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FLASH NEWS

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MONITORING OF PRELIMINARY RULINGS

OVERVIEW OF THE MONTHS OF JUNE, JULY AND AUGUST 2019

Poland – Administrative supreme court

[Ruling of Skarpa Travel, C-422/17]

Taxation - *VAT - Special system of travel agencies*

The Supreme administrative court was referred a case in the context of a dispute between the head of the national tax administration and a travel agency concerning a tax advice relating to the due date and the method of calculation of the VAT in case of collection of an advance payment on the payment of a touristic service provided by a travel agency. It annulled the decision of the administrative court of first instance, delivered against the said opinion.

Adopting the interpretation of the Court of Justice, the Administrative Supreme court ruled that the tax on the VAT is payable after the collection by a travel agency subject to the special system provided for by the VAT directive of an advance payment on the payment of touristic services that it will provide to the traveller, provided that the services can be clearly identified.

Najwyższy Sąd Administracyjny, ruling of 04. 06. 2019, I FSK 831/15 (PL)

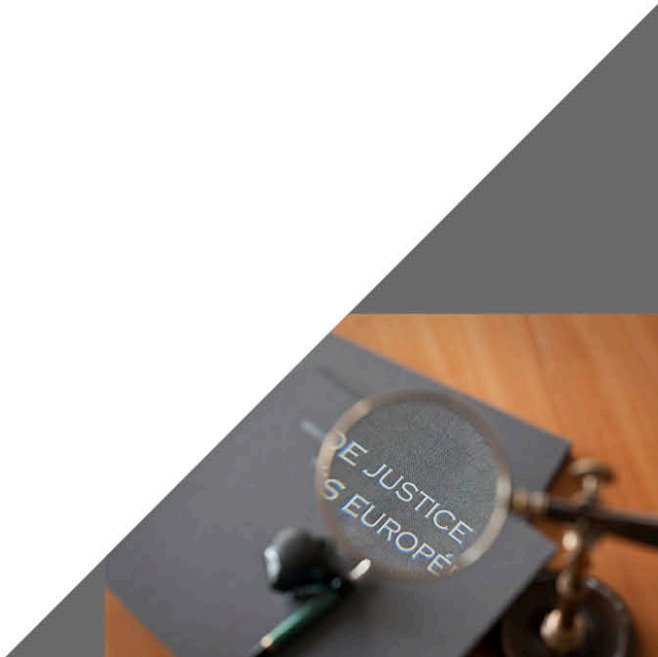
Sweden – Supreme Administrative Court

[Ruling of Srf konsulterna, C-647/17]

Taxation - VAT - Exemptions - Place of taxable transactions

Following the example of the judgment delivered under the preliminary ruling procedure of the Court of Justice, the Supreme Administrative Court decided that, as the services in question – in this case consisting of a training in accounting and management, of a duration of five years, provided only to taxable persons and which involves a prior registration and payment – come under article 53 of the directive 2006/112/EC, they also come under article 11a, of chapter 5 of the Swedish law relating to the value added tax. This implies that the services in question should be considered as taking place abroad. Therefore, the Supreme Administrative Court annulled the tax ruling issued by the Skatterättsnämnden (the tax law commission), contrary to this approach.

Högsta förvaltningsdomstolen, decision of 05.06.2019, 1990-17 (SV)



France – Court of cassation

[Ruling of Arib i.a., C-444/17]

Border controls, asylum and immigration - Illegal entry of a national from a third country - Directive 2008/115/EC

The Court of cassation upheld the dismissal of the application of the prefect seeking to extend the administrative detention of a national of a third State, of Moroccan nationality, on the grounds of illegal stay on national territory.

Adopting the interpretation of the Court of Justice of article 2, paragraph 2, under a), of directive 2008/115/EC, the Court of cassation held that the circumstances of the temporary reintroduction of internal border controls of the Schengen area do not impede the application of the provisions of the said directive to the situation of the national.

Accordingly and applying the Affum case-law, C-47/15, the Court of cassation ruled the police custody to be unlawful on the grounds that a national of a third country, who has illegally entered France, and who does not incur imprisonment provided for by the national legislation, cannot be placed under police custody solely on the grounds of illegal entry on the national territory.

Court of cassation, ruling of 13 June 2019, 16-22548 (FR)

Sweden – Supreme Administrative Court

[Ruling of SJ, C-388/17]

Approximation of laws - Award of contracts - Transport

By its ruling, the Administrative supreme court annulled the judgments delivered by the lower courts and referred the case back to the administrative court of first instance for a new consideration of the substance of the application. In fact, following the judgment delivered under the preliminary ruling procedure of the Court of Justice, the Supreme administrative court ruled that the transport activity of SJ comes under article 5, paragraph 1 of the directive 2004/17/EC. Thus, this activity also comes under article 8, of chapter 1, of the national law relating to the award of public contracts. SJ therefore had an obligation to apply the said national provision, which renders the decision, taken by the administrative court of first instance of dismissing the requests to impose a penalty on SJ, without examining the merits of the same, as wrong.

Högsta förvaltningsdomstolen, decision of 14.06.2019, 3999-15, and 4000-15 (SV)

Germany – Federal Fiscal Court

[Ruling of baumgarten sports & more, C-548/17]

Taxation - VAT- Service of placing of professional football players - Taxable event and chargeability

The Federal Fiscal Court ruled on the chargeability of the VAT relating to commissions paid to a service-provider of a sports agent in a phased and conditional manner over several years, in the context of the services of placement of players in a professional football club.

Adopting the interpretation of the Court of Justice of article 63 of directive 2006/112/EC, read in conjunction with article 64 of this directive, the Federal Fiscal Court ruled that, for this type of services, the taxable event of the tax takes place and the tax becomes payable only upon the expiry of the periods to which the payments paid are related, considering that, in this case, it pertains to a service of intermediation creating successive payments, which are conditioned by the player remaining on the team, under licence, for a determined duration.

Bundesfinanzhof, ruling of 26.06.2019, V R 8/19 (V R 51/16) (DE)

Belgium – Council of State

[Ruling of Thybaut i.a., C-160/17]

Environment - Directive 2001/42 - Ruling adopting an urban replotting area

Following the ruling C-160/17, the Council of State annulled a ruling of the Walloon government demarcating the urban replotting area from an area that is likely to be the subject of a town-planning project, on the grounds that an environmental evaluation, compliant with the requirements of the directive 2001/42, had not been carried out during the adoption of the said order.

Supporting the interpretation of the Court of Justice, and after having carried out concrete verifications that it was called upon to make on the scope of the order, the Council of State described this order as a “plan or programme”, within the meaning of directive 2001/42, which therefore makes an environmental impact assessment necessary.

Council of State, ruling of 27.06.2019, 245.021 (FR)

Netherlands – Council of State

[Ruling of Ahmedbekova, C-652/16]
[Order D. and I., C-586/17, removal]

Border controls, asylum and immigration - Appeal against a decision dismissing an application for international protection - Grounds for granting invoked for the first time

The Council of State accepted the appeal filed by the State Secretary against the judgment of the court of The Hague, which had declared the appeal filed by a national of a third country against the decision dismissing his application for international protection to be well-founded.

Based on the C-652/16 ruling, the Council of State ruled that when a national of a third country invokes, in the context of an appeal filed against such a decision of dismissal, new grounds for granting of international protection, the national court must assess these grounds, unless it finds that they have been invoked in a late phase of the appeal procedure or are not concrete enough to be able to be duly examined. In this case, the national concerned can file a new application for international protection.

Raad van State, decision of 03.07.2019, 201604484/3/V2 (NL)

Spain – Supreme court

[Ruling of Fundación Consejo Regulador de la Denominación de Origen Protegida Queso Manchego, C-614/17]

Agriculture – Use of a protected designation of origin - Use of signs indicating a region

The Supreme court established that the use, by a cheese manufacturer, of certain signs and certain proper and common nouns on labels and on his website constituted a mention, prohibited by regulation no. 510/2016, of the protected designation of origin (AOP) "Queso manchego", insofar as these signs and these names were related to the character of Don Quijote de la Mancha (Don Quijote of la Mancha), and thus reminded the Spanish consumers of the region of la Mancha. It ruled that this conclusion was not questioned by the fact that this manufacturer was established in the said region and that the other cheeses that he manufactured were covered by the PDO. The Supreme court thus fully adopted the interpretation of the Court of Justice in the C-614/17 ruling.

Tribunal Supremo, Sala de lo Civil, ruling of 18.07.2019, STS 2464/2019 (ES)

France – Council of State

[Ruling of France Télévisions, C-298/17]

Telecommunications- Directive 2002/22 - "Must carry" obligation

The Council of State accepted the appeal of France Télévisions seeking the annulment of the formal notice from the Conseil supérieur de l'audiovisuel (French Media Regulatory Authority) to not oppose the live transmission or streaming of its programmes by the Playmédia company on its website.

Adopting the interpretation of the Court of Justice, it ruled that the "must carry" obligation provided for by directive 2002/22 (universal service) did not apply to the activity of Playmédia. In addition, it noted that the "must carry" obligation of certain television services provided for by the French legislator, subject to the condition that the distribution of services be intended to subscribers, did not apply any more. In fact, with the concept of subscribers having to include users related to the distributor of services by a commercial contract providing for the payment of a price, the activity of Playmédia, that includes a service of free broadcast, cannot be seen as benefiting subscribers.

In addition, and also based on the C-298/17 ruling, the Court of cassation upheld the sentence of Playmédia for compensation for the violation of the copyrights and related rights of France Télévision.

Council of State, ruling of 24.07.2019, 391519 (FR)

Spain – Central court

[Ruling of Nestrade, C-562/17]

Taxation - VAT - Principles of equivalence and effectiveness

The Central court dismissed the appeal filed by a company established in Switzerland against a decision of partial refusal of VAT refund, in a context of rectification of incorrect invoices.

Supporting the reasoning of the Court of Justice, it noted that the principles of equivalence and effectiveness had not, as it happens, been violated by the Spanish tax administration. The Central court mainly ruled that the dismissal of the application for refund was justified as the company concerned had not provided the correct invoices and that it had not exercised any procedural action during the period of almost three months that passed between the date on which it had obtained the correct invoices and the date on which the decision refusing the VAT refund had been taken.

Audiencia Nacional, Sala de lo contencioso-administrativo, Sección sexta, ruling of 25.07.2019, SAN 3285/2019 (ES)

DECISIONS PRIOR TO JUNE 2019

Poland – Administrative Supreme court

[Ruling of Gmina Wrocław, C-665/16]

Taxation - VAT - Exemptions

In the context of a dispute between the Minister of Finance and the municipality of Wrocław concerning a tax advice concerning the exemption from VAT of an operation by which the ownership of real estate belonging to the municipality has been transferred, in accordance with the national legislation and against the payment of a compensation, to the Public Treasury with a view to build a national road, the Administrative supreme court annulled the decision of the administrative court of first instance, delivered against the said advice.

Adopting the interpretation of the Court of Justice, the Administrative Supreme court ruled that the said transfer, where the same person represents both the expropriating authority and the expropriated municipality, and where the latter continues to manage the property concerned, even if the payment of the compensation was made only through an internal accounting transfer within the budget of the municipality, constitutes a supply of goods subject to VAT.

Najwyższy Sąd Administracyjny, ruling of 16. 05. 2019, I FSK 1857/13 (PL)

Germany– Federal Fiscal Court

[Ruling of A & G Fahrschul-Akademie, C-449/17]

Taxation- VAT- Exemption for certain activities in the public interest – Driving classes provided by a driving school

The Federal Fiscal Court was required to rule on the imposing of VAT on the services of driving training provided by a driving school.

Adopting the interpretation of the Court of Justice, the Federal Fiscal Court ruled that this type of service cannot be included as "school or university education", within the meaning of article 132, paragraph 1, under i) and j), of directive 2006/112/EC. Accordingly, the driving school could not claim any exemption from VAT for certain activities in the public interest, as stated by the said directive.

Bundesfinanzhof, ruling of 23.05.2019, V R 7/19 (V R 38/16) (DE)

Press release (DE)

The Intranet site of the Direction Recherche et Documentation (Research and Documentation Department) lists all analyses of the monitoring decisions received and processed by the Direction since 1 January 2000, classified by year according to the date of submission of the case to the Court. All the analyses established in the context of the monitoring of preliminary rulings are also available, mainly via the internal portal, under each preliminary ruling, under the heading