of charge supply of goods performed for other reasons should not trigger VAT liability.

Obviously, only a short summary has been released regarding the judgment. The exact circumstances and arguments will be known when the judgement is published by the Court. Therefore, any conclusions could be drawn after the publication of the judgment.

Nevertheless, in some cases in the past the tax authority sought to collect VAT on free-of-charge supply of goods regardless of the purpose of the supply. The judgment may have influence on the viewpoint of the tax authority. We will inform our Clients once the judgement is published.

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