

# Tax & Legal Weekly Alert

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The Order of the minister of public finance, which stipulates the procedure and the conditions under which the tax warehouses, registered consignees, registered consignors and authorized importers, are authorized, was recently published.

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The Court of Justice of the European Union ("CJEU") allows the deduction of VAT incurred by taxable persons on purchases made from inactive taxpayers. The decision is general and mandatory and its effects are not limited in time. Thus, the decision can also be applied for operations performed prior to its issuance.

Moreover, we believe that CJEU decision opens the right to deduct VAT also for other cases where VAT deduction was blocked because the supplier had its VAT number cancelled.

### **Romania has received EU Council's approval to increase the VAT exemption threshold to EUR 88,500 (RON 300,000)**

The UE Council has authorized Romania to increase the VAT exemption threshold for small enterprises from EUR 65,000 to EUR 88,500. The measure derogates from the provisions of the VAT Directive and is valid only for a period of three years (1st of January 2018 to 31st December 2020).

### **Deloitte in mass media**

Reff & Associates obtains for the first time a decision of the Bucharest Court of Appeal that obliges the tax authority to pay interest for delay in a VAT reimbursement case, starting from the day immediately following the submission of the VAT return and until the actual repayment by the State of the amount in question.

<http://www.zf.ro/companii/avocatii-de-la-reff-asociatii-au-castigat-in-instanta-plata-de-catre-stat-a-unor-dobanzi-de-1-mil-euro-pentru-intarzierea-rambursarii-tva-16774571>

## New national regulations on excise duties

Recently, the Order no. **2482/2017** on the procedure and the conditions under which the tax warehouses, registered consignees, registered consignors and authorized importers, are authorized, entered into force. It establishes the membership structure and competence of the Commissions for authorization of the operations of products subject to harmonized excise duties. More precisely:

- authorization is carried out by the regional directorates general of public finance, through the regional commissions for the authorization of operators of products subject to harmonized excise duties;
- by exception, authorization of tax warehouses for exclusive wine production carried out by taxpayers, other than large and medium-sized taxpayers, small distilleries as well as small independent beer factories, is made through the territorial commissions for the authorization of operators of products subject to harmonized excise duties, set up at the level of the territorial structures of the regional directorates general of public finance;

### What to do?

We recommend that you review the impact of the legislation changes on your activity.

For further questions, please contact us.



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## CJEU decision on deduction of VAT related to purchases made from inactive taxpayers

On 19 October 2017, the CJEU decided in case C-101/16 Paper Consult SRL to grant the VAT deduction right to taxable persons that performed purchases from taxpayers declared inactive by the National Agency for Tax Administration (ANAF).

### Background

At the end of 2010, Rom Packaging SRL (Rom Packaging), a company established in Romania, was declared inactive for failing to submit the tax statements imposed by law and removed from the register of taxable persons registered for VAT purposes by ANAF.

Based on an agreement from 2011, Rom Packaging supplied services to Paper Consult SRL ("Paper Consult"), a company established in Romania. The VAT related to the acquisition of services was deducted by Paper Consult and paid by Rom Packaging to the state budget.

Based on the Tax Code, ANAF considered that Paper Consult was not entitled to deduct the VAT related to the purchased services as Rom Packaging was an inactive taxpayer at the signing date of the agreement.

Paper Consult appealed, considering that the decision by which ANAF declared Rom Packaging as an inactive taxpayer does not concern it and cannot be a reason for cancelling the VAT deduction right. In return, exercising the VAT deduction right depends exclusively on complying with the conditions provided by art. 178 of the EU VAT Directive (Directive 2006/112/EC on the common system of VAT).

### **Domestic provisions in force until 31 December 2016**

Beneficiaries who purchased goods and/or services from inactive taxpayers were not entitled to deduct VAT related to those purchases, regardless of whether the respective taxpayer was reactivated and would register for VAT purposes later on.

### **Domestic provisions in force starting with 1 January 2017**

Starting from 1 January 2017, the Tax Code allows VAT deduction in relation to purchases made from inactive taxpayers after they are reactivated and re-registers for VAT purposes.

The amendment was introduced following EU-Pilot procedure 8399/16 opened by the European Commission, which imposed the Romanian authorities to grant the VAT deduction right. However, the provision is applicable in the case of re-registration for VAT purposes after 1 January 2017, retroactive application not being available.

### **CJEU decision**

CJEU ruled that European law precludes a national rule according to which:

- a taxable person cannot deduct VAT because
- the supplier that rendered services was declared inactive by the tax authority, the inactive status being public and accessible on the Internet to any taxable person,
- where the refusal of the right to deduct is systematic and final, making it impossible to provide evidence that there was no tax evasion or loss of tax revenue.

### **CJEU's arguments were the following:**

1. It is not contrary to EU law to ask an operator to take all reasonable actions which to ensure the transaction that it performs does not lead to its participation in tax evasion. A measure such as to consult the list of taxpayers declared inactive published on the website of ANAF may be reasonably required to an economic operator, such a verification being straightforward to carry out.
2. The Romanian tax provision does not transfer to the taxpayer the control measures falling on the tax administration, but informs him of the result of an administrative inquiry which shows that the inactive taxpayer can no longer be controlled by the competent authority. By requiring the taxable person to carry out this verification, the national legislation seeks to ensure the correct collection of VAT and the avoidance of tax evasion.

Furthermore, the CJEU checked if the Romanian tax legislation does not go beyond what is necessary to achieve, i.e. it is proportional to, the pursued objective.

3. Although failure to submit the tax returns provided by law may be considered a sign of fraud, it does not undoubtedly prove the existence of VAT fraud.
4. According to the law in force at the time of the transaction between Rom Packaging and Paper Consult, even if the taxpayer had settled his situation and obtained his radiation from the inactive taxpayers

- list, the person acquiring the good or the service could no longer deduct the VAT invoiced by him.
5. Starting 1 January 2017, the Romanian tax law has been amended. Thus, in the event of reactivation of a taxpayer declared inactive, the tax effects generated by inactivation are cancelled for both the taxpayer and his partners who recover their VAT deduction right for transactions concluded during the inactivity period.
  6. Furthermore, from the case analyzed by the CJEU it results that Rom Packaging paid to the State Budget the VAT collected from Paper Consult. In this case, the tax law in force at the time of the transaction does not provide for a settlement to the benefit of Paper Consult, despite the proof of VAT payment by Rom Packaging, the annulment of the VAT deduction right being definitive.
  7. Accordingly, the impossibility of the taxable person (Paper Consult) to prove that the transactions concluded with the inactive operator (Rom Packaging) meet the requirements of the VAT Directive and, in particular, that the VAT was paid to the State Budget goes beyond what is necessary to achieve the legitimate objective followed by the Directive.

In addition, the CJEU dismissed the request of the Romanian authorities and decided that the effects of the present judgment don't need to be limited in time. Thus, the decision has *ex tunc* effect, namely for operations performed prior to the issuance of the decision.

#### **Our comments**

Firstly, we are of the opinion that CJUE decision in Paper Consult is valid for all cases where VAT could not be deducted because ANAF cancelled the VAT number due to the taxpayer's (supplier's) lack of compliance. The CJEU arguments are equally valid in these cases.

The amendments brought to Romanian tax law starting 1 January 2017 solved to a certain extent the issues raised by the general cancellation of VAT deduction for purchases from inactive taxpayers/having the VAT ID number cancelled, namely the (definitive) annulment has become a suspension (temporarily until re-registration for VAT purposes).

These changes did not solve the past, namely the situations in which the inactive taxpayer re-registered for VAT purposes before 1 January 2017.

We consider that these situations will be solved by CJUE decision in Paper Consult. However, in particular, cases where ANAF decisions/Court decisions cancelling the VAT deduction right remained final and those for which the statute of limitation expired will generate some practical issues. We cannot exclude VAT remaining non-deductible due to these procedural reasons, although in substance the CJEU has recognized the deduction right.

A point of discussion is the decisive factor in granting the VAT deduction:

- The fact that the supplier has re-registered for VAT purposes (as mentioned by the current tax law) or
- The fact that the operation fulfils the requirements of the VAT Directive, namely the VAT compliance obligations have been fulfilled, for example, the inactive supplier paid to the state budget the VAT collected from the beneficiary according to the law.

We believe that the second element has to be decisive. As such, contrary to the current Romanian tax law, the VAT deduction right could be claimed even if the supplier has not re-registered for VAT purposes.

However, the CJEU decision also mentions that the cancellation of the VAT deduction right must not be definitive. Thus, it could be argued that the current tax law provisions are in line with the CJEU decision.

In addition, the second element may trigger practical issues at the level of the taxable persons that wish to prove that their supplier has fulfilled its tax compliance obligations, namely the evidence to be made available and whether such evidence would be sufficient to support VAT deduction where the supplier did not re-register for VAT purposes.

These issues would also be for the legislator if pursuing to amend the current law. The clear and easily verifiable current criterion (re-registration for VAT purposes) would be replaced by a vague criterion that would put an extra burden on economic operators (i.e. the fulfilment of the supplier's tax compliance obligations).

We recommend taxable persons that could not recover the VAT charged by inactive taxpayers/having the VAT ID number cancelled to review the position to determine if entitled to ask deduct the VAT now.

[For further questions, please contact us.](#)



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