Court of Justice of the European Union
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Press and Information

Judgment in Case C-521/19
Tribunal Económico Administrativo Regional de Galicia

In the determination of the taxable amount of a transaction concealed by taxable persons for VAT purposes, the amounts paid and received as reconstituted by the tax authority must be regarded as already including that tax

Any other interpretation would be contrary to the principle of VAT neutrality

The Lito group is a group of companies responsible for the management of infrastructure and orchestras for patron saint feast days and village festivals in Galicia (Spain). In the context of an activity subject to value added tax (VAT), an agent for performing artists would negotiate performances by orchestras on behalf of the Lito group with the municipal festival committees. The festival committees paid in cash and there were no invoices. These payments were not declared to the tax authority for the purposes of either corporate tax or VAT. The agent would receive 10% of the Lito group's income. Payments to him were also made in cash, with no invoices, and were not declared, either. Since the agent did not issue invoices, he did not complete VAT returns.

The tax authority takes the view that the amounts received by the agent as remuneration for acting as an agent (namely € 64 414.90 in 2010, € 67 565.40 in 2011 and € 60 692.50 in 2012) did not include VAT and that the taxable base of income tax for those years had to be calculated taking those amounts into account in their entirety. A new tax assessment for the years 2010 to 2012 was sent to the agent and penalties were imposed. That is disputed by the agent, who submits that that the subsequent application of VAT to the amounts which the tax authority treated as income is contrary to the case-law of the Tribunal Supremo (Supreme Court, Spain) and the case-law of the Court of Justice, according to which, where transactions which are, in principle, subject to VAT and have not been declared or invoiced, are discovered, VAT must be regarded as included in the price agreed by the parties to those transactions. He takes the view that, in so far as, under Spanish law, it is impossible for him to reclaim VAT which has not been passed on because his conduct amounts to a tax offence, VAT must be treated as included in the price of the services he has provided.

In the case before it, the Tribunal Superior de Justicia de Galicia (High Court of Justice, Galicia) is essentially asking the Court as to the interpretation that should be given to the provisions of the VAT Directive [1] relating to the determination of the taxable amount of a transaction between taxable persons for VAT purposes, where those persons, by fraud, have not indicated the existence of the transaction to the tax authority, issued invoices or shown the income generated during that transaction in a direct tax declaration. The Spanish court asks whether or not, in such a case, the amounts paid and received must be regarded as already including VAT.

In today's judgment**, the Court rules that, in the circumstances mentioned, as part of an inspection of a direct tax declaration, the reconstitution of the amounts paid and received during the transaction at issue by the tax authority concerned must be regarded as a price already including VAT, unless, under national law, the taxable persons have the possibility of subsequently passing on and deducting the VAT at issue, notwithstanding the fraud.**

The Court notes at the outset that the prevention of tax evasion, avoidance and abuse is an objective recognised and encouraged by the directive. However, **the determination of the taxable**

[1] Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1).

amount of a transaction between taxable persons in case of fraud cannot in itself serve to penalise taxable persons. The Court recalls in that regard that **taxable persons who have not observed the basic rules of the directive, in particular in relation to invoicing, must bear the consequences of their behaviour by making it impossible to deduct VAT**, including where, after a tax inspection, transactions which were not invoiced are retroactively subject to VAT. **The right to deduction can, in principle, be exercised only once the taxable person holds an invoice**. The Court points out, in the present case, that due to the fraud he committed, without prejudice to any tax penalties which have been or could be imposed on him, it appears to be impossible for the agent to deduct the VAT amount charged on the transaction that was not declared to the tax authority and that was not invoiced by him to the Lito group.

According to the Court, **the fact that taxable persons have failed to comply with the obligation to invoice cannot constitute a restriction of the basic principle of the directive, which lies in the fact that the VAT system is aimed at taxing only the end consumer**.

The Court emphasises that the re-establishment of the situation that would have existed had there been no irregularity and, a fortiori, fraud always involves an inevitable margin of uncertainty. Therefore, **where**, on account of the failure to mention VAT on an invoice or the absence of an invoice, whether or not there has been fraudulent intent, **the taxable amount –** namely the consideration, a subjective value, actually received by the taxable person and not including VAT – **stems from a reconstitution a posteriori by the national tax authority concerned, it must be understood taking that inevitable margin of uncertainty into account**.

That is why the result of a transaction concealed from the tax authority when it should have been invoiced and declared, where it stems from a reconstitution by the national tax authority concerned performed in the context of an inspection of direct taxes, must be deemed to include the VAT charged on that transaction. **The situation would be otherwise if VAT correction were possible under the applicable national law**.

The Court finds that **any other interpretation would run counter to the principle of VAT neutrality** and would place part of the VAT burden on a taxable person, when **VAT must be borne solely by the end consumer**. The Court adds that observance of that principle does not preclude the possibility for Member States to adopt penalties aimed at combating tax fraud. It is in the context of such penalties, and not by the determination of the taxable amount, that fraud such as that at issue in the main proceedings must be punished.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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