VAT EUROPEAN CASE·LAW

Adverting expenses and VAT deduction (on the Amper Metal case, C-334/20)

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FACTS (I)

Amper Metal was a Hungarian company dedicated to the electrical installations sector, which hired advertising services, consisting of the **placement of advertising stickers**, with the Amper Metal sign, **in cars at a motorsport championship in Hungary**. Amper Metal deducted the VAT paid for these services.

The Hungarian tax authorities rejected this deduction, considering that the costs related to the advertising services in question were not related to the taxed transactions carried out by Amper Metal.

The argument for this was that the aforementioned advertising services were **too expensive** and, in reality, of no use to Amper Metal, in particular considering the nature of that company's customer base, namely paper mills, hot rolling shops and other industrial facilities, **it was unlikely that their business decisions were influenced** by the stickers on racing cars. All of this sparked controversy.

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REASONING (I)

Regarding the **excessive nature of the price paid** for services, the ECJ has recalled that the right to deduct presupposes the existence, for these purposes, of an operation subject to VAT, for which the fact that a transaction is carried out at a price higher or lower than the cost price and, therefore, at a price higher or lower than the normal market price, is **irrelevant**.

The deductible VAT, therefore, will be the one that results from the application of the tax rate to the **taxable base** of the operation, which will be the consideration established between the intervening parties for the operation in question, and **not an objective value**, such as the market value or a reference value determined by the tax authorities. The fact that the price paid is higher than the market price or a possible reference value determined by the tax authorities for similar advertising services cannot justify the refusal to exercise the right to deduction to the detriment of the taxable person.

Although **article 80 of the VAT Directive** establishes an exception to this general rule, by providing that the tax base may correspond to the normal value of the transaction, it should be remembered that this rule is only applicable to transactions between **related entities**, not in a generic way. Consequently, it is irrelevant for these purposes, insofar as the dispute concerns an operation between independent parties.

REASONING (II)

Regarding the finding that the services provided did not imply an **increase in the taxable person's turnover**, which shows its uselessness, the ECJ has indicated neither article 168.a) nor article 176 of the VAT Directive subordinate the right to deduction to a criterion relating to the increase in the volume of business of the taxpayer or, more generally, to a criterion of economic profitability of the taxpayer.

According to settled jurisprudence, the right to deduction presupposes that expenses corresponding to the **goods and services acquired are part of the price** of the taxed operations that generate the right to deduction. It is also settled jurisprudence that, even in the absence of such a link, the VAT corresponding to the general expenses of the taxable person is deductible, which, as such, are components of the price of the goods or services that they provide, on the understanding that said costs have a direct and immediate link with all the economic activity of the taxpayer (judgments of 14-11-2017, Iberdrola Inmobiliaria Real Estate Investments, C-132/16, and of 16-9-2020, Mitteldeutsche Hartstein-Industrie, C-528/19).

REASONING (III)

The tax authorities must, therefore, analyse the operations carried out by taxpayers and, in view of their objective characteristics, determine whether this inclusion occurs in the prices of their taxed operations or not. In determining this relationship, **the absence of an increase in the taxable person's turnover may not affect the exercise of the right to deduct**.

It will be up to the court to determine, in particular, whether the purpose of the affixing of advertising stickers on cars was to promote the products and services marketed by Amper Metal, so that it could figure among the general expenses of the company, or whether, for on the contrary, they are non-professional expenses and of any connection with the economic activity of said company. The fact that the services acquired by Amper Metal did not increase its turnover is irrelevant for the purposes of this assessment.

CONCLUSION

A taxable person can deduct input VAT paid for advertising when it constitutes a provision of services subject to VAT and has a direct and immediate link with one or more taxable operations or with the taxable person's economic activity as a whole, as long as that with its overheads, without taking into account the fact that the **price** charged for such services would be **excessive** compared to a reference value defined by the national tax administration **or that these services would not have led to an increase in turnover of said taxpayer**.

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RELATED TOPICS (I)

A. The first arising question is, precisely, the one that deals with in the second place, as is the criterion for the admission of the right to deduct VAT paid for the **overheads**.

It is true, that in the decisions adopted in the cases Iberdrola Inmobiliaria Real Estate Investments, C-132/16, and Mitteldeutsche Hartstein-Industrie, C-528/19, expressly referred, the **inclusion the price was the criterion used**, without any reference to the increase in the taxable person's turnover.

RELATED TOPICS (II)

A (it continues). It is no less true, however, that in the judgment of 10-11-2016, Bastová, C-432/15, raising the deduction of the VAT borne by the participation in horse races, the ECJ indicated that a taxable person has a right to full deduction of such a VAT where those horses are actually intended for sale or where that participation is, from an objective point of view, a **means of promoting the economic activity** of the stables which he operates.

On the other hand, there is no right to deduction of this VAT if the participating horses are not actually intended for sale, if the participation is not, from an objective point of view, a means of promoting the economic activity of the operated stables and if those expenses are not used for any other of the taxable person's activities relating to his economic activity (par.52).

It is undeniable that advertising and participation in horses racing are very different activities; however, it is no less true that, in certain circumstances, they may include or somehow constitute **non-professional supplies**, for which the right to deduction should not be allowed, as was the claim of the Hungarian tax authorities, something that the ECJ, as we have seen, has already admitted in some case.

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RELATED TOPICS (III)

B. Related to the previous one is probably the question of the **proof** of the **inclusion in the price** of the advertising expenses that were discussed in the Amper Metal case, more specifically, if it is the taxable person who has to demonstrate said inclusion.

Certainly, like any other extreme that benefits it, it is **incumbent on the taxpayer** to prove the facts on which he supports his claim (as the ECJ itself has indicated in other judgments on evidence in tax control procedures, judgments of 7-7-1981, Rewe/Hauptzollamt Kiel, C-158/80, 5-5-1982, Gaston Schul, C-15/82, 6-9-2012, Mecsek-Gabona, C-273/11, or of 27-9-2012, VSTR, C-587/10, among others).

Perhaps the problem in this case, beyond the hypothetical excess price paid for the services received, has been **the way in which the Hungarian tax authorities have justified their decision**, the non-accreditation of the increase in sales by the taxpayer.

We are left in doubt as to whether, if it had been justified in a way closer to that indicated by the ECJ in its decision corresponding to the Bastová case, given a possible lack of relationship with the activity of the taxpayer, the conclusion would have been different.

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