VAT EUROPEAN CASE·LAW

Do hidden sales include VAT when discovered by the tax authorities? (on case C-521/19)

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FACTS (I)

In its judgment of 1-7-2021, C-521/19, the ECJ has ruled on the taxable base of VAT when the tax authorities discover **undeclared sales** by taxpayers.

CB was a self-employed person who carried out an artistic agent activity, VAT taxable, who worked for another taxable person, in charge of the management of orchestras playing at and municipal festivals in Spain.

CB contacted clients and negotiated the performance of the orchestras on his client's behalf. This received payments in cash, without issuing invoices or accounting records, not declaring itself for VAT purposes.

For its part, CB received 10% of these amounts, also in cash, and neither were they declared nor resulted in the issuance of invoices. CB did not keep accounting or official records, did not issue or receive invoices and, consequently, did not make VAT returns.

FACTS (II)

The Spanish tax authorities estimated the income received in this way and considered that they did not include VAT, therefore the taxable base of the income tax had to be determined taking into account all of these amounts. For its part, CB understood that these amounts should be considered inclusive of VAT, since, according to Spanish law, it cannot claim unpaid VAT due to its conduct, constituting a tax offense.

REASONING (I)

The preliminary question was aimed at elucidating whether when in a transaction between VAT taxpayers, engaging in fraudulent behaviour, have not communicated the existence of the transaction to the Tax Administration, nor have they issued an invoice, nor have they recorded the income obtained thanks to this operation in a direct tax return, it must be considered that the amounts delivered and received include VAT or not.

The ECJ has begun to recall (judgment of 11-12-2020, ITH Comercial Timișoara, C-734/19, among others), that the determination of the tax base is not one of the available instruments to the Member States in the fight against fraud, in the sense that, in such a case, they are allowed to determine it differently from how they would proceed in the face of non-fraudulent behaviour. The fact that taxable persons have failed to fulfil their invoicing obligations cannot impede the application of the basic principle of invoicing, which, according to settled ECJ case-law, the VAT system seeks to tax only the final consumer.

REASONING (II)

Also considering the unavoidable margin of uncertainty in any tax control procedure and that the VAT taxable base is constituted by the consideration or subjective value actually received by the taxpayer, excluding VAT, it has been concluded that, in the framework of a reconstitution carried out by the tax administration in the framework of an inspection relating to direct taxes, the result of an operation that has been hidden from the tax administration by VAT taxpayers, being that it should have led to the issuance of an invoice, the said transaction includes VAT.

This would not be the case if the referring court considered that, according to the applicable national law, it is possible to rectify VAT (judgment of 7-11-2013, Tulică and Plavoşin, C-249/12 and C-250/12) .

REASONING (II)

The ECJ has added to the foregoing that:

a) Any other interpretation would be contrary to the principle of neutrality of VAT and would place a part of the burden of said tax on a taxable person, so that VAT should only be borne by the consumer final.

b) This solution is not contrary to judgments such as those of 28-7-2016, Astone, C-332/15, 5-10-2016, Maya Marinova, C-576/15, or 7-3-2018, Dobre, C-159/17, which have been deemed not applicable to the case.

The principle of VAT neutrality does not preclude the possibility for Member States to adopt sanctions to combat tax fraud and, more broadly, to the obligation imposed on these States, by virtue of art.325.1 and 2 TFEU, to combat illegal activities that affect the financial interests of the European Union through effective and dissuasive measures. However, fraud such as that at issue in the main proceedings must be punished within the framework of those penalties, and not by determining the taxable amount within the meaning of Dir 2006/112 art.73 and 78.

CONCLUSION

In accordance with Dir 2006/112, art.73 and 78, in light of the principle of VAT neutrality, when, incurring in fraudulent behaviour, VAT taxpayers have not notified the Tax Administration of the existence of a transaction , nor have they issued an invoice, nor have they recorded the income obtained thanks to said operation in a direct tax declaration, the reconstitution carried out by the tax administration concerned, within the framework of the inspection of said declaration, of the amounts delivered and received with the occasion of the contested transaction must be regarded as a price that includes VAT, unless, under national law, taxable persons have the possibility of subsequently passing on and deducting the VAT at issue despite the fraud.

RELATED TOPICS (I)

1st. It seems clear, based on the judgment that we have just commented, that the quantification of the tax base is not the way to fight fraud, a fight that has to be conducted through other tools, such as the imposition of sanctions or other similar ones. Nothing to object to the foregoing, except for the fact that the ECJ itself has admitted the denial of the right to deduct in cases of tax fraud (for all, we will limit ourselves to refer the Astone judgment). Since one and the other matter are the two sides of the same coin, it is not easy to understand the difference.

RELATED TOPICS (II)

2nd. The possibility of passing on VAT to the transactions recipients is one of the ways through which the principle of VAT neutrality is specified, making it to reach final consumers. The impossibility of passing on VAT to customers has been analysed by the ECJ in several of its judgments, from which the following can be concluded:

a) The Member States have to admit the adjustment of any VAT improperly charged, being such adjustment mandatorily admitted if the taxable person justifies having acted in good faith (judgments of 19-9-2000, Schmeink & Cofreth and Strobel, C-454/98, and 12-13-1989, Genius Holding, C-342/87) or eliminates any risk of financial losses for the tax authorities (judgment of 19-9-2000, Schmeink & Cofreth and Strobel, C-454/98).

b) The principle of effectiveness does not preclude national rules governing the recovery of VAT sums paid but not due, under which the time-limits for a civil law action for recovery of said sums are bigger than the specific time-limits for a fiscal law action for a tax refund, brought by the supplier against the tax authority (judgment of 15-12-2011, Banca Antoniana Popolare Veneta, C-427/10).

RELATED TOPICS (III)

3rd. It does not appear that the concealment of sales can be considered as acting in good faith. On the contrary, and in the case of transactions between taxpayers with full right to deduction, this concealment does not imply by itself, in terms of VAT, a risk of loss of tax revenue. And if this risk is to be given by taxes other than VAT itself, income tax, as was the controversial case, that would be giving the ECJ case-law jurisprudence on the matter, by extending its consequences to non-harmonized taxes, a scope, in principle, not foreseen in it. The hypothetical breach of the Spanish regulation does not comply with the case law on the matter, nor should it affect one of the fundamental elements of the tax, such as its tax base.

RELATED TOPICS (III)

4th. It is not clear, from the content of the judgment, what is the criterion adopted by the Spanish law in this case.

In fact, it was modified for a better approximation to European jurisprudence, although this is an irrelevant question; initially, the repercussion was prevented if the taxpayer's conduct was sanctioned, later it was modified, currently being limited to cases in which a tax fraud has been committed or participated in, having been admitted the retroactive effect of this change by the Spanish tax authorities.

In any case, the judgment avoids an unconditional criterion, applicable in any case in which undeclared sales are detected, but only in those in which the taxable person is unable to pass on VAT to his client.