

June 2020

Opinion of the Advocate-General of CJEU to support extension of the bad-debt relief application scope

On 4 June 2020, the Advocate-General of the Court of Justice of the European Union delivered her opinion in case E. Sp. z o.o. Sp. k. seated in S. vs the Minister of Finance (case file C-335/19).

She took a firm stand that the Polish regulations on bad-debt relief are incompatible with the EU law.

This, in turn, opens up the opportunity to recover VAT on outstanding debts in situations where debtors are subject to insolvency or liquidation proceedings.

The case at hand

The case at hand concerns the assessment of the compatibility of the Polish regulations on bad-debt relief with the EU law.

Provisions of the Polish VAT Act preclude the option of taking advantage of the bad-debt relief if on the date on which the service or goods are supplied and on the day preceding the date on which the tax return adjustment is filed the debtor is subject to insolvency or liquidation proceedings.

The issue of compliance of the above provisions with EU law has been the subject of dispute between taxpayers and the Polish tax authorities for years. Finally, in one of the cases, the Polish Supreme Administrative Court asked the Court of Justice of the European Union (hereinafter: CJEU or the Court of Justice) whether the provisions of Council Directive 2006/112/EC (hereinafter: the VAT

Directive) permit the introduction into national law of a restriction on reducing the taxable amount if debtors are, among others, subject to insolvency or liquidation proceedings.

Opinion of the Advocate-General of CJEU

In the opinion delivered, the Advocate-General pointed out that, in accordance with well-settled case law of the Court of Justice of the European Union, Article 90(1) of the VAT Directive reflects the fundamental principle that the taxable amount constitutes the consideration actually received. As a consequence, the amount of VAT charged by tax authorities may not be higher than the one received by the taxpayer.

Moreover, the Advocate-General noted that although Article 90(2) of the VAT Directive permits the introduction into national law of a restriction on using the bad-debt relief, it is only provided to prevent any potential abuse. This applies primarily to situations where it is uncertain whether the lack of consideration is permanent or only temporary.

In the Advocate-General's view, the fact that the recipient is subject to insolvency or liquidation proceedings only confirms that failure to pay the consideration is final, and thus denying the taxpayer the right to take advantage of the bad-debt relief would constitute a breach of the principles of fiscal neutrality and proportionality.

As a result, **Article 90 of the VAT Directive does not provide for exclusion of the possibility of making a VAT adjustment (i.e. of applying a bad debt relief) on the sole basis that on the date on which the service or goods were supplied and on the day preceding the date on which the tax return adjustment was filed the debtor was subject to insolvency or liquidation proceedings.**

Implications

The Advocate-General's opinion may be of significant importance to taxpayers, since it opens up the opportunity to apply the bad-debt relief and, consequently, recover VAT in situations where the taxpayers' contractors are subject to insolvency or liquidation proceedings.

Moreover, the Advocate-General's opinion contains some general indications that seem to support the thesis that also other restrictions on applying the bad-debt relief (applicable under the VAT Act) may be incompatible with the VAT Directive. In particular, this may apply to sales to debtors being natural persons. In fact, Polish law precludes the possibility of applying the bad-debt relief in relation to sales to entities not being VAT-payers.

Although the opinion of the Advocate-General is not binding on the Court, it indicates the likely path that the CJEU will take.

Thus, one can hope for a ruling favorable to taxpayers, especially given the decisions of the CJEU on similar cases (e.g. the judgment in case C-127/18 A-Pack on Czech provisions on the bad-debt relief).

Please note that in order to avoid limitation, taxpayers willing to apply the bad-debt relief on the basis of this opinion should do so immediately.

If you would like to learn more about the ways we can assist you, please do not hesitate to contact us at: mam pytanie@kpmg.pl

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